

AAAR: Breakwater is not 'plant and machinery' but a 'civil structure', not eligible for ITC

The Hon'ble AAAR, Maharashtra in the matter of *M/s Konkan LNG Private Limited [Order No. MAH/AAAR/SS-RJ/14/2019-20 dated November 6, 2019]* upheld the decision of Hon'ble AAR, Maharashtra to disallow that Input Tax Credit ("ITC") of taxes paid on breakwater wall construction which saves the jetty and cargo from high tide and forceful sea waves.

Facts:

M/s Konkan LNG Private Limited ("**the Appellant**" or "**KLPL**") is engaged in the regasification of LNG. The LNG reaches to the plant through the jetty where it is unloaded from various cargoes. That in order to prevent jetty from high tide and forceful sea waves, there is existing partly constructed breakwater which was constructed by Dabhol Power Company ("**DPC**"). This breakwater was a part of original approved design, meaning thereby, the jetty was not workable at its potential without breakwater.

Although, having the breakwater was absolute necessity, the existing breakwater was not complete and required immediate reconstruction. Also, due to incomplete breakwater facility, the NSPC, the authority for the clearance of jetty, provides only provisional clearances for the berthing and unloading of the LNG cargo and therefore does not allow berthing of the cargo unless the height of the wave is less than 0.5 meters. Thus, the performance of jetty is much below its potential and has suffered the risk of damage due to high tides and waves.

The Appellant invited tender where scope of work included basic design, detail engineering, surveys, supply of material, construction, drawings, job specifics etc.

AAR- Held that the Appellant is not allowed to take credit of ITC of the amount of the GST paid to the contractors/ supplier of the goods or services as:

- Construction of breakwater is only facilitating receipt of raw material i.e., LNG and is not going to be used for rendering outward supply.
- The breakwater being an immovable structure, cannot be considered as Plant & Machinery.
- KLPL is already functioning without the complete breakwater and hence could not establish that it is impossible for them to function without breakwater.

Issue:

Whether the Appellant is eligible for taking ITC on construction of breakwater, which is an important and integral part of the existing jetty?

Appellant's contentions:

- ITC will be eligible because it is going to be used for rendering outward supply of goods or service or both.

- The AAR failed to consider that though breakwater is an immovable property it can be considered as plant and machinery as all immovable structures are not disqualified from being covered in term 'plant and machinery'
- The AAR has stated that to qualify for inclusion in the term 'plant and machinery' it must be established that it is impossible for regasification plant to function without the breakwater. However, there is no such test provided for the explanation to Section 17 of the Central Goods and Service Tax Act, 2017 ("CGST Act").

Held:

The Hon'ble AAAR, Maharashtra *in Order No. MAH/AAAR/SS-RJ/14/2019-20 dated November 6, 2019* held as under:

- Observed that as per Section 17(5)(d) of the CGST Act, plant and machinery though immovable are eligible for ITC. In order to come under the meaning of 'plant and machinery', the inputs must be used for making:
 - Plant and machinery which should be apparatus, equipment and machinery;
 - It should be used for outward supply of goods or services;
 - It should be neither of the following:
 - Land, building or any other civil structure;
 - Telecommunication tower;
 - Pipeline laid outside the factory premises.
- The term plant and machinery mean a place where certain commercial activities are carried out with the help of inputs and covers apparatus, equipment and machinery as per the explanation to Section 17(5)(d) of the CGST Act. The breakwater wall constructed on the sea to protect the ship from high waves can hardly be called machine or apparatus or equipment.
- The breakwater involves extensive civil work and foundation laying to build breakwater wall and the Accropods is only a part of it. It is therefore immovable structure though not plant and machinery. Therefore, break wall will be excluded by virtue of it being a civil structure.
- The extensive earthwork as well as civil work which has gone into the making of the break wall makes it clear that it is nothing but a civil structure.
- Distinguished the Hon'ble HC, Bombay judgment in case of *Mazagaon Dock (191 ITR 490)* rendered in the context of definition of term 'plant' under Income-tax Act, 1961.
- Upheld AAR's order.

Relevant provision:

Section 17(5)(d) of the CGST Act:

"Apportionment of credit and blocked credits.

(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely: -

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation. —For the purposes of clauses (c) and (d), the expression “construction” includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;”

Explanation to Section 17(5)(d) of the CGST Act:

“Explanation.— For the purposes of this Chapter and Chapter VI, the expression “plant and machinery” means apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural supports but excludes-

(i) land, building or any other civil structures;

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises.”

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