Chief Commissioner Of Central Goods And ... vs M/S Safari Retreats Private Limited on 3 October, 2024

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Bench: Sanjay Karol, Abhay S Oka

2024 INSC 756

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE/ORIGINAL JURISDICTION

CIVIL APPEAL NO. 2948 OF 2023

Chief Commissioner of Central Goods
and Service Tax & Ors. … Appellants

versus

M/s Safari Retreats Private Ltd. & Ors. … Respondents

with
WRIT PETITION (CIVIL) NOS. 804 of 2022 & 1030 of 2022
CIVIL APPEAL NO. 2949 OF 2023
WRIT PETITION (CIVIL) NOS. 1036 of 2022 & 90 of 2023
WRIT PETITION (CIVIL) NO. 846 of 2023
and
WRIT PETITION (CIVIL) NO. 847 of 2023

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

1. The issues which broadly arise in this group of matters concern clauses (c) and (d) of sub-section (5) of Section 17 of the Central Goods and Services Tax Act, 2017 (“the CGST Act”).

There is a challenge to the constitutional validity of the said provision. There is a prayer for reading

down the said provision.

2. In Civil Appeal Nos. 2948 and 2949 of 2023, the first respondent is engaged in the construction of a shopping mall for the purpose of letting out premises in the malls to different tenants. Vast quantities of material, inputs and services are required for the construction of the malls in the form of cement, sand, steel, aluminium, wires, plywood, paint, lifts, escalators, air-conditioning plants, electrical equipment, transformers, building automation systems etc., and also consultancy services, architectural services, legal and other professional services, engineering services and other services including the services of a special team of international designers specialised in the construction of Malls. These goods and services used in the construction of the mall are taxable under the CGST Act. It is the case of the first respondent that it has accumulated input credit of GST amounting to more than Rs. 34 crores by the purchase/supply of goods and services consumed and used in the construction of the shopping mall. At the same time, the first respondent's letting out of units in the shopping mall attracts CGST based on the rent received by the first respondent since it amounts to the supply of service under the CGST Act. Therefore, the first respondent was desirous of availing the Input Tax Credit (ITC) accumulated against the rental income received by it upon letting out the mall premises.

According to the first respondent, when it approached the concerned authorities, it was advised to deposit GST on rent without deducting ITC because of the exception carved out by Section 17(5)(d).

3. The first respondent filed a writ petition before the High Court of Orissa seeking a declaration that Section 17(5)(d) of the CGST Act and the corresponding provisions of the Orissa Goods and Services Act, 2017 do not apply to the construction of immovable property intended for letting out on rent. A prayer in the alternative was made that in the event it is held that the bar under Section 17(5)(d) is applicable even to the construction of immovable property intended for letting out, a declaration be issued that Section 17(5)(d) is violative of Articles 14 and 19 (1)(g) of the Constitution of India. A consequential prayer was made to issue a writ of mandamus to enjoin the present appellants, who were respondents in the writ petition, to grant the benefit of ITC to the first and second respondents.

4. By the impugned judgment dated 17th April 2019, the High Court held that in view of the decision of this Court in the case of Eicher Motors Limited & Anr. v. Union of India & Ors.1, Section 17(5)(d) was required to be read down as the very purpose of ITC is to benefit the assessee. The High Court held that if the assessee is required to pay GST on the rental income from the mall, it is entitled to ITC on the GST paid on the 1 (1999) 2 SCC 361 construction of the mall. It was held that the narrow interpretation given by the Department to Section 17(5)(d) would frustrate the very object of the Act. Civil Appeal No. 2949 of 2023 takes exception to the same judgment.

5. In the Writ Petitions, the petitioners contend that due to the restrictions imposed by Section 17(5)(c) and Section 17(5)(d) of the CGST Act, they are unable to avail the credit on GST paid on goods and services used in the construction of factory premises, buildings etc against the GST received by them for the renting/leasing/letting out etc. of the premises. GST is being recovered on the supply of goods and services used in the construction of commercial office buildings, and GST is

also being recovered on rentals collected. Accordingly, several writ petitions have been preferred seeking the following reliefs:

> a. Writ Petition (C) No. 90 of 2023 challenging clauses (c) and (d) of Section 17(5) of the CGST Act to the extent to which it excludes works contract services and goods from ITC. It is also prayed that the bar imposed by Section 16(4) should not apply to the petitioner;
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> b. Writ Petition (C) No. 804 of 2022 challenging the validity of Section 17(5)(d) of the CGST Act;
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> c. Writ Petition (C) No. 846 of 2023 challenging the validity of clauses (c) and (d) of Section 17(5) of the CGST Act. There is another prayer to read down the provisions;
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> d. Writ Petition (C) No. 847 of 2023 challenging the constitutional validity of clauses (c) and (d) of Section 17(5). There is a prayer to read down the clauses (c) and
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> (d) of Section 17(5) and Section 16(4) of the CGST Act;

e. Writ Petition (C) No. 1036 of 2023 challenging the constitutional validity of clauses (c) and (d) of Section 17(5). There is a prayer to read down the clauses (c) and

(d) of Section 17(5) and Section 16(4) of the CGST Act; and f. Writ Petition (C) No. 1030 of 2022 containing similar prayers SUBMISSIONS ON BEHALF OF ASSESSEES

6. Very detailed submissions have been made by the parties to the civil appeals, intervenors and parties to the writ petitions. We find that the submissions made by the learned counsel for the assessees and the intervenors are repetitive. There are a large number of decisions relied upon, whether relevant or irrelevant. Brevity is the hallmark of good advocacy. It would be ideal if parties on one side file joint written submissions. The Judges and lawyers are humans. Sometimes, bulky compilations and submissions can be counterproductive.

7. Assessees have submitted that clauses (c) and (d) and sub-section (5) of Section 17 are violative of Articles 14, 19(1)(g) and 300A of the Constitution of India. The submissions concerning the challenge to constitutional validity can be summarised as follows:

> a. Section 17(5)(d) is violative of Article 14 since it classifies assessees engaged in the business of constructing immovable properties and then renting/leasing/letting out etc. premises within the said immovable properties on the same footing as assessees engaged in the business of constructing immovable properties and then selling the immovable properties or premises within the said immovable properties, by denying them ITC for their business expenditure, i.e., the expenditure incurred in constructing the immovable properties. Therefore, it is submitted that the provision treats unequals as equals and contravenes the principle of GST Law, i.e., to allow ITC

for business expenditure. Therefore, the provisions are arbitrary, irrational and unreasonable.

b. There is no intelligible differentia on the basis of which such classification is done. Creation of an immovable property is not a differentia. The contention is that works contracts, namely the contracts for the construction of immovable property wherein transfer of property is involved, are treated as a supply of services. Therefore, de jure, they are treated as a supply of services notwithstanding the immovable character of the deliverable. It is submitted that there are cases where a transaction may seemingly appear to involve a supply of goods, but in essence, it is a transaction involving something else. An illustration is given of a lawyer drafting a legal contract. In such a case, the deliverable may be in the form of documents handed over to the client and, therefore, apparently may appear to be a supply of goods. However, it is a legal service rendered, which is what the bargain was for. In short, the dominant intention test, as laid down in the case of Bharat Sanchar Nigam Limited & Anr. v. Union of India & Ors.2, must be applied. It is submitted that under the CGST Act, a works contract involving the creation of immovable property is treated as a supply of services. Thus, the nature of the deliverable, namely, building, etc., has no relevance to the levy of GST. Under the CGST Act, the immovable character of the deliverables, such as buildings, etc., under a works contract is entirely disregarded. Therefore, such immovable property cannot be said to exist under the architecture of GST. In short, the submission is that the differentia canvassed by the State, which is an immovable characteristic of the deliverable under the works contract, is artificial and non-existent in the eyes of the law. As intelligible differentia does not exist, the first condition of the twin test can be said to be satisfied;

c. Break in the credit chain is also not a differentia, since, in the assessees' case, unlike in the case of assessees selling immovable properties, there is no break in the 2 (2006) 3 SCC 1 credit chain. The break arises when the recipient uses the supplier's output to make non-taxable transactions for which GST is not payable by the recipient. In such a case, credit cannot be utilised in the subsequent leg of the transaction from where the break in the chain took place. Several illustrations have been given in support of this submission. It was submitted that there is no break in the chain at any of the levels, starting from the sub-

contractor to the main contractor and the petitioner, since all three entities are liable to output GST, and therefore, in such a case, denial of credit cannot be justified;

d. It is submitted that even assuming that coming into existence of an immovable property is an intelligible differentia, it has no nexus with the objects of the CGST Act. The reason is that denying credit in such cases essentially perpetuates and continues the cascading effect of tax, contrary to the very object of the CGST Act of eliminating the cascading effect of tax and achieving tax neutrality. For example, if a manufacturer hires a contractor to build a factory building through a works contract, the manufacturer would have to pay GST for the services rendered by the contractor. If the

manufacturer is not permitted to avail ITC for the GST so paid, the GST would be included in the cost of the output product price, upon which further GST would be levied, leading to tax on tax. If what is being supplied by the seller is a service, it has to be necessarily received as a service by the buyer;

e. Section 17(5)(c) and (d) remain vague due to the absence of definitions of the expressions "on its own account" and "plant or machinery". The distinction between the expression "plant and machinery" used in Section 17(5)(c) and the expression "plant or machinery" used in Section 17(5)(d) has not been clarified by the Government. Therefore, the provisions suffer from vagueness. It is submitted that if a provision is very vague, it can be struck down, as held in the case of Shreya Singhal v. Union of India3.

f. It is submitted that ITC is the bedrock of the GST framework. The right to avail of ITC is a statutory right in terms of Section 16 of the GST Act. The receipt of rental income and tax payable are direct consequences of the construction undertaken. By blocking the ITC on the rentals collected by the assessee who has constructed the building, the State is unjustly enriching itself and violating the right to avail ITC flowing from Section 300A of the Constitution of India. Reliance is also placed on a decision of this Court in the case of Union of India v. Bharti Airtel Limited & Ors.4; and 3 (2015) 5 SCC 1 4 (2021) SCC OnLine SC 1006 g. Reliance has been placed on numerous decisions concerning the principles for examining the constitutional validity of taxation statutes. It is submitted that though, in the matters of taxing Statutes, the legislature enjoys a very wide latitude, and the Courts are expected to show deference to legislative choices, a decision of this Court in the case of Federation of Hotel & Restaurant Association of India, etc. v. Union of India and Ors.5 holds that wide latitude is also subject to exceptions, it is argued that "wide latitude" does not mean "wild latitude". On the twin test of reasonable classification, reliance was placed on various decisions, including those in the case of R.K Garg v. Union of India and Ors.6, Twyford Tea Co. Ltd. and Anr. v. State of Kerala and Anr.7, Union of India and Ors. v. Nitdip Textile Processors Pvt. Ltd. and Anr.8. Varying standards of review under the doctrine of classification are typically applied to economic and non-economic legislation, with the rational basis test being applied to economic legislation. Various decisions were relied upon dealing with the wide latitude doctrine in relation to economic legislations. Reliance was placed on the Government of Andhra Pradesh and Ors. v. P. Laxmi Devi9, Assistant Commissioner of Urban Land Tax 5 (1989) 3 SCC 634 6 (1981) 4 SCC 675 7 (1970) 1 SCC 189 8 (2012) 1 SCC 226 9 (2008) 4 SCC 720 and Ors. v. Buckingham and Carnatic Co. Ltd., Etc.10, Jindal Stainless Ltd. and Anr. v. State of Haryana and Ors.11 and State of Tamil Nadu and Anr. v. National South Indian River Interlinking Agriculturist Association12. The true import of the legislative provision is to be understood from the plain reading of the provision and not on the basis of affidavits or submissions of the State. A decision in the case of Sanjeev Coke Manufacturing Company v. M/s Bharat Coking Coal Ltd. & Anr.13 is relied upon.

8. Assessees have submitted that clauses (c) and (d) and sub-section (5) of Section 17 must be read down to the extent that ITC is blocked for suppliers who procure taxable works contract services, goods or services on the input side and then provide taxable supplies on the output side. The submissions about reading down clauses (c) and (d) of Section 17(5) of the CGST Act can be summarised as follows:

a. The statement of objects and reasons of the Constitution (122nd Amendment) Bill, 2014 shows that Articles 246A and 279A were introduced to simplify the indirect tax regime to prevent the cascading effect of multiplicity of taxes. The cascading effect of taxes can be removed only by introducing a system for allowance of ITC so that there would not be any missing link in the chain or series of 10 (1969) 2 SCC 55 11 (2017) 12 SCC 1 12 (2021) 15 SCC 534 13 (1983) 1 SCC 147 transactions culminating into deliverable goods and services or both to the ultimate end-user, who is the customer. Reliance has been placed on the observations made by this Court in the case of Union of India & Anr v. Mohit Minerals Pvt. Ltd.14. The entire GST regime has been so designed that the credit of tax paid at every stage of value addition from the point of manufacture to the point of consumption could be availed at the next stage. It provides for seamless transfer of ITC from one stage to another. Moreover, GST is a destination-based tax on consumption, and accordingly, the final burden of the tax must be borne by the customers and not the businesses. If the entire scheme of the CGST Act is perused, except for clauses (c) and (d) of Section 17(5), the ITC is not denied when the transaction is from business to business.

b. The assessees pay substantial amounts for the construction of immovable properties and are levied CGST on the same. However, since they are not permitted to avail of the CGST paid as ITC, it gets added to the price of services they supply, i.e., renting/leasing/letting out, etc. Further, CGST is leviable on the supply of these services, resulting in tax on tax or the cascading effect of tax. Moreover, due to the denial of ITC, the assessees have to bear the tax burden. Thus, the interpretation put by revenue to clauses (c) and (d) of Section 17(5), as per 14 (2022) 10 SCC 700 which ITC is denied to assessees on construction expenditure, results in the cascading effect of taxes and denial of credit for business expenditure, which is in direct contradiction of the objects of GST Law as elaborated previously. It is submitted that ITC cannot be denied solely because immovable properties are created in the assessee's business. The primary condition for availing of ITC is the nexus between the assessee's input and output business activities, which exists in the assessee's case. Direct corelation with input services or output services is not necessary to avail of the benefit of ITC.

c. It is submitted that the phrase "on its own account" should be read down and given a purposive construction instead of a myopic one. The phrase should be deemed to mean when construction is done for personal use and not for services, i.e., credit should be denied only when goods and services are utilised for the construction of immovable property for his own purposes, like an office building or factory building. In such a case, no further GST on the sale of such a building occurs and, therefore, a chain of taxability breaks. However, when such immovable property is not being used by the assessee itself but is used for other supplies, such as renting property or supply of hotel accommodation services, etc., the same should not be covered by the expression 'on his own account'. Therefore, when an immovable property itself is a means by which business is being carried out, like letting out for short-term purposes by a hotel, the embargo under Section 17(5)(d) on ITC will not apply as it cannot be construed on his own account. It is submitted that this manner of reading down will ensure that in cases where there is no breakage in the chain of taxable supply, ITC is available to a taxable person who pays output tax. Moreover, this interpretation will avoid the

cascading effects of tax.

d. In the submissions made by assessees, principles of reading down were sought to be invoked based on the decision of this Court in the case of Indian Social Action Forum (INSAF) v. Union of India15. Reliance was also placed on a decision of this Court in the case of Delhi Transport Corporation v. DTC Mazdoor Congress & Ors.16.

9. Assessees have submitted that Section 17(5)(d) of the CGST Act can be interpreted in a manner that ITC is available to them for the construction of immovable property used for the purpose of further output supply. Shri Arvind P Datar, the learned senior counsel appearing in Writ Petition (C) No. 804 of 2022 contended that the conclusion rendered by the Orissa High Court in the impugned judgment could have been reached 15 (2021) 15 SCC 60 16 (1991) Supp (1) SCC 600 without reading down Section 17(5)(d). The contention is founded on a three-pronged argument:

> a. Firstly, it is submitted that Clause (d) exempts "plant or machinery" from blocked credit, which is distinct from the expression "plant and machinery" used in Clause (c). Therefore, the explanation to sub-section (6) of Section 17, which defines "plant and machinery" is not applicable to the Clause (d). Revenue has opposed this contention by submitting that 'or' must be read as 'and' stating it to be the mistake of the legislature and contending that assigning distinct meaning to the two clauses would result in unequal treatment of works contract services for the construction of immovable properties under clause (c) and goods and services for the construction of immovable properties under clause (d). The submissions in relation to this can be summarised as follows:
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> • Section 17, being an exception to the general rule under Section 16, must be construed strictly. The expression "plant and machinery" has been used at least ten times in Chapters V and VI of the CGST Act, and the expression "plant or machinery" occurs only once in Section 17(5)(d). Therefore, the intention of the legislature to treat the expression "plant or machinery" differently from the expression "plant and machinery" is apparent.
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> • In the model GST law, which the GST Council Secretariat circulated in November 2016 for inviting suggestions and comments, the expression "plant and machinery" was used both in clauses (c) and (d) of Section 17(5). However, while enacting the law, the legislature has advisedly used the expression "plant and machinery" in clause (c) and "plant or machinery" in clause (d) of Section 17(5). Therefore, the intention of the legislature cannot be brushed aside by contending that the use of the word "or" in Section 17(5)(d) is a mistake of the legislature.
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> • The expression "plant or machinery" has not been defined under the CGST Act. The definition of "plant and machinery" provided in the explanation to Section

17 will not apply to the expression “plant or machinery”. Since the legislature has intentionally used two different expressions in clauses (c) and (d) of Section 17(5), different meanings will have to be assigned to these expressions.

• Clauses (c) and (d) of Section 17(5) give unequal treatment to unequals. Though they may appear to be similar, they are quite different from each other. Besides using different expressions, clauses (c) and (d) use a completely different language. Clause (c) applies to the works contract, which will not per se apply to clause (d). The classes of cases covered by clauses (c) and (d) of Section 17(5) are two separate classes and the same cannot be treated equally.

b. Secondly, it is submitted that malls, hotels, warehouses, etc., are ‘plants’ and, therefore, are exempted from the provision. The submissions in relation to this can be summarised as follows:

> • The word “plant” is not defined under the CGST Act or the General Clauses Act, 1897. It is also not defined in any of the State GST enactments. Reliance was placed on a decision of this Court in the case of Indcon Structurals (P) Ltd. v. Commissioner of Central Excise, Chennai17 in support of the proposition that the words and expressions in taxing statute unless defined in the statute itself, have to be understood in the sense that the person dealing with them understands them as per the trade understanding, commercial and technical practice and usage. Reliance was also placed on a decision of this Court in the case of CIT, Andhra Pradesh v. Taj Mahal Hotel, Secunderabad18 wherein this court held that the word “plant” means land, building, machinery, apparatus and fixtures employed in carrying on trade and other industrial business.
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> 17 (2006) 4 SCC 786 18 (1971) 3 SCC 550 • Functionality or essentiality tests must be applied to decide what a plant is. Ultimately, a plant is an apparatus used by a businessman for carrying on his business. It does not include his stock in trade, but it does include all goods and property, whether movable or immovable. Apart from holding that a generating station building, hospital, and pond are plants, this Court has also held that even a dry dock is a plant. A building or a warehouse must be considered a ‘plant’ within the meaning of Section 17(5)(d) if it serves as an essential tool of trade with which business is carried on. However, if it merely serves as a setting in which business is carried on, it will not qualify as a ‘plant’.

• Since buildings have been specifically excluded from the definition of “plant and machinery” in the explanation to sub-section (5) of Section 17, the word 'plant' in the expression 'plant or machinery' must be taken in its natural sense, which will include buildings.

• In support of the submission that a shopping mall could be treated as a plant, which will fall in the exception carved out to Section 17(5)(d), reliance was placed on the decision of this Court in the case of CIT, Trivandrum v. Anand Theatres19 wherein it was 19 (2000) 5 SCC 393 held that when a building is specially designed and constructed with some special features to attract the customers, the building could be treated as a plant. In the case of Commissioner of Income Tax, Karnataka v.

Karnataka Power Corporation20, this Court held that an electricity power generating station building would have to be treated as a plant as it would satisfy the functional test or test of essentiality. This Court further held that the judgment in the case of Anand Theatres19 would be limited to buildings used for hotels or cinemas/theatres. Reliance was also placed on the decision in the case of Commissioner of Income Tax v. Victory Aqua Farm Ltd.,21 which holds that ponds specially designed for doing business of aquaculture of prawns should be treated as plants for the purposes of the Income Tax Act.

• Reliance has been placed on numerous decisions concerning the principles for interpreting taxation statutes. Usually, a taxation Statute calls for strict interpretation, as held in the decision of this Court in the case of Commissioner of Customs (Import), Mumbai v. Dileep Kumar & Company & Ors. 22 It is equally well settled that when two interpretations of a provision in a taxing Statute are possible, the Court 20 (2002) 9 SCC 571 21 (2016) 16 SCC 553 22 (2018) 9 SCC 1 would ordinarily interpret the provisions in favour of the assessee and against the revenue. Reliance was placed on this behalf in the case of Sneh Enterprises v. Commissioner of Customs, New Delhi23 and Commissioner of Income Tax, West Bengal 1, Calcutta v. M/s Vegetables Products Ltd.24 It is submitted that if one reads Section 17 objectively, it would be noticed that the restrictions on availing ITC are imposed on a reasonable basis. The benefit of ITC is excluded when the services are used for personal purposes or for providing exempted services, or if the supply is outside the ambit of levying GST. However, where the taxing chain continues, ITC is not restricted. It is submitted that the Court shall not interpret a statutory provision in such a manner that it would create an additional fiscal burden on a person.

c. Thirdly, it is submitted that services of renting/leasing/letting out, etc., in relation to immovable property constitute supply. Clause 2 of Schedule II provides that any lease or letting out of the building, including a commercial, industrial or residential complex for business or commerce, is a supply of service. Clause 5(a) of Schedule II provides that renting an immovable property is a supply of service. Clause 5(b) of Schedule II 23 (2006) 7 SCC 714 24 (1973) 1 SCC 442 provides that the construction of a complex, building, civil structure or a part thereof intended for sale to a buyer, wholly or partly, is also a supply of service, except where the entire consideration has been received after issuance of the completion certificate or after its first occupation, whichever is earlier. Therefore, ITC accrued on construction of immovable property can be availed against these services.

Miscellaneous Submissions

10. It is submitted that even though sub-Section (5) of Section 17 starts with the non-obstante clause, it cannot be said that the legislature intended to override Section 16(1) in its entirety. It is submitted that the non-obstante clause in Section 17(5) cannot cut down the construction or restrict the scope of operation of Section 16(1). Reliance was placed on a decision of this Court in the case of R.S. Raghunath v. State of Karnataka & Anr.25;

11. It is pointed out that Section 17(5)(c) carves out an exception only for works contracts, assuming that this is the only category of service where there is no breakage in the chain of taxable supplies. It is submitted that while Section 17(5)(c) allows ITC on works contracts for contractors, ITC has been

blocked for other developers;

12. The classification sought to be invoked by the Revenue leads to invidious discrimination within the provision in as 25 (1992) 1 SCC 335 much as credit has been allowed for the construction of immovable plant and machinery during the execution of a works contract and for the construction of a building during the execution of work by the sub-contractor under its work contract with the main contractor;

13. It is submitted that Section 16(1) of the CGST Act is not pari materia with the provisions of the Tamil Nadu Value Added Tax Act, 2006. Therefore, the decisions relied upon by learned ASG will have no application. It is submitted that the decision of this Court in the case of Union of India & Ors v. VKC Footsteps India Pvt. Ltd.26 is not relevant as this Court did not have an occasion to consider the implications of statutory entitlement to ITC.

SUBMISSIONS OF THE REVENUE

14. Shri N. Venkataraman, learned Additional Solicitor General, has made detailed submissions. He brought our attention to provisions regarding taxation on goods and services in the pre-GST and post-GST eras. He submitted that in the GST regime, the taxable event is one common event, namely, the supply of goods and services. He invited the attention of the Court to the definition of goods and services in Article 366 of the Constitution. He submits that the distinction between goods and services has not been obliterated. He also pointed out the historical evolution of ITC, starting from 26 (2022) 2 SCC 603 MODVAT credit, which was made available to inputs and raw materials and later extended to capital goods.

15. His submissions about the challenge to constitutional validity can be summarised as follows:

> a. Classification of the assessees on the same footing as assessees engaged in the business of constructing immovable properties and then selling the immovable properties is justified on the ground that the classification has been done on the basis of intelligible differentia which has rational nexus with the object of GST. The transactions lead to the creation of immovable property, which itself is the intelligible differentia based on which classification has been done. Such classification has a rational nexus since there is a break in the tax chain and therefore, the ITC is being denied;
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> b. Denial of ITC was justified on the ground that it is not a fundamental or constitutional right. He submitted that ITC is a statutory right, and in the absence of the right under the statute, the Court cannot issue a mandamus to grant ITC. Reliance has been placed upon the decision of this Court in the case of ALD Automotive Pvt. Ltd. v. Commercial Tax Officer, now upgraded as Assistant Commissioner (CT) & Ors.27 and in particular, what is held in paragraphs 34, 37, 38 and 40.

27 (2019) 13 SCC 225 c. In response to the principles for examining the constitutional validity of taxation statutes, he submitted that the test of vice of discrimination in a taxing statute is less rigorous. He submitted that the Parliament is entitled to make policy choices and adopt appropriate classifications given the latitude that our Constitutional jurisprudence allows in the matters involving tax legislation. The principle of equality does not preclude the classification of property, credit, profession and events for taxation. He submitted that it is settled law, as held in the case of Hari Krishna Bhargav v. Union of India & Anr28 that a taxing statute is not open to challenge on the ground that the tax is harsh or excessive. He refuted a submission that clauses (c) and (d) of Section 17(5) are fraud on the Constitution or that they are manifestly arbitrary. He invited our attention to a decision of the Constitution Bench in the case of Joseph Shine v. Union of India29 and, in particular, what is held in paragraphs 163 to 165. He submitted that considering the test laid down in the said decision, even assuming that clauses (c) and (d) are discriminatory, they are not manifestly discriminatory. He submitted that English decisions will not apply, as in India, there is a constitutional and statutory distinction between goods that are movables 28 (1966) 2 SCR 22 29 (2019) 3 SCC 39 and immovables. This distinction is not available in England.

16. His submissions about the interpretation of Section 17(5)(d) can be summarised as follows:

a. The expression “plant or machinery” must be read as “plant and machinery”. It is not uncommon to read “and” as “or” or “or” as “and”. He relied upon a decision of this Court in the case of Indore Development Authority v. Manoharlal & Ors.30 and, in particular, what is held in paragraph 105. He also relied upon another decision of this Court in the case of State of Bombay v. R.M.D. Chamarbaugwala & Anr.31. Further, he submitted that if “or” is not read as “and”, it would be discriminatory since ITC would be available on a mall or warehouse, but under clause (c), it would not be available on works contracts relating to the construction of a mall or warehouse. In this regard, he stated that Clauses (c) and

(d) of Section 17(5) deal with the same subject matter, i.e., immovable property and therefore they cannot be treated unequally. Furthermore, he submitted that the explanation to Section 17(5) applies to Chapters V and VI and thus has to apply to clause (d). However, he accepted that the expression “plant and machinery” occurs ten times in Chapter V and Chapter VI and the expression “plant or machinery” occurs only once in Section 17(5)(d).

30 (2020) 8 SCC 129 31 (1957) SCC OnLine SC 12 He invited our attention to Section 16(3) of the CGST Act, which bars the claim of depreciation on ‘plant and machinery’ if the assessees choose to avail of ITC. Thus, ITC is allowable only when depreciation is not claimed. He submitted that if the argument of the assessees is accepted, they would be entitled to take benefit of both ITC and depreciation simultaneously. In a similar vein, he submitted that if the submission is accepted, even Sections 18(6) and 29(5) will not apply to plant or machinery falling under Section 17(5)(d).

b. For identifying what would constitute plant and machinery/plant or machinery, it is not necessary to refer to decisions under the Income Tax Act as the same have no relevance. There is no concept of ITC in the Income Tax Act. The scheme of the Act is completely different. He further submitted that if the assessee's submission that a shopping mall or warehouse is treated as a plant is accepted, it would amount to hostile discrimination.

c. Tax on goods cannot be extended to immovable property. However, taxation on services can be raised even on using immovable properties for rendition of services. He submitted that when it comes to sales tax or VAT on goods, a consistent view taken by this Court is that the sale would include the sale of goods and not the sale of immovables. He submitted that malls, hotels, office buildings, etc., are immovable properties; therefore, GST cannot be levied. He relied upon the earlier decisions of this Court arising out of the Central Excise Act, 1944. According to him, those plants and machinery which are deeply rooted in the earth and cannot be relocated without sufficient damage are immovable goods. However, he accepted that renting an immovable property amounts to a supply of service, which is taxable under the CGST Act.

d. While dealing with the case of a shopping mall, he submitted that since a shopping mall is an immovable property, it is excluded from the GST. Therefore, it does not fall in Clause (5)(b) of Schedule II. He submitted that the entire purpose of ITC is to extend the ITC paid at the anterior stage to remove the cascading burden of taxation at a subsequent stage. As there is no GST payable on shopping malls, there is no need to grant ITC. He pointed out that if a shopping mall is sold as an immovable property immediately after the completion certificate is issued, no GST is payable at the time of sale of the immovable property. Therefore, ITC credit cannot be used. If the mall is used to render renting service for five years and then is sold after five years, no GST will be payable on the sale. However, if ITC is allowed as contended during these five years, ITC will be exhausted against GST payable on rental income. Thereafter, the mall would be sold without paying any tax, which would cause a substantial monetary loss. Learned ASG relied upon a decision of this Court in Union of India v. Shri Harbhajan Singh Dhillon32, and in particular, what is held in paragraphs 74 to 76 and 82. He also relied upon a decision in the case of India Cement Ltd. & Ors. v. State of Tamil Nadu & Ors.33 and State of W.B. v. Kesoram Industries Ltd. & Ors.34. He pointed out that the construction of a complex building intended for sale to a buyer will be treated as a supply of service except where the entire consideration has been received after the issuance of the commencement certificate. He pointed out that the supply of a constructed building complex or a civil structure before the issuance of the completion certificate can be construed as a supply of services and will be liable to GST. The dividing line is the issuance of a completion certificate. A supply prior to the issuance of the commencement certificate is treated as a supply of service, whereas a sale made after the issuance of the completion certificate is not treated as a supply of service.

Miscellaneous Submissions e. He submitted that tax on works contracts is also a tax on movable goods, either as goods, or during the transfer of goods, or before accretion takes place, leading to their becoming immovable property.

32 (1971) 2 SCC 779 33 (1990) 1 SCC 12 34 (2004) 10 SCC 201 f. The learned ASG also dealt with the services on tax and work contracts in the pre-GST regime. Relying upon the definition of "works

contract" in Article 366 (29A)(b) of the Constitution, he submitted that what is taxed cannot be a taxation on the immovable property.

GIST OF REJOINDER

17. By way of rejoinder, the learned counsel representing assessees submitted that the legislature intentionally used the expression "plant or machinery" in only one place, and the legislative intention has to be adhered to.

18. It was submitted that in certain cases, CENVAT credit was allowed for the construction of buildings. That is the view taken by the Tribunals/High Courts.

19. Concerning the apprehension of misusing GST expressed by the learned ASG, it was submitted that even if the argument of the assessees is accepted, the ITC on goods or services used to construct a warehouse or mall is only to a limited extent of GST payable on rental activity. It was, therefore, submitted that the definition of "plant or machinery" will not apply to "plant and machinery".

20. The learned counsel submitted that there is no conflict between Section 17(5)(d) and Section 16(3). He submitted that Section 16(3) applies to "plant and machinery" and not to "plant or machinery". He submitted that even assuming that Section 16(3) applies to plant or machinery, the effect of the provision is that if the registered person claims depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income Tax Act, 1961, he cannot avail of the ITC on the said tax component. He submitted that there is no conflict between the provisions of Section 17(5)(d) and Section 29(5) of the CGST Act. Inviting our attention to Section 18(6), he submitted that the provision can be pressed into service only in case of supply of capital goods or plant and machinery on which ITC has been taken. He submitted that in the facts of the case, it is nobody's case that the registered persons are supplying capital goods, plant or machinery.

21. It was argued that the constitutional bar in Entry 49 of List II exists only against the levy of GST on land and buildings and not against the grant of ITC on movable goods and services used for the construction of buildings. In its wisdom, the legislature has allowed ITC on immovable property provided it meets the criteria of functionality or essentiality of a plant. It is submitted that GST is leviable on the activity of renting and the activity of selling buildings before the grant of completion certificate. The disallowance of ITC on goods and services used in the construction of buildings could be a logical corollary only if the buildings were intended to be sold as stock by the developer instead of being further used for providing taxable goods or services. There is no contradiction in promoting ITC on goods and services used for the construction of buildings when such buildings are deployed to provide taxable supplies on which GST is being discharged. Not permitting ITC in such a situation would lead to absurdness and the unintended consequence of breaking the ITC chain, which will amount to thwarting the seamless flow of tax credits.

22. There is a deliberate intention to permit ITC on plant or machinery under Section 17(5)(d) even if the plant or machinery is immovable, and Section 17(5)(d) cannot be detracted by Section 16(3).

He submitted that Sections 16(3) and 17(5) must be read harmoniously.

REPLY TO REJOINDER

23. We may note here that submissions in brief were made by learned ASG dealing with the arguments of Shri Arvind Datar, Senior Advocate. His submission is that the expression "capital goods" is intended to include "plant and machinery". He submitted that what emerges from steel, cement, etc., are immovable goods, which would be excluded from GST. Since no GST is payable on immovable property, ITC is not available.

BROAD ISSUES FOR CONSIDERATION

24. Considering the submissions made by the parties, the following main questions arise for consideration:

> (i) Whether the definition of "plant and machinery" in the explanation appended to Section 17 of the CGST Act applies to the expression "plant or machinery" used in clause (d) of sub-section (5) of Section 17?
>
> (ii) If it is held that the explanation does not apply to "plant or machinery", what is the meaning of the word "plant"? and
>
> (iii) Whether clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act are unconstitutional?

RULES REGARDING THE INTERPRETATION OF TAXING STATUTES

25. Regarding the interpretation of taxation statutes, the parties have relied on several decisions. The law laid down on this aspect is fairly well-settled. The principles governing the interpretation of the taxation statutes can be summarised as follows:

> a. A taxing statute must be read as it is with no additions and no subtractions on the grounds of legislative intendment or otherwise;
>
> b. If the language of a taxing provision is plain, the consequence of giving effect to it may lead to some absurd result is not a factor to be considered when interpreting the provisions. It is for the legislature to step in and remove the absurdity;
>
> c. While dealing with a taxing provision, the principle of strict interpretation should be applied;
>
> d. If two interpretations of a statutory provision are possible, the Court ordinarily would interpret the provision in favour of a taxpayer and against the revenue;

e. In interpreting a taxing statute, equitable considerations are entirely out of place;

f. A taxing provision cannot be interpreted on any presumption or assumption;

g. A taxing statute has to be interpreted in the light of what is clearly expressed. The Court cannot imply anything which is not expressed. Moreover, the Court cannot import provisions in the statute to supply any deficiency;

h. There is nothing unjust in the taxpayer escaping if the letter of the law fails to catch him on account of the legislature's failure to express itself clearly;

i. If literal interpretation is manifestly unjust, which produces a result not intended by the legislature, only in such a case can the Court modify the language;

j. Equity and taxation are strangers. But if construction results in equity rather than injustice, such construction should be preferred;

k. It is not a function of the Court in the fiscal arena to compel the Parliament to go further and do more;

l. When a word used in a taxing statute is to be construed and has not been specifically defined, it should not be interpreted in accordance with its definition in another statute that does not deal with a cognate subject. It should be understood in its commercial sense. Unless defined in the statute itself, the words and expressions in a taxing statute have to be construed in the sense in which the persons dealing with them understand, that is, as per the trade understanding, commercial and technical practice and usage.

RELEVANT PROVISIONS OF THE CGST ACT AND INTERPRETATION THEREOF

26. Firstly, we will deal with the issue of interpretation of the relevant statutory provisions. To deal with the first question, we must analyse the provisions of the CGST Act. The charging Section is Section 9, which reads as follows:

"9. Levy and collection.— (1) Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent., as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), natural gas and aviation turbine fuel shall be levied

with effect from such date as may be notified by the Government on the recommendations of the Council.

(3) The Government may, on the recommendations of the Council, by notification, specify categories of supply of goods or services or both, the tax on which shall be paid on reverse charge basis by the recipient of such goods or services or both and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to the supply of such goods or services or both.

(4) The Government may, on the recommendations of the Council, by notification, specify a class of registered persons who shall, in respect of supply of specified categories of goods or services or both received from an unregistered supplier, pay the tax on reverse charge basis as the recipient of such supply of goods or services or both, and all the provisions of this Act shall apply to such recipient as if he is the person liable for paying the tax in relation to such supply of goods or services or both.

(5) The Government may, on the recommendations of the Council, by notification, specify categories of services the tax on intra-State supplies of which shall be paid by the electronic commerce operator if such services are supplied through it, and all the provisions of this Act shall apply to such electronic commerce operator as if he is the supplier liable for paying the tax in relation to the supply of such services:

Provided that where an electronic commerce operator does not have a physical presence in the taxable territory, any person representing such electronic commerce operator for any purpose in the taxable territory shall be liable to pay tax:

Provided further that where an electronic commerce operator does not have a physical presence in the taxable territory and also he does not have a representative in the said territory, such electronic commerce operator shall appoint a person in the taxable territory for the purpose of paying tax and such person shall be liable to pay tax." (emphasis added) Thus, the GST is to be levied on supplies of goods or services or both, as provided in sub-section (1) of Section 9. Sub- sections (3) and (4) provide for certain categories of cases where the tax on the supply of goods or services or both shall be paid on a reverse charge basis by the recipient of such goods or services. As per Section 2(98) of the CGST Act, 'reverse charge' means the liability to pay tax by the recipient of the supply of goods or services, or both, instead of the supplier. Therefore, when sub-sections (3) or (4) of Section 9 are applicable, the recipients of goods, services, or both are liable to pay tax as if they were the suppliers.

27. Section 16 deals with ITC, which reads thus:

"16. Eligibility and conditions for taking input tax credit—(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in Section 49, be entitled to take credit of input tax charged on any

supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,—

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;

(aa) the details of the invoice or debit note referred to in clause

(a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under Section 37;

(b) he has received the goods or services or both;

Explanation.—For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services—

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.

(ba) the details of input tax credit in respect of the said supply communicated to such registered person under Section 38 has not been restricted;

(c) subject to the provisions of Section 41 [* * *], the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under Section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the

amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be paid by him along with interest payable under Section 50, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him to the supplier of the amount towards the value of supply of goods or services or both along with tax payable thereon.

(3) Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.

(4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier:

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under Section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-

section (1) of Section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019.

(5) Notwithstanding anything contained in sub-section (4), in respect of an invoice or debit note for supply of goods or services or both pertaining to the Financial Years 2017-18, 2018-19, 2019-20 and 2020-21, the registered person shall be entitled to take input tax credit in any return under section 39 which is filed up to the thirtieth day of November, 2021.

(6) Where registration of a registered person is cancelled under Section 29 and subsequently the cancellation of registration is revoked by any order, either under Section 30 or pursuant to any order made by the Appellate Authority or the Appellate Tribunal or court and where availment of input tax credit in respect of an invoice or debit note was not restricted under sub-section (4) on the date of order of cancellation of registration, the said person shall be entitled to take the input tax credit in respect of such invoice or debit note for supply of goods or services or both, in a return under Section 39,—

> (i) filed up to thirtieth day of November following the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier;

or

(ii) for the period from the date of cancellation of registration or the effective date of cancellation of registration, as the case may be, till the date of order of revocation of cancellation of registration, where such return is filed within thirty days from the date of order of revocation of cancellation of registration, whichever is later." (emphasis added) From sub-section (1) of Section 16, it is apparent that only a registered person, as defined by Section 2(94) of the CGST Act, can avail of ITC. A person who is registered under Section 25 of the CGST Act becomes a registered person. The availability of ITC is subject to such conditions and restrictions as may be prescribed. The word "prescribed" is defined to mean prescribed by the rules made under the CGST Act. Therefore, the entitlement to ITC is subject to conditions and restrictions as may be provided in the Rules framed under the CGST Act. ITC has to be availed in the manner laid down by Section 49. Sub-section (2) of Section 49 and other sub-sections deal with how ITC can be availed. Under sub-section (1) of Section 16, a registered person is entitled to take credit of the input tax charged on any supply of goods or services or both to him, which are used or intended to be used in the course of or in furtherance of his business. Input tax is defined by Section 2(62). In relation to a registered person, it means Central, State, Integrated or Union Territory tax charged on the supply of goods or services or both made to him. It includes the tax payable by him on a reverse charge basis under sub-sections (3) and (4) of Section 9. Further conditions for the use of ITC are prescribed by sub-section (2) of Section 16.

28. Sub-section (3) of Section 16 is of some relevance as it provides that if a registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income Tax Act, 1961, he is disentitled to ITC on the said tax component. In short, a registered person will not be entitled to ITC on the tax component of the cost of capital goods and plant and machinery if he claims depreciation on the said tax component under the Income Tax Act. The object is that a registered person does not take advantage of both depreciation and ITC.

29. Now we come to sub-Section (4) of Section 16. Before the amendment made by the Finance Act, 2022, the sub-section read thus:

> "16. .. ..
>
> (4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019." The Finance Act, 2022, substituted the words "due date of furnishing return under Section 39 for the month of September" with "thirtieth day of November" with effect from 1st October 2022. Under Section 39(1), every registered person other than an Input Service Distributor is required to furnish for every calendar month or part thereof a return of inward and outward supplies of goods or services or both, ITC availed, tax payable, tax paid, etc. The meaning of sub-section (4) of Section 16 as amended is that a registered person can avail of ITC in respect of any invoice or debit note for the supply of goods or services before 30th day of November following the end of the financial year to which such invoice or debit note pertains, or furnishing of annual return, whichever is earlier.

30. Section 17 deals with apportionment of credit and blocked credits. The provision regarding blocked credits is in sub-section (5) of Section 17. Sub-sections (5) and (6) of Section 17 read thus:

"17. .. ..

(5) Notwithstanding anything contained in sub-section (1) of Section 16 and sub-

section (1) of Section 18, input tax credit shall not be available in respect of the following, namely :—

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:— (A) further supply of such motor vehicles; or (B) transportation of passengers; or (C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

(i) for making the following taxable supplies, namely:— (A) further supply of such vessels or aircraft; or (B) transportation of passengers; or (C) imparting training on navigating such vessels; or (D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged— (I) in the manufacture of such motor vehicles, vessels or aircraft; or (II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

(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;

(e) goods or services or both on which tax has been paid under Section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(fa) goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility referred to in Section 135 of the Companies Act, 2013 (18 of 2013);

(g) goods or services or both used for personal consumption;

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of Section 74 in respect of any period up to Financial Year 2023-24.

(6) The Government may prescribe the manner in which the credit referred to in sub-sections (1) and (2) may be attributed.

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." (emphasis added) Section 17(5) begins with a non-obstante clause. A non-

obstante clause is a device used by the legislature that is usually employed to give an overriding effect to certain provisions over some contrary provisions that may be found in the same or some other enactments. Such a clause is used to indicate that the said provision should prevail despite anything to the contrary in the provisions mentioned in the non-obstante clause. It is pertinent to note that in view of the non-obstante clause used at the beginning of sub-section (5), it seeks to override both sub-section (1) of Section 16 and sub-section (1) of Section 18. As noted earlier, sub-section (1) of Section 16 lays down the eligibility and conditions for taking ITC. Sub- section (1) of Section 18 deals with the availability of ITC in special circumstances. Therefore, in the cases covered by sub- section (5), ITC is not available. In a sense, sub-section (5) of Section 17 carves out an exception to the provisions of sub- section (1) of Sections 16 and 18, which confer the benefit of ITC.

ANALYSIS OF CLAUSES (c) AND (d)

31. Now, we analyse clauses (c) and (d) of Section 17(5). Clause (c) applies when works contract services are supplied for constructing immovable property. The definition of "works contract" under Section 2(119) is extensive. It reads thus:

> "2.Definitions:-
>
> .. ..
>
> (119) "works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, 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;" Thus, in the case of works contract services supplied for the construction of immovable property, the benefit of ITC is not available. However, there are exceptions to clause (c). First is when goods or services, or both, are received by a taxable person for the construction of "plant and machinery", as defined in the explanation to Section 17. The second exception is where the works contract service supplied for the construction of immovable property is an input service for further supply of the works contract.

32. Clause (d) of Section 17(5) is different from clause (c) in various aspects. Clause (d) seeks to exclude from the purview of sub-section (1) of Sections 16 and 18, goods or services or both received by a taxable person to construct an immovable property on his own account. There are two exceptions in clause (d) to the exclusion from ITC provided in the first part of Clause (d). The first exception is where goods or services or both are received by a taxable person to construct an immovable property consisting of a "plant or machinery". The second exception is where goods and services or both are received by a taxable person for the construction of an immovable property made not on his own account. Construction is said to be on a taxable person's "own account" when (i) it is made for his personal use and not for service or

(ii) it is to be used by the person constructing as a setting in which business is carried out. However, construction cannot said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.

33. Section 17(5) incorporates an explanation which provides that the word "construction" used in clauses (c) and (d) includes reconstruction, renovation, additions, alterations or repairs, to the extent of capitalisation, to the immovable property. Thus, a very wide meaning has been assigned to the expression "construction" by the said explanation.

34. There is hardly a similarity between clauses (c) and (d) of Section 17(5) except for the fact that both clauses apply as an exception to sub-section (1) of Section 16. Perhaps the only other similarity is that both apply to the construction of an immovable property. Clause (c) uses the expression "plant and machinery", which is specifically defined in the explanation. Clause (d) uses an expression of "plant or machinery", which is not specifically defined.

35. Now, what is material is the explanation to Section 17, which reads thus:

> "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." The explanation defines the meaning of the expression "plant and machinery". However, as stated earlier, the expression "plant or machinery" has not been defined under the CGST Act.

It is pertinent to note that clauses (c) and (d) do not altogether exclude every class of immovable property from the applicability of ITC. In the case of clause (c), if the construction is of "plant and machinery" as defined, the benefit of ITC will accrue. Similarly, under clause (d), if the construction is of a "plant or machinery", ITC will be available.

36. The Union legislature cannot levy taxes on lands and buildings as it is exclusively a State subject at item no.49 in List II of Schedule VII of the Constitution of India. It is, therefore, necessary to consider the categories of services concerning land and buildings, which are within the purview of the CGST Act. Section 2(102) defines service as meaning anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged. Under the CGST Act, the supply of service is taxable. The scope of supply of services or goods is laid down in Section 7 of the CGST Act, which reads thus:

> "7. Scope of supply.—(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;
>
> (aa) the activities or transactions, by a person, other than an individual, to its members or constituents or vice-

versa, for cash, deferred payment or other valuable consideration.

Explanation.—For the purposes of this clause, it is hereby clarified that, notwithstanding anything contained in any other law for the time being in force or any judgment, decree or order of any Court, tribunal or authority, the person and its members or constituents shall be deemed to be two separate persons and the supply of activities or transactions inter se shall be deemed to take place from one such person to another;

(b) import of services for a consideration whether or not in the course or furtherance of business; and

(c) the activities specified in Schedule I, made or agreed to be made without a consideration;

(1-A) 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.

(2) Notwithstanding anything contained in sub-section (1),—

(a) activities or transactions specified in Schedule III; or

(b) such activities or transactions undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities, as may be notified by the Government on the recommendations of the Council, shall be treated neither as a supply of goods nor a supply of services.

(3) Subject to the provisions of sub-

sections (1), (1-A) and (2), the Government may, on the recommendations of the Council, specify, by notification, the transactions that are to be treated as—

(a) a supply of goods and not as a supply of services; or

(b) a supply of services and not as a supply of goods." (emphasis added)

37. In view of clause (a) of sub-section (1) of Section 7, a supply of services such as sale, transfer, licence, rental or lease made for consideration is a supply. Whether the activities or transactions covered by sub-section (1) of Section 7 constitute a supply has to be considered in light of Schedule II. Schedule II has a title: "Activities or transactions to be treated as supply of goods or supply of services". The activities/transactions incorporated in Schedule II are treated as a supply of service. As far as lands and buildings are concerned, clauses (2) and (5) of Schedule II are relevant, which read thus:

"2. Land and Building

(a) any lease, tenancy, easement, licence to occupy land is a supply of services;

(b) any lease or letting out of the building including a commercial, industrial or residential complex for business or commerce, either wholly or partly, is a supply of services.

.. ..

5. Supply of services The following shall be treated as supply of services, namely:—

(a) renting of immovable property;

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier. Explanation.—For the purposes of this clause— (1) the expression "competent authority"

means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-

requirement of such certificate from such authority, from any of the following, namely:—

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972; or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority; (2) the expression "construction"

includes additions, alterations, replacements or remodelling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;

(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

(f) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration."

38. Clause 5(b) of Schedule II has to be read with the provisions of Schedule III, which has a title: "Activities or transactions which shall be treated neither as a supply of goods nor a supply of services". Clause (5) of Schedule III reads thus:

"5. Sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building."

39. Analysis of the provisions of Section 7 read with Schedule II and III shows that:

a. Any lease, tenancy, easement or licence to occupy land is a supply of services. Clause 2(a) is not qualified by the purpose of the use. But the sale of a land is not a supply of service;

b. Any lease or letting out of buildings for business or commerce, wholly or partly, is a supply of services. Clause 2(b) will not apply if the lease or letting out of a building is for a residential purpose;

c. Renting of an immovable property is a supply of service;

d. Construction of a complex, building, civil structure or a part thereof, including a complex, building or civil structure intended for sale to a buyer, wholly or partly, is a supply of service. However, the construction of a complex, building or civil structure, referred to above, is excluded from the category of supply of service if the entire consideration for sale is received after issuance of the completion certificate, wherever required or its first occupation, whichever is earlier. Broadly speaking, if a building or a part thereof to which clause 5(b) is applicable is sold before it is ready for occupation, the construction thereof becomes a supply of service. Therefore, if a building is sold by accepting consideration before issuance of a completion certificate or before its first occupation, whichever is earlier, the construction thereof becomes a supply of service;

40. If there is a complex, building or civil structure constructed which is intended for sale to a buyer, wholly or partly, construction becomes a supply of service only if consideration for sale is received before the issuance of a completion certificate or after its first occupation, whichever is earlier. Thus, if the consideration for sale is paid after the competition certificate is issued or its first occupation, whichever is earlier, the sale transaction will not amount to the supply of service. However, no such distinction has been made in the case of lease, tenancy, or licence concerning land or letting of buildings. Even if the entire consideration for lease, tenancy or a licence to occupy land or a lease of a building is paid after the issuance of the completion certificate or its first occupation, whichever is earlier, it continues to be a supply of service.

41. It is also necessary to bear in mind the philosophy of the GST regime, which is discussed in the case of Mohit Minerals14. This Court held that the philosophy of the GST is to incorporate a consumption and destination-based test. The emphasis is on taxing supplies of goods and services. If we apply the well-settled principles on the interpretation of taxing statutes, as discussed in the earlier part of this judgment, there is no scope to give any meaning to clause (c) of Section 17(5) other than its plain and natural meaning. The expression "plant and machinery" has been specifically defined in the explanation of Section 17. Works contract service has been defined under the CGST Act. We cannot add anything to clause

(c) or subtract anything from clause (c). ITC is a creation of legislature. Therefore, it can exclude specific categories of goods or services from ITC. Exclusion of the category of works contracts by clause (c) will not, per se¸, defeat the object of the CGST Act.

MEANING OF THE EXPRESSION "PLANT OR MACHINERY" IN CLAUSE (d) OF SECTION 17(5)

42. The question is whether the explanation that lays down the meaning of the expression "plant and machinery" in Section 17 will apply to the expression "plant or machinery" used in Section 17 (5)(d).

43. Learned ASG himself accepted that the expression "plant and machinery" appears at ten different places in Chapters V (Input Tax Credit) and VI (Tax Invoice, Credit and Debit Notes) of the CGST Act. According to him, the expression "plant or machinery" appears only in clause (d) of Section 17(5). His submission is that the use of the word "or" in clause (d) is a mistake of the legislature. To counter this, it was submitted that in the Model GST Law, which the GST Council Secretariat circulated in November 2016 to invite suggestions and comments from the public, the expression 'plant and machinery' was used in clauses (c) and (d). However, while enacting the CGST Act, the legislature has consciously chosen to use the expression "plant or machinery" only in clause (d). The impugned judgment in the main Civil Appeal is more than five years old. The writ petition in which the impugned decision was rendered is a six-year-old writ petition. If it was a drafting mistake, as suggested by learned ASG, the legislature could have stepped in to correct it. However, that was not done. In such circumstances, it must be inferred that the legislature has intentionally used the expression "plant or machinery" in clause (d) as distinguished from the expression "plant and machinery", which has been used in several places. As the expression "plant or machinery" appears to be intentionally incorporated, it is not possible to accept the contention of the learned ASG that the word "or" in clause (d) should be read as "and". If the said contention is accepted, there will not be any difference between the expressions "plant and machinery" and "plant or machinery". This will defeat the legislative intent.

44. The explanation to Section 17 defines "plant and machinery". The explanation seeks to define the expression "plant and machinery" used in Chapter V and Chapter VI. In Chapter VI, the expression "plant and machinery" appears in several places, but the expression "plant or machinery" is found only in Section 17(5)(d). If the legislature intended to give the expression "plant or machinery" the

same meaning as "plant and machinery" as defined in the explanation, the legislature would not have specifically used the expression "plant or machinery" in Section 17(5)(d). The legislature has made this distinction consciously. Therefore, the expression "plant and machinery" and "plant or machinery" cannot be given the same meaning. It may also be noted here that the expression 'plant or machinery' is used in dealing with a peculiar case of goods or services being received by a taxable person for the construction of an immovable property on his own account, even when such goods or services or both are used in the course of furtherance of business. Therefore, if the expression "plant or machinery" is given the same meaning as the expression "plant and machinery" as per the definition contained in the explanation to Section 17, we will be doing violence to the words used in the statute. While interpreting taxing statutes, it is not a function of the Court to supply the deficiencies.

45. Now, the question which arises is what meaning should be given to the expression "plant or machinery". When the legislature uses the expression "plant and machinery," only a plant will not be covered by the definition unless there is an element of machinery or vice versa. This expression cannot be read as "plant or machinery". That is so clear from the explanation in Section 17, which says that plant and machinery means apparatus, equipment and machinery fixed to the earth by foundation or structural support that are used for making outward supply of goods or services or both. The expression includes such foundation and structural support fixed to the earth. However, the definition excludes land, buildings or any other civil structure.

46. The expression "plant or machinery" has a different connotation. It can be either a plant or machinery. Section 17(5)(d) deals with the construction of an immovable property. The very fact that the expression "immovable property other than "plants or machinery" is used shows that there could be a plant that is an immovable property. As the word 'plant' has not been defined under the CGST Act or the rules framed thereunder, its ordinary meaning in commercial terms will have to be attached to it.

47. There are few decisions relied upon on this aspect. The first is Commissioner of Central Excise, Ahmedabad v. Solid and Correct Engineering Works & Ors.35. The case arose from the demand for duty and penalty under the Central Excise Act, 1944 (Excise Act). The assessee was manufacturing parts and components for road and civil construction machinery and equipment like Asphalt Drum/Hot Mix Plants, etc. One of the questions examined by the Tribunal was whether the plants so manufactured could be termed as goods. The issue before this Court was whether setting up an Asphalt Drum/Hot Mix Plant by using duty-paid components amounts to the manufacture of excisable goods within the meaning of the Excise Act. It was argued before this Court that the plants in question did not satisfy the test of marketability and 35 (2010) 5 SCC 122 movability. This Court referred to the definition of movable property in Section 3(36) of the General Clauses Act, 1897, which defines movable property as property of every description except immovable property. The same enactment defines immovable property in Section 3(26), which is an inclusive definition which includes land, benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth. This Court considered the definition of the expression "attached to the earth" in Section 3 of the Transfer of Property Act, 1882. In the facts of the case, it was held that the plants subject matter of the case, were not per se immovable property as the same cannot be said

to get attached to the earth. This Court applied the movability test by holding that the setting up of the plant itself is not intended to be permanent at a given place. The plant can be removed or is indeed removed after the road construction or repair project is completed. The issue that we were called upon to decide about the meaning of the plant did not arise in this case.

48. Another decision of this Court in the case of Taj Mahal Hotel18 was pressed into service. The assessee was running a hotel. The issue arose in a cognate enactment in the sense in the enactment providing for levy of income-tax. The issue referred to the opinion of the High Court was whether sanitary fittings and pipelines installed in the hotel constituted a 'plant' within the meaning of Section 10(5) of the Income Tax Act, 1922. The definition of plant in Section 10(5) of the Income Tax Act, 1922 provided that 'plant' includes vehicles, scientific apparatus, surgical equipment, and books purchased for the purposes of business, profession or vocation. The Court considered whether the word plant should be given a broader meaning. In paragraph 6 of the said decision, this Court held thus:

> "6. Now it is well settled that where the definition of a word has not been given, it must be construed in its popular sense if it is a word of everyday use. Popular sense means "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". In the present case, Section 10(5) enlarges the definition of the word "plant" by including in it the words which have already been mentioned before. The very fact that even books have been included shows that the meaning intended to be given to "plant" is wide. The word "includes" is often used in interpretation clauses in order to enlarge the meaning of the words or phrases occurring in the body of the statute. When it is so used, those words and phrases must be construed as comprehending not only such things as they signify according to their nature and import but also those things which the interpretation clause declares that they shall include. The word "include" is also susceptible of other constructions which it is unnecessary to go into." (emphasis added) Thereafter, in paragraphs 8 and 9, this Court held thus:
>
> "8. It cannot be denied that the business of a hotelier is carried on by adapting a building or premises in a suitable way to be used as a residential hotel where visitors come and stay and where there is arrangement for meals and other amenities are provided for their comfort and convenience. To have sanitary fittings etc. in a bathroom is one of the essential amenities or conveniences which are normally provided in any good hotel, in the present times. If the partitions in Jarrold case [(1887) 19 QB 647] could be treated as having been used for the purpose of the business of the trader, it is incomprehensible how sanitary fittings can be said to have no connection with the business of the hotelier. He can reasonably expect to get more custom and earn larger profit by charging higher rates for the use of rooms if the bathrooms have sanitary fittings and similar amenities. We are unable to see how the sanitary fittings in the bathrooms in a hotel will not be "plant" within Section 10(vi)(b) read with Section 10(5) when it is quite clear that the intention of the legislature was to give it a wide meaning and that is why, articles like books and

> surgical instruments were expressly included in the definition of "plant". In decided cases, the High Courts have rightly understood the meaning of the term "plant" in a wide sense. (See CIT v. Indian Turpentine and Rosin Co. Ltd. [(1970) 75 ITR 533].
>
> 9. If the dictionary meaning of the word plant were to be taken into consideration on the principle that the literal construction of a statute must be adhered to unless the context renders it plain that such a construction cannot be put on the words in question — this is what is stated in Webster's Third New International Dictionary:
>
> "Land, buildings, machinery, apparatus and fixtures employed in carrying on trade or other industrial business...." (emphasis added)

49. The next decision in the line is in the case of Anand Theatres19. This was a case where the issue was whether a building which is used as a hotel or a cinema theatre can be considered as apparatus or a tool for running a business so that it can be termed as a plant and depreciation can be allowed on the same under the Income Tax Act, 1961. This Court dealt with Section 32, which provided for granting depreciation to buildings, machinery, and plants. This Court extensively referred to its earlier decision in the case of Taj Mahal Hotel18 and other decisions of this Court and High Courts. This Court decided the question of whether a building used for running a hotel or cinema business could be held to be a plant. This Court considered British decisions on the point. Paragraphs 61 to 63 of the decision are material, which read thus:

> "61. Further, there are hotels of all kinds and hotel business can be carried on in all kinds of buildings, may be pucca or kuccha constructions. A building intended to be used or in fact used earlier either as a residential accommodation or business purpose can be converted for running hotel business. Section 32 itself contemplates a hotel business being carried on in a residential accommodation including an accommodation which is in the nature of guest house. On occasions hotel buildings may be constructed with a special design and features so as to attract and accommodate a certain class of tourist.

Similarly with regard to cinema business, it can be carried on in a specially-designed and constructed building and also in other buildings. Still, however, it would be difficult to draw a distinction and differentiate by holding that a building which is specially designed and constructed for running a hotel or cinema would be covered by a "plant" and other buildings used for the same purpose would not get depreciation as "plant", even though such business is carried on in such premises. In our view, the Delhi High Court has in the case of R.C. Chemical Industry [(1982) 134 ITR 330 (Del)] rightly observed that mere fact that manufacture of saccharine would be better carried on in a building having atmospheric controls would not convert the building from "the setting" to "the means" for carrying the business. Similarly, the Rajasthan High Court also in Lake Palace Hotels and Motels [(1997) 226 ITR 561 (Raj)] rightly observed that simply because some special fittings or controlling equipments are attached for the purpose of carrying on hotel business, it will not take it out of the category of building and make it a plant. In our view special fittings or equipments to control atmospheric effects would be plant, but not the building which houses such

equipments.

62. Further for running almost all industries or for carrying on any trade or business building is required. On occasions building may be designed and constructed to suit the requirement of a particular industry, trade or business. But that would not make such building a plant. It only shelters running of such business. For each and every business, trade or industry, building is required to carry on such activity. That means building plays some role and in other words, its function is to shelter the business, but it has no other function except in some rare cases such as dry dock where it plays an essential part in the operations which take place in getting a ship into the dock, holding it squarely and then returning it to the river. Building is more durable. If the contention of the assessee is accepted, virtually all such buildings would be considered to be a plant and the distinction which the legislature has made between "building" and "machinery" or "plant" would be obliterated.

63. Learned counsel for the assessee submitted that the words "plant" and "building" are not mutually exclusive. "Plant" may include building in a certain set of circumstances and, therefore, applying the functional tests the assessee would be entitled to depreciation under the head "it is more beneficial to it". He submitted that in the modern era, theatre building and hotel building are integral part of operation for carrying out such business and, therefore, such building should be considered as a "plant".

Ultimately, in paragraph 67, this Court held thus:

> "67. In the result, it is held that the building used for running of a hotel or carrying on cinema business cannot be held to be a plant because:
>
> (1) The scheme of Section 32, as discussed above, clearly envisages separate depreciation for a building, machinery and plant, furniture and fittings etc. The word "plant" is given inclusive meaning under Section 43(3) which nowhere includes buildings. The Rules prescribing the rates of depreciation specifically provide grant of depreciation on buildings, furniture and fittings, machinery and plant and ships.
>
> Machinery and plant include cinematograph films and other items and the building is further given meaning to include roads, bridges, culverts, wells and tubewells.
>
> (2) In the case of Taj Mahal Hotel [(1971) 3 SCC 550 : (1971) 82 ITR 44] this Court has observed that business of a hotelier is carried on by adopting building or premises in suitable way. Meaning thereby building for a hotel is not an apparatus or adjunct for running of a hotel. The Court did not proceed to hold that a building in which the hotel was run was itself a plant, otherwise the Court would not have gone into the question whether the sanitary fittings used in bathroom was plant.

(3) For a building used for a hotel, specific provision is made granting additional depreciation under Section 32(1)(v) of the Act.

(4) Barclay, Curle & Co. case [(1969) 1 WLR 675 : (1969) 1 All ER 732 : (1970) 76 ITR 62 : 1969 SC 30 : 45 TC 221 (HL)] decided by the House of Lords pertains to a dry dockyard which itself was functioning as a plant, that is to say, structure for the plant was constructed so that dry dock can operate. It operated as an essential part in the operations which took place in getting a ship into the dock, holding it securely and then returning it to the river. The dock as a complete unit contained a large amount of equipment without which the dry dock could not perform its function.

(5) Even in England, courts have repeatedly held that the meaning to the word "plant" given in various decisions is artificial and imprecise in application, that is to use the words of Lord Buckley, "it is now beyond doubt that the word 'plant' is used in the relevant section in an artificial and largely judge-made sense". Lord Wilberforce commented by stating that "no ordinary man, literate or semi-literate, would think that a horse, a swimming pool, moveable partitions, or even a dry dock was plant".

(6) For the hotel building and hospital in the case of Carr v. Sayer [65 TC 15 :

> 1992 CLY 2470 : 1992 STC 396 (Ch D)] it has been observed that a hotel building remains a building even when constructed to a luxury specification and similarly a hospital building for infectious diseases which might require a special layout and other features also remains a premises and is not a plant.
>
> It is to be added that all these decisions are based upon the interpretation of the phrase "machinery or plant" under Section 41 of the Finance Act, 1971 which was applicable and there appears no such distinction for grant of allowance on different heads as provided under Section 32 of the Income Tax Act.
>
> (7) To differentiate a building for grant of additional depreciation by holding it to be a "plant" in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable."
>
> 50. Another decision on the point is in the case of Victory Aqua Farm Ltd.21, wherein the issue before this Court was whether a natural pond used by the assessee, which was specially designed for rearing prawns, could be a plant within the meaning of Section 32 of the Income Tax Act, 1961. This Court heavily relied upon the decision of a three-judge Bench of this Court in the case of Karnataka Power Corporation20.

In this case, the question was whether a power-generating station building is a plant. In the decision rendered by a Bench of three Hon'ble Judges, it was held that the decision in the case of Anand Theatres19 cannot be read broadly. In paragraphs 5 to 8 of the decision, it was held thus:

> "5. It was the case of the assessee that it was entitled to investment allowance as applicable to a plant in respect of its power- generating station building. In a note filed before the Commissioner (Appeals) it stated that it had included for the purpose

the value of its potential transformer foundation, cable duct system, outdoor yard structures and tail race channel. It explained that the process of generation started from letting in water from the reservoir into the penstocks and ducts which were the water conductor system into the turbines. Once electricity had been produced by generation, it had to be conducted, as it was not possible to store the same, and the process of generation continued until the electricity was led to the transmission towers. The water that was used for rotation of the turbines had to be removed and this was done through the tail race channel. For stepping up the electricity, transformers were used in the outdoor yard. The conduction of the electricity was through conductors held in ducts, called the cable duct system, which were specifically designed for the purpose. The case of the assessee, therefore, was that all these were part of the special engineering works that were an essential part of a generating plant and, therefore, it was entitled to have the same treated as a plant for the purposes of investment allowance. The Commissioner accepted the correctness of the assessee's case. He held that it was clear that the generating station buildings had to be treated as a plant for the purposes of investment allowance. These buildings could not be separated from the machinery and the machinery could not be worked without such special construction. He, therefore, allowed investment allowance on the generating station building, as claimed. The Tribunal affirmed this finding, as, indeed, did the High Court.

6. We, therefore, have before us a finding of fact recorded by the fact-finding authority that the generating station building is an integral part of the assessee's generating system.

7. Our attention has been drawn by learned counsel for the Revenue to the judgment of this Court in CIT v. Anand Theatres [(2000) 5 SCC 393 : (2000) 244 ITR 192] . He submits that, in that judgment, this Court has held that, except in exceptional cases, the building in which the plant is situated must be distinguished from the plant and that, therefore, the assessee's generating station building was not to be treated as a plant for the purposes of investment allowance.

8. It is difficult to read the judgment in the case of Anand Theatres [(2000) 5 SCC 393 : (2000) 244 ITR 192] so broadly. The question before the Court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a “plant” and it was in relation to that question that the Court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or a cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said: (SCC p. 430, para 67) “67. (7) To differentiate a building for grant of additional depreciation by holding it to be a ‘plant’ in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable.” This observation is, in our view, limited to buildings

> that are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, basically, is a question of fact, and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance." (emphasis added)
>
> 51. We may note here that the decision in the case of Anand Theatres19 is by a Bench of two Hon'ble Judges. Thus, the decision of a larger Bench in the case of Karnataka Power Corporation20 limits the applicability of the decision in the case of Anand Theatres19 to hotels or cinema theatres.

Therefore, the decision in the case of Anand Theatres19 cannot be applied while considering the question of whether a mall or warehouse or a building other than a hotel or a cinema theatre can be said to be a "plant".

52. This Court has laid down the functionality test. This Court held that whether a building is a plant is a question of fact. This Court held that if it is found on facts that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance. The word 'plant' used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of "plant and machinery", which excludes land, buildings or any other civil structures. Therefore, in a given case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression "plant or machinery". We have discussed the provisions of the CGST Act earlier. To give a plain interpretation to clause (d) of Section 17(5), the word "plant" will have to be interpreted by taking recourse to the functionality test.

53. One of the submissions of the learned ASG is that as the Union legislature cannot levy tax on land and buildings, the chain is broken once a building comes into existence by using goods and services. As discussed earlier, Schedule II of the CGST Act recognises the activity of renting or leasing buildings as a supply of service. Even the activity of the construction of a building intended for sale is a supply of service if the total consideration is accepted before the completion certificate is granted. Therefore, if a building qualifies to be a plant, ITC can be availed against the supply of services in the form of renting or leasing the building or premises, provided the other terms and conditions of the CGST Act and Rules framed thereunder are fulfilled. Therefore, the argument regarding breaking the chain cannot be accepted in its entirety. However, if the construction of a building by the recipient of service is for his own use, the chain will break, and therefore, ITC would not be available.

54. One of the arguments of learned ASG was that if different meanings were given to the words "plant and machinery" and "plant or machinery", it could result in discriminatory treatment. Clause (c) of Section 17(5) operates in a completely different field, as it applies only to works contract services supplied for the construction of immovable property. Clause

(d) deals with services received by a taxable person for the construction of an immovable property on his own account. As clauses (c) and (d) operate in substantially different areas, the argument of ASG relying on discrimination cannot be accepted.

55. Under the CGST Act, as observed earlier, renting or leasing immovable property is deemed to be a supply of service, and it can be taxed as output supply. Therefore, if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant.

56. In the main appeal, which is the subject matter of this group, the High Court has not decided whether the mall in question will satisfy the functionality test of being a plant. The reason is that the High Court has done the exercise of reading down the provision. Each mall is different. Therefore, in each case, fact-finding enquiry is contemplated. Thus, in the facts of the case, we will have to send the case back to the High Court to decide whether, on facts, the mall in question satisfies the functionality test so that it can be termed as a plant within the meaning of bracketed portion in Section 17(5)(d). The same applies to warehouses or other buildings except hotels and cinema theatres. A developer may construct a mall predominantly to sell the premises therein after obtaining an occupation certificate. Therefore, it will be out of the purview of clause 5(b) of Schedule II. Each case will have to be tested on merits as the question whether an immovable property or a building is a plant is a factual question to be decided.

CONSTITUTIONAL VALIDITY CHALLENGE

57. Now, we turn to the issue of constitutional validity challenge. While dealing with the issue of the constitutional validity of clauses (c) and (d) of Section 17(5) of the CGST Act, it is necessary to consider the law laid down by this Court in paragraphs 104 to 110 of the decision in the case of VKC Footsteps26 which read thus:

> “104. As a matter of first principle, it is not possible to accept the premise that the guiding principles which impart a measure of flexibility to the legislature in designing appropriate classifications for the purpose of a fiscal regime should be confined only to the revenue harvesting measures of a statute. The precedents of this Court provide abundant justification for the fundamental principle that a discriminatory provision under tax legislation is not per se invalid. A cause of invalidity arises where equals are treated as unequally and unequals are treated as equals. Both under the Constitution and the CGST Act, goods and services and input goods and input services are not treated as one and the same and they are distinct species.
>
> 105. Parliament engrafted a provision for refund Section 54(3). In enacting such a provision, Parliament is entitled to make policy choices and adopt appropriate classifications, given the latitude which our constitutional jurisprudence allows it in matters involving tax legislation and to provide for exemptions, concessions and benefits on terms, as it considers appropriate. The consistent line of precedent of this Court emphasises certain basic precepts which govern both judicial review and

judicial interpretation of tax legislation.

These precepts are:

> 105.1. Selecting the objects to be taxed, determining the quantum of tax, legislating for the conditions for the levy and the socio-economic goals which a tax must achieve are matters of legislative policy. M. Hidayatullah, C.J., speaking for the Constitution Bench in Commr. of Urban Land Tax v. Buckingham & Carnatic Co.
>
> Ltd. [Commr. of Urban Land Tax v. Buckingham & Carnatic Co. Ltd., (1969) 2 SCC 55] held : (SCC p. 67, para 10) "10. ... The objects to be taxed, the quantum of tax to be levied, the conditions subject to which it is levied and the social and economic policies which a tax is designed to subserve are all matters of political character and these matters have been entrusted to the legislature and not to the courts. In applying the test of reasonableness it is also essential to notice that the power of taxation is generally regarded as an essential attribute of sovereignty and constitutional provisions relating to the power of taxation are regarded not as grant of power but as limitation upon the power which would otherwise be practically without limit." 105.2. The same principle has been reiterated in Federation of Hotel & Restaurant Assn. of India v. Union of India [Federation of Hotel & Restaurant Assn. of India v. Union of India, (1989) 3 SCC 634], where M.N. Venkatachaliah, J. (as the learned Chief Justice then was), speaking for the Constitution Bench held : (SCC pp. 658-

59, paras 46-47) "46. It is now well settled that though taxing laws are not outside Article 14, however, having regard to the wide variety of diverse economic criteria that go into the formulation of a fiscal policy legislature enjoys a wide latitude in the matter of selection of persons, subject-matter, events, etc. for taxation. The tests of the vice of discrimination in a taxing law are, accordingly, less rigorous. In examining the allegations of a hostile, discriminatory treatment what is looked into is not its phraseology, but the real effect of its provisions. A legislature does not, as an old saying goes, have to tax everything in order to be able to tax something. If there is equality and uniformity within each group, the law would not be discriminatory.

Decisions of this Court on the matter have permitted the legislatures to exercise an extremely wide discretion in classifying items for tax purposes, so long as it refrains from clear and hostile discrimination against particular persons or classes.

47. But, with all this latitude certain irreducible desiderata of equality shall govern classifications for differential treatment in taxation laws as well. The classification must be rational and based on some qualities and characteristics which are to be found in all the persons grouped together and absent in the others left out of the class. But this alone is not sufficient. Differentia must have a rational nexus with the object sought to be achieved by the law. The State, in the exercise of its governmental power, has, of necessity, to make laws operating differently in relation to different groups or classes of persons to attain certain ends and must, therefore, possess the power to distinguish and classify persons or things. It is also recognised that no precise or set formulae or doctrinaire tests or precise

scientific principles of exclusion or inclusion are to be applied. The test could only be one of palpable arbitrariness applied in the context of the felt needs of the times and societal exigencies informed by experience." 105.3. In matters of classification, involving fiscal legislation, the legislature is permitted a larger discretion so long as there is no transgression of the fundamental principle underlying the doctrine of classification. In Hiralal Rattanlal [Hiralal Rattanlal v. State of U.P., (1973) 1 SCC 216 : 1973 SCC (Tax) 307] , K.S. Hegde, J., speaking for a four-Judge Bench observed : (SCC p. 223, para 20) "20. It must be noticed that generally speaking the primary purpose of the levy of all taxes is to raise funds for public good. Which person should be taxed, what transaction should be taxed or what goods should be taxed, depends upon social, economic and administrative considerations. In a democratic set up it is for the legislature to decide what economic or social policy it should pursue or what administrative considerations it should bear in mind. The classification between the processed or split pulses and unprocessed or unsplit pulses is a reasonable classification. It is based on the use to which those goods can be put.

Hence, in our opinion, the impugned classification is not violative of Article

14." 105.4. More recently in Union of India v. Nitdip Textile Processors (P) Ltd. [Union of India v. Nitdip Textile Processors (P) Ltd., (2012) 1 SCC 226] , a two- Judge Bench observed : (SCC p. 255, para 67) "67. It has been laid down in a large number of decisions of this Court that a taxation statute, for the reasons of functional expediency and even otherwise, can pick and choose to tax some. A power to classify being extremely broad and based on diverse considerations of executive pragmatism, the judicature cannot rush in where even the legislature warily treads.

All these operational restraints on judicial power must weigh more emphatically where the subject is taxation. Discrimination resulting from fortuitous circumstances arising out of particular situations, in which some of the taxpayers find themselves, is not hit by Article 14 if the legislation, as such, is of general application and does not single them out for harsh treatment. Advantages or disadvantages to individual assessees are accidental and inevitable and are inherent in every taxing statute as it has to draw a line somewhere and some cases necessarily fall on the other side of the line."

106. The principles governing a benefit, by way of a refund of tax paid, may well be construed on an analogous frame with an exemption from the payment of tax or a reduction in liability (CCT v. Dharmendra Trading Co. [CCT v. Dharmendra Trading Co., (1988) 3 SCC 570 : 1988 SCC (Tax) 432]).

107. In Elel Hotels & Investments Ltd. v. Union of India [Elel Hotels & Investments Ltd. v. Union of India, (1989) 3 SCC 698] , M.N. Venkatachaliah, J. (as the learned Chief Justice then was) held that :

> (SCC p. 708, para 20) "20. ... It is now well settled that a very wide latitude is available to the legislature in the matter of classification of objects, persons and things for purposes of taxation. It must need to be so, having regard to the complexities involved in the formulation of a taxation policy. Taxation is not now a mere source of raising money to defray expenses of Government. It is a recognised

> fiscal tool to achieve fiscal and social objectives. The differentia of classification presupposes and proceeds on the premise that it distinguishes and keeps apart as a distinct class hotels with higher economic status reflected in one of the indicia of such economic superiority. The presumption of constitutionality has not been dislodged by the petitioners by demonstrating how even hotels, not brought into the class, have also equal or higher chargeable receipts and how the assumption of economic superiority of hotels to which the Act is applied is erroneous or irrelevant."

108. In Spences Hotel (P) Ltd. v. State of W.B. [Spences Hotel (P) Ltd. v. State of W.B., (1991) 2 SCC 154] , a two-Judge Bench, speaking through K.N. Saikia, J. revisited the precedents of this Court governing the principles of classification in tax legislation and held : (SCC pp. 168-69, para 24) "24. ... The history of taxation is one of evolution as is the case in all human affairs. Its progress is one of constant growth and development in keeping with the advancing economic and social conditions; and the fiscal intelligence of the State has been advancing concomitantly, subjecting by new means and methods hitherto untaxed property, income, service and provisions to taxation. With the change of scientific, commercial and economic conditions and ways of life new species of property, both tangible and intangible gaining enormous values have come into existence and new means of reaching and subjecting the same to contribute towards public finance are being developed, perfected and put into practical operation by the legislatures and courts of this country, of course within constitutional limitations."

109. The Court held that the principle of equality does not preclude the classification of property, trade, profession and events for taxation — subjecting one kind to one rate of taxation and another to a different rate. The State may exempt certain classes of property from any taxation at all and impose different specific taxes upon different species which it seeks to regulate. The Court held : (Spences Hotel case [Spences Hotel (P) Ltd. v. State of W.B., (1991) 2 SCC 154] , SCC p. 171, para

27) "27. 'Perfect equality in taxation has been said time and again, to be impossible and unattainable.

Approximation to it is all that can be had. Under any system of taxation, however, wisely and carefully framed, a disproportionate share of the public burdens would be thrown on certain kinds of property, because they are visible and tangible, while others are of a nature to elude vigilance. It is only where statutes are passed which impose taxes on false and unjust principle, or operate to produce gross inequality, so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges that courts can interpose and arrest the course of legislation by declaring such enactments void.' 'Perfectly equal taxation', it has been said, 'will remain an unattainable good as long as laws and government and man are imperfect.' 'Perfect uniformity and perfect equality of taxation', in all the aspects in which the human mind can view it, is a baseless dream.'

110. Parliament while enacting the provisions of Section 54(3), legislated within the fold of the GST regime to prescribe a refund. While doing so, it has confined the grant of refund in terms of the first proviso to Section 54(3) to the two categories which are governed by clauses (i) and (ii). A claim to

refund is governed by statute. There is no constitutional entitlement to seek a refund. Parliament has in clause (i) of the first proviso allowed a refund of the unutilised ITC in the case of zero-rated supplies made without payment of tax. Under clause (ii) of the first proviso, Parliament has envisaged a refund of unutilised ITC, where the credit has accumulated on account of the rate of tax on inputs being higher than the rate of tax on output supplies. When there is neither a constitutional guarantee nor a statutory entitlement to refund, the submission that goods and services must necessarily be treated on a par on a matter of a refund of unutilised ITC cannot be accepted. Such an interpretation, if carried to its logical conclusion would involve unforeseen consequences, circumscribing the legislative discretion of Parliament to fashion the rate of tax, concessions and exemptions. If the judiciary were to do so, it would run the risk of encroaching upon legislative choices, and on policy decisions which are the prerogative of the executive. Many of the considerations which underlie these choices are based on complex balances drawn between political, economic and social needs and aspirations and are a result of careful analysis of the data and information regarding the levy of taxes and their collection. That is precisely the reason why courts are averse to entering the area of policy matters on fiscal issues. We are therefore unable to accept the challenge to the constitutional validity of Section 54(3)." (emphasis added) Paragraph 142 of the decision reads thus:

> "142. The above judicial precedents indicate that in the field of taxation, this Court has only intervened to read down or interpret a formula if the formula leads to absurd results or is unworkable. In the present case however, the formula is not ambiguous in nature or unworkable, nor is it opposed to the intent of the legislature in granting limited refund on accumulation of unutilised ITC. It is merely the case that the practical effect of the formula might result in certain inequities. The reading down of the formula as proposed by Mr Natarjan and Mr Sridharan by prescribing an order of utilisation would take this Court down the path of recrafting the formula and walk into the shoes of the executive or the legislature, which is impermissible. Accordingly, we shall refrain from replacing the wisdom of the legislature or its delegate with our own in such a case. However, given the anomalies pointed out by the assessees, we strongly urge the GST Council to reconsider the formula and take a policy decision regarding the same." At this stage, it will be also necessary to consider the decision of this Court in the case of Nitdip Textiles8. In paragraph 66, this Court held thus:
>
> "66. To sum up, Article 14 does not prohibit reasonable classification of persons, objects and transactions by the legislature for the purpose of attaining specific ends. To satisfy the test of permissible classification, it must not be "arbitrary, artificial or evasive" but must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislature. The taxation laws are no exception to the application of this principle of equality enshrined in Article 14 of the Constitution of India. However, it is well settled that the legislature enjoys very wide latitude in the matter of classification of objects, persons and things for the purpose of taxation in view of inherent complexity of fiscal adjustment of diverse elements. The power of the legislature to classify is of wide

range and flexibility so that it can adjust its system of taxation in all proper and reasonable ways. Even so, large latitude is allowed to the State for classification upon a reasonable basis and what is reasonable is a question of practical details and a variety of factors which the court will be reluctant and perhaps ill-equipped to investigate." (emphasis added) Apart from these decisions, there are other binding decisions which hold that the laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion, etc. In the present case, the legislature was dealing with a complex issue. Therefore, greater freedom and greater play in the joints has to be allowed to the legislature.

58. Essentially, the challenge to constitutional validity is that, in the present case, the provisions do not meet the test of reasonable classification, which is a part of Article 14 of the Constitution of India. To satisfy the test, there must be an intelligible differentia forming the basis of the classification, and the differentia should have a rational nexus with the object of legislation. The Union of India rightly contends that immovable property and immovable goods for the purpose of GST constitute a class by themselves. Clauses (c) and (d) of Section 17(5) apply only to this class of cases. The right of ITC is conferred only by the Statute; therefore, unless there is a statutory provision, ITC cannot be enforced. It is a creation of a statute, and thus, no one can claim ITC as a matter of right unless it is expressly provided in the statute. It cannot be disputed that the legislature can always carve out exceptions to the entitlement of ITC under Section 16 of the CGST Act.

59. Therefore, the cases covered by clauses (c) and (d) of Section 17(5) are entirely distinct from the other cases. This appears to be done to ensure the object of not encroaching upon the State's legislative powers under Entry 49 of List II.

Therefore, it is not possible to accept the submission that the difference is not intelligible and has no nexus to the object sought to be achieved. Moreover, to decide why transactions covered by clauses (c) and (d) are separately classified, the Court will have to go into complex questions involving fiscal adjustments of diverse elements. The Court has no experience or expertise to embark upon the said exercise.

60. We fail to understand the argument that the classification is underinclusive and creates discrimination. In this case, equals are not being treated as unequals. The test of vice of discrimination in taxing law is less rigorous. Ultimately, the legislature was dealing with a complex economic problem. By no stretch of the imagination, clauses (c) and (d) of Section 17(5) can be said to be discriminatory. No amount of verbose and lengthy arguments will help the assessees prove the discrimination. In the circumstances, it is not possible for us to accept the plea of clauses (c) and (d) of Section 17(5) being unconstitutional.

61. Though, violation of Articles 19(1)(g) and 300A has been alleged, it is not elaborated by the assessees how such a violation is made out.

62. While dealing with a taxing statute, it can always be said that, ideally, a particular provision ought not to have been incorporated or ought to have been incorporated with a modification. Even if this can be said, per se, the particular provision does not become unconstitutional. The Court cannot impose its views on the legislature.

63. Now, we come to the challenge to sub-section (4) of Section 16 of the CGST Act, which reads thus:

> "16. Eligibility and conditions for taking input tax credit.— .. ..
>
> (4) A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the thirtieth day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier:
>
> Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under Section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of Section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019." The words "thirtieth day of November" were substituted with effect from 1st October 2022 for the words "due date of furnishing of the return under Section 39 for the month of September". We fail to understand how sub-section (4) of Section 16 becomes discriminatory when the legislature says that a registered person shall not be entitled to take ITC in respect of any invoice or debit note for the supply of goods or services or both after the thirtieth day of November following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier. It is not shown how the provision is arbitrary and discriminatory. The fact that the provisions could have been drafted in a better manner or more articulately is not sufficient to attract arbitrariness.

64. As we are upholding the constitutional validity of clauses

(c) and (d) of Section 17(5), and as held earlier, its plain interpretation does not lead to any ambiguity, the question of reading down the provisions does not arise.

65. Some of our conclusions can be summarised as under:

> a. The challenge to the constitutional validity of clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act is not established;

b. The expression "plant or machinery" used in Section 17(5)(d) cannot be given the same meaning as the expression "plant and machinery" defined by the explanation to Section 17;

c. The question whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression "plant or machinery" used in Section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business. If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5) to sub-section (1) of Section 16. Functionality test will have to be applied to decide whether a building is a plant. Therefore, by using the functionality test, in each case, on facts, in the light of what we have held earlier, it will have to be decided whether the construction of an immovable property is a "plant" for the purposes of clause (d) of Section 17(5).

66. In the light of what we have held above, by setting aside the impugned judgment in Civil Appeal Nos. 2948 and 2949 of 2023, the writ petitions are remanded to the High Court of Orissa for limited purposes of deciding whether, in the facts of the case, the shopping mall is a "plant" in terms of clause (d) of Section 17(5). Appeals are partly allowed in above terms.

67. While deciding these cases, we cannot make any final adjudication on the question of whether the construction of immovable property carried out by the petitioners in Writ Petitions amounts to plant, and each case will have to be decided on its merit by applying the functionality test in terms of this judgment. The issue must be decided in appropriate proceedings in which adjudication can be made on facts. The petitioners are free to adopt appropriate proceedings or raise the issue in appropriate proceedings.

68. The writ petitions are rejected subject to the interpretation of clause (d) of sub-section (5) of Section 17 of the CGST Act made by us.

.....J. (Abhay S Oka) .....J. (Sanjay Karol) New Delhi;

October 3, 2024.