

# **GST ON WORKS CONTRACT INCLUDING GOVERNMENT CONTRACTS**

---

**Abhay Desai**

**B. Com., C.A., L.L.B., D.I.S.A.**

# Agenda

- Constitutional aspects
- Scope of supply as relevant ?
- What are “works contract” ?
- Relevance of “composite supply” ?
- Divisibility of contracts ?
- Concessional rate @ 12% ?
- Concessional rate @ 5% ?
- Exempted from tax ?
- Other issues (e.g. ITC, POS, Record keeping, mobilization advance, LD)

# Constitution of India

- Article 246A
  - Power to make laws with respect to goods and services tax imposed by Union or State.
- Article 366 – Definitions
  - (12A) — Goods and services tax means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption
  - (12) — Goods includes all materials, commodities, and articles
  - (26A) — Services means anything other than goods
  - (29A) — Tax on the sale or purchase of goods defined
- Entry 49 of List II – (State List)
  - Taxes on lands and buildings

# Scope of supply

- SECTION 7. (1) For the purposes of this Act, the expression “supply” includes —
  - (a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business;
- (1A) where certain activities or transactions, constitute a supply in accordance with the provisions of sub-section (1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II
- Schedule II
  - 6. Composite supply
  - The following composite supplies shall be treated as a supply of services, namely :—
    - (a) works contract as defined in clause (119) of section 2; and

# Basics

## **Works Contract [S. 2(119) of the CGST Act]**

- A contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, alteration or commissioning **of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.**
- Three elements to be satisfied:
  - a) A contract for building, construction ...
  - b) Of any immovable property
  - c) Wherein transfer of property in goods is involved

# Basics – First element

A contract for	Meaning
Building	The act of bringing into existence a structure with walls and a roof exp. a permanent structure.
Construction	The act of building by combining or arranging parts or elements.
Fabrication	An act of manufacture.
Completion	The act of finishing something.
Erection	To construct or to establish.
Installation	An occasion when equipment is put into position or made ready for use.
Fitting out	To supply things fit and necessary.
Improvement	An addition to property whether permanent or not which increases its value or utility or enhances its appearance.
Modification	A change to something.
Repair	The process of restoring something that has been suspected to decay, waste, injury, partial destruction, dilapidation, etc.
Maintenance	The care and work put into property to keep it operating and productive.
Renovation	Alterations to pre-existing structure.
Alteration	A substantial change to a structure.
Commissioning	Bring into working condition.

# Basics – Second element

- Immovable property
- Sec. 2 of the General Clauses Act, 1897
  - (26) "immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;
- Sec. 3 of the Transfer of Property Act, 1882
  - "immoveable property" does not include standing timber, growing crops or grass;
  - "instrument", means a non-testamentary instrument;
  - "attached to the earth" means--(a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached;

# Basics – Second element

- T.T.G. Industries Ltd. v. CCE, (2004) 4 SCC 751 (SC)
  - “We are not impressed by this reasoning, because it ignores the evidence brought on record as to the nature of processed employed in the erection of the machine, the manner in which it is installed and rendered functional, and other relevant facts which may lead one to conclude that what emerged as a result was not merely a machine but something which is in the nature of being immovable, and if required to be moved, cannot be moved without first dismantling it, and then re-erecting it at some other place.”
- Municipal Corpn. of Greater Bombay v. The Indian Oil Corporation Ltd. [1991 Supp (2) SCC 18]
  - Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the later place? If the answer is yes to the former it must be a moveable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter it is attached to the earth.



# Basics – Second element

- Triveni Engg. & Industries Ltd. v. CCE [(2000) 7 SCC 29: (2000) 120 ELT 273] (SC)
- Mittal Engg. Works (P) Ltd. case [(1997) 1 SCC 203 : (1996) 88 ELT 622] (SC)

# Basics – Third element

- “wherein transfer of property in goods (whether as goods or in some other form) is involved”
- Sec. 5 of the Transfer of Property Act, 1882
  - In the following sections “transfer of property” means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act.
- Dynamic Industrial & Cleaning Service (P.) Ltd. (1994) 1994 taxmann.com 376 (Ker.)
  - Chemicals used as cleaning agents in the business of cleaning boilers in power stations and fertilizer plants.
- Shekhawat Explosives v. State of Rajasthan (2004) 2004 taxmann.com 2071 (Raj.)
  - Explosives used for blasting.

# Relevance of Sec. 8 ?

- The tax liability on a composite or a mixed supply shall be determined in the following manner, namely :—
  - (a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply; and
  - (b) a mixed supply comprising two or more supplies shall be treated as a supply of that particular supply which attracts the highest rate of tax.
- Sec. 2(30) “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;
- Sec. 2(74) “mixed supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

# Indivisible contract

- Daelim Industrial Co. Ltd. vs. CCE, Vadodara [2003-TIOL-110- CESTAT-Delhi] (SLP dismissed [2004-TIOL-66-SC ST])
  - The price was the lump sum one and Clause 2.2 of the letter dated 2-2-98 of IOC makes it clear that “Contractor shall furnish further break up of lump sum prices for review and approval of owner/Engineer-in-charge. *The break-up of prices so approved shall be treated as the billing schedule which shall be used for release for progressive payments.* Notwithstanding the amount shown in the Billing schedule under the various heads, the total payments to the contractor for performance of this contract shall be limited to lump sum price mentioned in the price schedule”.
  - Thus, a perusal of the clauses of the contract leaves no doubt that the appellant contract with IOC was a work contract on turnkey basis and not a consultancy contract. It is well settled that a work contract cannot be vivisected and part of it subjected to tax. The impugned orders have proceeded to do precisely that. Therefore, they are required to be set aside.

# Indivisible contract

- The State of Madras v. Gannon Dunkerley & Co., (Madras) Ltd. [1959 SCR 379]
  - To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. It is possible that the parties might enter into distinct and for money consideration, and the other for payment of remuneration for services and for work done.
- M/s. Gannon Dunkerley & Co. & Ors. v. State of Rajasthan & Ors. [(1993) 1 SCC 364].
  - Keeping in view the legal fiction introduced by the Forty-sixth Amendment whereby the works contract which was entire and indivisible has been altered into a contract which is divisible into one for sale of goods and other for supply of labour and services, the value of the goods involved in the execution of a works contract on which tax is leviable must exclude the charges which appertain to the contract for supply of labour and services.”

# Indivisible contract

- Bharat Sanchar Nigam Ltd. v. Union of India 2006 (2) S.T.R. 161 (S.C.)
  - The test therefore for composite contracts other than those mentioned in Article 366(29-A) continues to be: Did the parties have in mind or intend separate rights arising out of the sale of goods? If there was no such intention there is no sale even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is “the substance of the contract”. We will, for the want of a better phrase, call this the dominant nature test.

# Divisible contract

- Imagic Creative Private Limited [2008-TIOL-04-SC-VAT]
  - Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax as envisaged in a composite contract as contradistinguished from an indivisible contract. It may consist of different elements providing for attracting different nature of levy. It is, therefore, difficult to hold that in a case of this nature, sales tax would be payable on the value of the entire contract; irrespective of the element of service provided.

# Splitting under GST

- CBIC flyer - hotel is fully justified to charge individually for constituent elements so long as there is no attempt to off load value of one service on to another service that is chargeable at concessional rate.
- Circular No. 47/21/2018-GST dated 08.06.2018 - permits split in case of car servicing involving spare parts and labour where value of goods and services are shown separately in invoice.
- M/s. Kerala Forest Development Corporation Limited (2019-TIOL102-AAR-GST-Kerala) – tour package



# Considered as works contract

- Erection of towers and testing and commissioning of transmission lines and setting up sub-station - EMC Ltd. (2018) 67 GST 580
- Contract for manufacture, supply, erection and commissioning of transmission towers - Skipper Ltd. [2018] 71 GST 430
- Erection, fitting and commissioning of data center - Hewlett Packard Enterprise India P Ltd (2020) 77 GST 453
- Comprehensive CCTV based City Surveillance Project - Allied Digital Services Ltd. (2019) 72 GST 755
- Turnkey project of wind tunnel for Vikram Sarabhai Space Centre - Tata Projects Ltd. (2020) 77 GST 504

# Government contracts

---

# Notf. No. 11/2017 – CT (R)

- Sr. No. 3 - Heading 9954 (Construction services) – 12% Rate
- Composite supply of works contract supplied to the Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,—
- (iii)
  - Historical monuments historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958)
  - canal, dam or other irrigation works
  - pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal

# Notf. No. 11/2017 – CT (R)

- (vi)
  - a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;
  - a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or
  - a residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017.]
  - *Explanation.*—For the purposes of this item, the term 'business' shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.

# Notf. No. 11/2017 – CT (R)

- Sub-contractor – 12% Rate
- Sr. No. 3(ix)
  - Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item (iii) or item (vi) above to the Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity.

# Notf. No. 11/2017 – CT (R)

- Sr. No. 3 - Heading 9954 (Construction services) – 5% Rate
- (vii) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, involving predominantly earth work (that is, constituting more than 75 per cent of the value of the works contract) provided to the Central Government, State Government, Union territory, local authority, a Governmental Authority or a Government Entity.

# Notf. No. 11/2017 – CT (R)

- Sub-contractor – 5% Rate
- Sr. No. 3(x)
  - Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided by a sub-contractor to the main contractor providing services specified in item (vii) above to the Central Government, State Government, Union territory, a local authority, a Governmental Authority or a Government Entity.

# Definitions

- (ix) "Governmental Authority" means an authority or a board or any other body,—
  - (i) set up by an Act of Parliament or a State Legislature; or
  - (ii) established by any Government,
- with 90 per cent or more participation by way of equity or control, to carry out any function entrusted to a Municipality under article 243W of the Constitution or to a Panchayat under article 243G of the Constitution.
- (x) "Government Entity" means an authority or a board or any other body including a society, trust, corporation,
  - (i) set up by an Act of Parliament or State Legislature; or
  - (ii) established by any Government,
- with 90 per cent or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority.



# Issues

- Meaning of the term "Governmental Authority" ?
- Meaning of the term "sub-contractor" ?
- Can the concessional rate apply to sub-sub-contractor ?

# Notf. No. 11/2017 – CT (R)

- Sr. No. 3(iv) – Rate 12%
- Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,—
  - road, bridge, tunnel or terminal for road transportation for use by general public
  - a pollution control or effluent treatment plant, except located as a part of a factory;
  - structure meant for funeral, burial or cremation of deceased.
  - building owned by an entity registered under section 12AA of IT Act, used for carrying out the activities of providing, centralized cooking or distribution, for mid-day meals under the mid-day meal scheme sponsored by the Central Government, State Government, Union territory or local authorities.

# Notf. No. 11/2017 – CT (R)

- Concessional rate of 12% to apply to constructions done under various Governmental housing schemes (e.g. Pradhan Mantri Awas Yojana)
- Sr. No. 3(v) - Concessional rate of 12% to also apply on works contract pertaining to Railways, including monorail and metro, Storage Infrastructure for post-harvest storages, cold storage, mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages

# Issue

- Whether benefit can be availed by sub-contractor or even sub-sub-contractor ?
- Benefit not qua the status of the recipient.
- Shimsha Infrastructures (2019) 76 GST 742

# 70/30 split

- Supply/Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following,—
  - (a) Bio-gas plant
  - (b) Solar power based devices
  - (c) Solar power generating system
  - (d) Wind mills, Wind Operated Electricity Generator (WOEG)
  - (e) Waste to energy plants / devices
  - (f) Ocean waves/tidal waves energy devices/plants

# Exemption – Notf. 12/2017 – CT (R)

- Services provided to .....
- Sr. No. 3
  - Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority <sup>1</sup>[or a Government Entity] by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.
- Sr. No. 3A
  - Composite supply of goods and services in which the value of supply of goods constitutes not more than 25 per cent of the value of the said composite supply provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.

# Exemption – Notf. 12/2017 – CT (R)

- Sr. No. 10
  - Services provided by way of pure labour contracts of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works pertaining to the beneficiary-led individual house construction or enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana.

# Other issues

- Location of supplier – Sec. 2(71) of the CGST Act, 2017
- Place of supply – Sec. 12(3) of IGST Act, 2017
- Input tax credit – Sec. 17(5)(c)/(d) of CGST Act, 2017
- Time of supply – Sec. 13(2) of the CGST Act, 2017
- Date of issuance of invoice – Sec. 31(2)/Sec. 31(5)
- Mobilization advance
- Value of supply – Sec. 15 of the CGST Act, 2017
- Record keeping – Rule 56(14) of the CGST Rules, 2017
- E-way bill
- TDS – Sec. 51
- Liquidated damages – Sr. No. 62 of Notf. 12/2011 – only covers payable to the CG, SG, UT and LA



# THANKS !!

---

[Abhay.desai@ydco.in](mailto:Abhay.desai@ydco.in)