

ITC is not available on input, input services and capital goods on purchased for the construction of the LNG jetties

The AAAR, Gujarat, in the matter of *M/s. Swan LNG Pvt. Ltd [Advance Ruling (Appeal) No. GUJ/GAAAR/APPEAL/2022/06]* has held that the Liquefied Natural Gas (“LNG”) jetties built are not in the nature of plant and machinery and therefore, the Input Tax Credit (“ITC”) on input, input services and capital goods for the construction of building the LNG Jetties are not admissible.

Facts:

M/s. Swan LNG Pvt. Ltd, (“**the Appellant**”) has entered into a concession agreement with the Gujarat Maritime Board and the Government of Gujarat for the development, construction, operation and maintenance of the LNG Port with a Floating Storage and Regasification Unit (“**FSRU**”) facility near Jafrabad, Gujarat, on Build, Own, Operate and Transfer basis. As a part of developing the LNG Port and FSRU facility, the Appellant is developing an Import Terminal for FSRU near the village Bhankodar, near Jafrabad, Gujarat. After the development of the Import Terminal, the Appellant intends to provide the LNG regasification service to prospective customers.

This appeal has been filed by the Appellant challenging the ruling passed by the AAR, Gujarat vide *Advance Ruling No. GUJ/GAAR/R/46/2020 dated July, 30, 2020* holding that, the LNG jetties proposed to be built by the Appellant are not covered within the expression of plant and machinery and the Appellant cannot avail the ITC of the Goods and Services Tax (“**GST**”) paid on input, input services as well as on capital goods procured for the construction of building the LNG jetties as per the Section 17 of the Central Goods and Services Tax Act, 2017 (“**the CGST Act**”).

The Appellant contended that as per the Explanation to Section 17(5) of the CGST Act, any foundation built for installation of plant and machinery on it also gets covered under the expression plant and machinery and accordingly, the restriction on availing of the ITC should not be applicable to such foundation. Thus, the ITC of the LNG jetties, which are the foundation of the plant and machinery, should be available.

Issue:

Whether the LNG jetties are in the nature of plant and machinery and can the ITC be availed on input, input services, and capital goods for the purchase of construction of the LNG jetties?

Held:

The AAAR Gujarat in ***Advance Ruling (Appeal) No. GUJ/GAAAR/APPEAL/2022/06***, held as under:

- Noted that, allowing the ITC on the construction of foundation cannot be decided in isolation without deciding as to whether items to be fixed on it falls within the definition of plant and machinery and further the same would be used for making outward supply of goods or services or both.
- Observed that, that, the ITC on construction of foundation is allowed if the same is used for fixing on it the plant and machinery and further the said plant and machinery should be used for making outward supply of goods or services or both. The foundation or structural support needs to be exclusively for fixing the plant and machinery on it.
- Stated that, the LNG Jetties are nothing but civil structures and civil structures are excluded from the definition of foundation and structural supports. The foundation that is allowed in the definition of plant and machinery is that which fixes the plant

and machinery to the earth making it immovable. If a certain portion of the LNG jetties is used for directly fixing plant and machinery then it will not make jetties foundation for plant and machinery but, they are only in the nature of civil structures.

- Upheld the ruling passed by the AAR.
- Held that, the LNG Jetties being built by the Appellant are not in the nature of plant and machinery and therefore, the ITC on the LNG, input services and capital goods for the construction of building the LNG Jetties are not admissible.

Our comments:

The Hon'ble High Court of Orissa in the case of ***M/s Safari Retreats Pvt. Ltd. [W.P. (C) No. 20463 of 2018 decided on April 17, 2019]*** has read down Section 17(5)(d) of the CGST Act by confining the provision only to cases where the building is constructed for the purpose of sale post issuance of completion certificate. Thus, it was held that where the building was constructed for the purpose of letting out and tax chain is not broken, the restriction under Section 17(5)(d) is not applicable.

However, it should be noted that Section 17(5)(d) of the CGST Act has not been struck down, but its interpretation has been restricted to conclude that that letting out of property does not fall under the expression 'own account'.

Further, a SLP has been filed, which is pending before Hon'ble SC in ***Chief Commissioner v. Safari Retreats Private Limited [2020 (32) GSTL J120 (Supreme Court)]*** on the constitutional validity of Section 17(5)(c) and 17(5) (d) of the CGST Act. Moreover, it needs to be seen, whether the Hon'ble Supreme Court would agree with the above view or not.

Relevant Provision:

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

“(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(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;*

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(6)

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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