

# GST issues of Works Contract Services including infra and energy sector

@ WIRC of ICAI

GST Relearn Refresher Series

19<sup>th</sup> April 2023

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Only for education purpose



- Section-2(119) -“works contract” **means** a contract for
  - building, improvement,
  - construction, modification,
  - fabrication, repair,
  - completion, maintenance,
  - erection, renovation,
  - installation, alteration
  - fitting out, **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**
- Works contract vs Contract for work
- Immovable Property – Not Defined
- Transfer of Property – Water, Electricity, Consumables, Chemicals – consumed in the process – No transfer of property



**Section 2 of General Clauses Act, 1987** - "immovable property" shall include

- land,
- benefits to arise out of land and
- **things attached to the earth, or permanently fastened to anything attached to the earth.**

**Transfer of Property Act – “attached to the earth” means—**

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; **OR**
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached

Clause (a) and (b) – Degree of attachment/annexation

Clause (c) – object of attachment/annexation

**Commissioner of Central Excise v. Solid and Correct Engineering Works [2010 (252) E.L.T. 481 (S.C.)]**

*“Attachment of the plant with the help of nuts and bolts to a foundation intended to provide stability to the working of the plant and **prevent vibration/wobble free operation does not qualify for being described as attached to the earth under any one of the three clauses extracted above.** That is because attachment of the plant to the foundation is not comparable or synonymous to trees and shrubs rooted in earth. It is also not synonymous to imbedding in earth of the plant as in the case of walls and buildings, for the obvious reason that a building imbedded in the earth is permanent and cannot be detached without demolition. Imbedding of a wall in the earth is also in no way comparable to attachment of a plant to a foundation meant only to provide stability to the plant especially because the attachment is not permanent and what is attached can be easily detached from the foundation. So also the attachment of the plant to the foundation at which it rests does not fall in the third category, for an attachment to fall in that category it must be for permanent beneficial enjoyment of that to which the plant is attached. It is nobody's case that the attachment of the plant to the foundation is meant for permanent beneficial enjoyment of either the foundation or the land in which the same is imbedded.”*

Mere attachment  
is not a deciding  
criteria

- **Municipal Corp. of Greater Bombay v. Indian Oil Corp. Ltd [AIR 1991 SC 686]**
- *“The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at a later place? If the answer is yes to the former it must be a movable property and thereby it must be held that it is not attached to the earth. If the answer is yes to the latter, it is attached to the earth...”*
- If chattel attached to earth can't be removed without structural damage, then it is Immovable Property
- If chattel attached to earth can be removed without structural damage, then it is Movable Property
- CBIC Circular 58/1/2002-CX dated 15<sup>th</sup> Jan 2002
- If goods are capable of being sold without dismantling but are dismantled for ease of transportation – Still movable



Degree of Attachment

## Sirpur Paper Mills Ltd. v. Collector of Central Excise, Hyderabad - (1998) 1 SCC 400

*"For example, a factory owner or a house-holder may purchase a water pump and fix it on a cement base for operational efficiency and also for security. That will not make the water pump an item of immovable property... Just because a plant and machinery are fixed in the earth **for better functioning**, it does not automatically become an immovable property."*

If article/attached aids in the permanent enjoyment of land/building then it is immovable property.

If the object of attachment is the beneficial enjoyment of that article (e.g. increase in stability, enhancement of operational efficiency), then the article still remains movable.



Object of Attachment

- Section 7(1A)
- *“Where certain activities or transactions constitute a supply in accordance with the provisions of Section 7(1), they shall be treated either as supply of goods or supply of services as referred to in Schedule II”*

## Para 6(a) of Schedule II

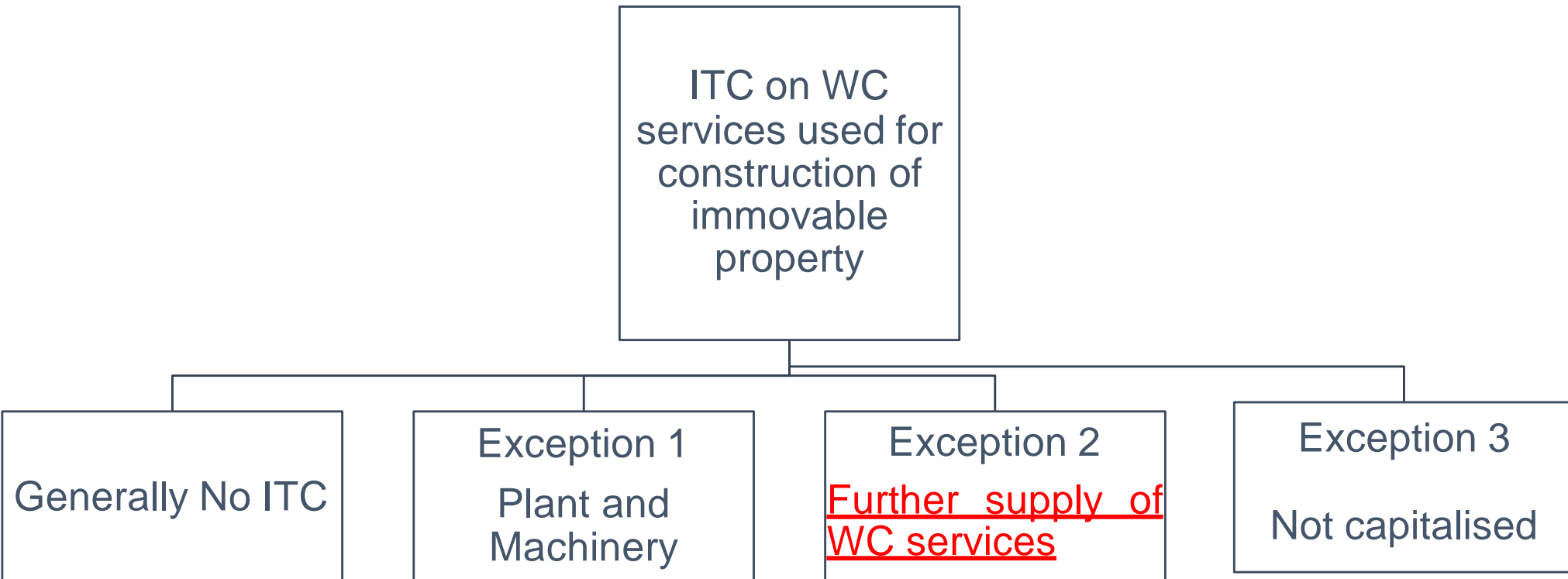
- *“**Composite supply** of works contract as defined in Sec 2 (119) shall be treated as a supply of **services**”*
- Irrespective of whether principal supply is supply of good or services
- Article 366(29A) – Works contract is Supply of **Goods**
- Whether splitting of Works contract transaction is now possible? Goods + Commissioning + Insurance + Transportation etc
- Cross Fall breach clause
- Solar power-based project – 70% Supply of Goods + 30% Supply of Services
- HSN : 9954
- General GST Rate : 18% (few exceptions) w.e.f. 18<sup>th</sup> July 2022 – Concessional rate of 12% almost withdrawn

- Taxability of Contracts in relation to **Movable Properties** where both supplies of goods and supply of services are involved.
- Not a works contract – Moveable
- Taxability as per Composite supply, Mixed Supply and independent supply (CBIC Circular No. 47)
- E.g. Car Repair
- In Triveni Engineering & Industries Ltd [(2000) 120 ELT 273 (SC)] the Apex Court observes that while determining whether an article is permanently fastened to anything attached to the earth both the intention as well as the factum of fastening has to be ascertained from the facts and circumstances of each case.



- **Section 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)...
  - (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;

- 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.
- ITC on works contract services for foundation or structural support for plant and machinery - ITC Eligible
- ITC on civil structure – ITC blocked
- ITC on Telecommunication tower - ITC blocked
- ITC on pipelines laid outside factory premises – ITC blocked



- ITC on foundation / Structure for Plant and Machinery – Depends on facts generally ITC eligible – No ITC on Civil Structure
- ITC on shed for storage of plant and machinery – Shed will not form part of Plant and Machinery. Generally the cost of constructing such shed will be capitalized in books – ITC ineligible
- ITC on construction of warehouse / Factory Shade – ITC ineligible as Civil Structure
- ITC on sewage treatment plan - ITC ineligible as Civil Structure
- ITC on electrical fittings - Rambagh Palace Hotels Private Limited [2019-TIOL-155-AAR-GST – ITC eligible

- A company is involved in the construction of shopping malls and same shall be let out on completion. The company would be paying GST on its lease rent income. Whether Company can avail ITC and utilize the same against GST liability on lease Rental?
- Hon`ble Orrisa High Court in the judgment of ***Safari Retreats (P.) Ltd. v. Chief CCG & ST [2019] 105 taxmann.com 324/74 GST 500*** has held that if the assessee is required to pay GST on lease rental income arising from shopping mall then the assessee is also allowed to avail and utilize ITC on construction cost of such shopping mall
- Hearing is already started in SC on 18<sup>th</sup> April 2023

SI No	Description	Rate
3(i)	Construction Services (Builders etc)	1.5%, 7.5%, 12%, 18%
3(ii) to 3(vi)	deleted	NA
3(vii)	Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017, <b>involving predominantly earth work (that is, constituting more than 75 percent of the value of the works contract)</b> provided to the Central Government, State Government, Union territory or a local authority	12%
3(x)	Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 provided <b>by a sub-contractor to the main contractor</b> providing services specified in item (vii) above to the Central Government, State Government, [ <i>Union territory or a local authority</i> ]	12% GST

Section  
14 –  
Change  
of Rate

SI No	Description	Rate
3(viii)	Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 and associated services, in respect <b>of offshore works contract relating to oil and gas exploration and production (E&amp;P) in the offshore area beyond 12 nautical miles from the nearest point of the appropriate base line</b>	12% GST
3(ix)	Deleted	NA
3(xi)	Services by way of house-keeping, such as plumbing, carpentering, etc. where the person supplying such service through <b>electronic commerce operator</b> is not liable for registration under sub-section (1) of section 22 of the Central Goods and Services Tax Act, 2017  <b>Provided</b> that credit of input tax charged on goods and services has not been taken [Please refer to <i>Explanation</i> No. (iv)].	5% GST
3(xiii)	Residuary head	18% GST

SI No	Description	HSN
10	Services provided by way of <b>pure labour contracts</b> of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a civil structure or any other original works pertaining to the beneficiary-led individual house construction or enhancement under the <b>Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana</b>	9954
10A	Services supplied by <b>electricity distribution utilities</b> by way of construction, erection, commissioning, or installation of infrastructure for extending electricity distribution network upto the tube well of the farmer or agriculturist for agricultural use	9954
11	Services by way of <b>pure labour contracts</b> of construction, erection, commissioning, or installation of original works pertaining <b>to a single residential unit otherwise than as a part of a residential complex</b>	9954



- Section 2(33)
- “Continuous supply of services”
- means a supply of services which is provided, or agreed to be provided,
- continuously or on a recurrent basis,
- under a contract,
- for a period exceeding three months
- with periodic payment obligations
- and includes supply of such services as the Government may, subject to such conditions, as it may, by notification, specify;
  
- Depending upon facts WC Services may qualify as ‘Continuous Supply of Services’

- Section 31(5) CGST Act – Time limit to raise Invoice in case of **Continuous supply of services**

Situation	Time Limit to raise invoice
Where the due date of payment is ascertainable from the contract	invoice shall be issued on or before the due date of payment
Where due date of payment is not ascertainable from the contract	invoice shall be issued before or at the time when the supplier of service receives the payment
Where the payment is linked to the completion of an event	invoice shall be issued on or before the date of completion of that event

- Works Contract **not falling under 'Continuous supply of services'** - invoice shall be issued within 30 days from the date of the supply of service(Rule 47 of CGST Rules).



## Section 13(2) of CGST Act

Situation	Time of Supply
If invoice is issued within the period prescribed under 31	date of issue of invoice by the supplier or the date of receipt of payment, whichever is earlier
If invoice is not issued within the period prescribed under 31	date of provision of service or the date of receipt of payment, whichever is earlier; or
Residuary situation	date on which the recipient shows the receipt of services in his books of account

## #1 : In case of supply of service, involving transfer of property in land or undivided share of land,

Value of supply of service and goods portion in such supply shall be equal to

- Total amount charged for such supply XXX
- Less: 1/3rd of Total Amount charged as Value of Land XXX
- Explanation. - For the above purpose, "total amount" means the sum total of,- (a) consideration charged for aforesaid service; and (b) amount charged for transfer of land or undivided share of land, as the case may be.

## #2 In case of Works Contracts where transfer of land is not involved

### 1. Value for the purpose of charging GST in case Supplier and Recipient is not related

Transaction Value i.e the price charged to the recipient for selling/providing goods/services

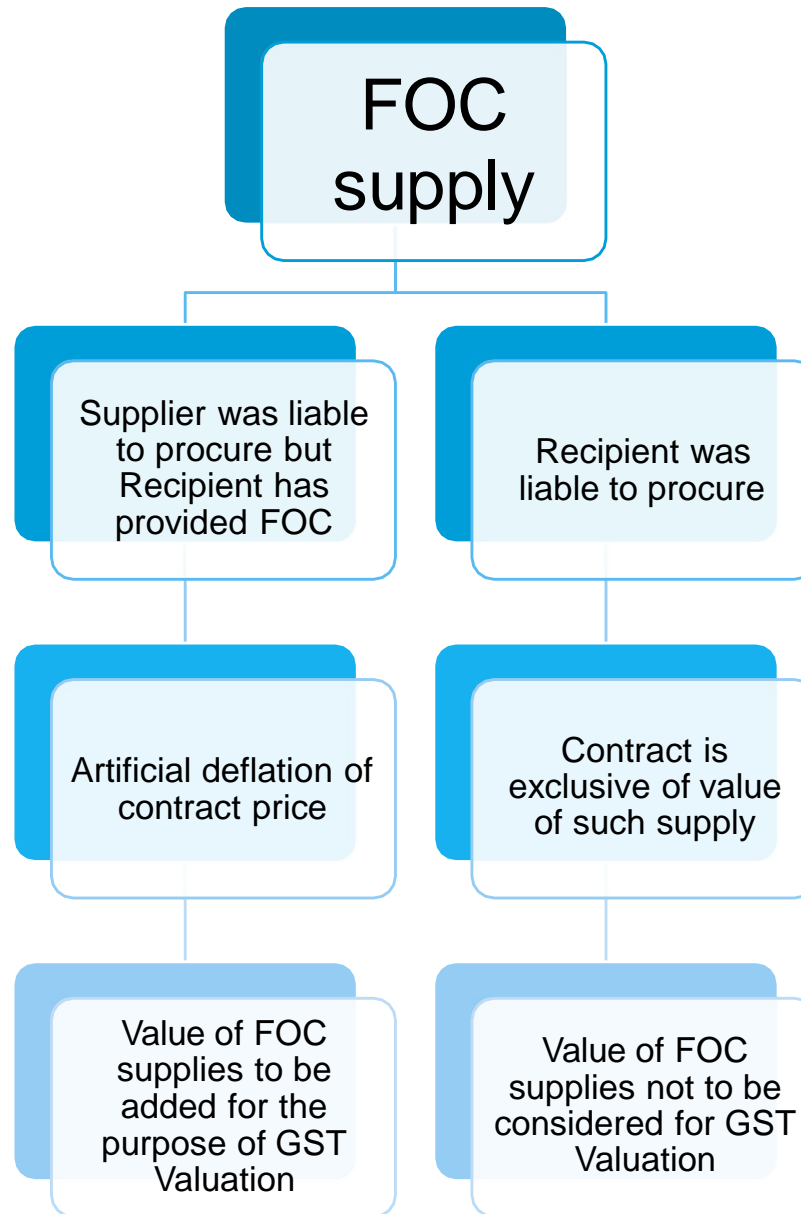
### 2. Value for the purpose of charging GST in case Supplier and Recipient is related

Valuation to be determined by valuation Rules, Open Market Value etc.

- Section 15(2)
- The value of supply shall include–
- (a) .....
- (b) any amount that the **supplier is liable to pay in relation to such supply** but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;

Valuation of Free of Charge Supply in case of Works contract

Bhayana Builders Private Limited [2018] 91 Taxmann.com 109 (SC)



### Section 12(3)(a) IGST ACT

“ The place of supply of services,—

- *directly in relation to an immovable property, including services provided by architects, interior decorators, surveyors, engineers and other related experts or estate agents, any service provided by way of grant of rights to use immovable property or for carrying out or co-ordination of construction work;*
- **shall be the location at which the immovable property is located or intended to be located “**
- highway construction services – multiple states – Separate state-wise invoices



Whether multiple registration must ?

### Section 13(4) IGST ACT

- *“ The place of supply of services supplied directly in relation to an immovable property, including services supplied in this regard by experts and estate agents, supply of accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including that of architects or interior decorators,*
- *shall be the place where the immovable property is located or intended to be located.”*



- Damages whose amount the parties to a contract quantify and designate during the negotiation of a contract for the non-breaching party to receive as compensation upon a specific breach (e.g., non-performance, late performance or inadequate performance).
- Schedule II, Entry 5 (e)
- *agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act shall be treated as supply of services*
- CBIC Circular No. 178/10/2022-GST dated 3rd August 2022
- Liquidated damages cannot be said to be a consideration received for tolerating the breach or non-performance of contract. They are rather payments for not tolerating the breach of contract. **Such payments do not constitute consideration for a supply and are not taxable.**
- Further, payments such as liquidated damages, forfeiture of salary for premature leaving of the employment, penalty for cheque dishonour, etc. are not a consideration for tolerating an act or situation. Rather, such payments are for preventing breach of contract or nonperformance and are therefore mere 'events' in a contract.

- Very common in WC Services industry
- To mobilize resources in time
- Later on adjusted against bills
- Whether GST payable on Mobilization Advance?
- M/s. Gammon India Limited vs. Commissioner of Service Tax-V - 2020-TIOL- 1526-CESTAT-MUM - held that mobilization advance received before the commencement of service is not received as an advance towards the provision of taxable services
- M/s. Siemens Limited - 2019-TIOL-78-AAAR-GST, - WB AAAR held that the unutilized part of the mobilization advance held by the Appellant as of 01.07.2017 will attract GST on the said date itself.
- M/s. Shapoorji Pallonji and Company Pvt Ltd - 2020-TIOL-35-AAR-GST - TN AAR held that mobilization advance received prior to GST and on which applicable Service Tax was paid in Pre GST regime is not subject to GST in terms of Section 142(11)(b) of the CGST Act, 2017.

- As per rule **56(14) of CGST Rules 2017**, every registered person executing works contract shall keep separate accounts for works contract. showing -
- (a) the names and addresses of the persons on whose behalf the works contract is executed;
- (b) description, value and quantity (wherever applicable) of goods or services received for the execution of works contract;
- (c) description, value and quantity (wherever applicable) of goods or services utilized in the execution of works contract;
- (d) the details of payment received in respect of each works contract; and
- (e) the names and addresses of suppliers from whom he received goods or services.

- Payment to vendors within 180 days
- Stock Transfer – Taxable – Pre GST (Exempt)
- Inter-State movement of goods like rigs, tools, spares and goods on wheels like cranes - CBIC Circular 21 - If movement **not being in the course of furtherance of supply of such goods** (e.g. repair & maintenance – Not a taxable supply )
- In all Other situations – taxable supply
- Cross charge of Services as multiple registration
- Cross Charge of Salary Cost?
- Recipient may not be eligible for full ITC
- Benefit of 2<sup>nd</sup> Proviso to Rule 28 may not be available
- Multiple GST registration whether must? Fixed Establishment
- GST TDS by Government Recipient in case contract exceeds 2.5 Lakhs – 2%

- Public-Private Partnership (PPP) financial models
- National Highway Authority of India (NHAI)/ State Highway Authorities (SHA)



EPC Model

PPP Models

BOT Model

HAM Model

## Engineering, Procurement, and Construction ('EPC') model

- NHAI/SHA owner of project – Project financed by Government - Right to collect TOLL vest with NHAI/SHA
- Works contractors are providing Construction (WC) Services. Contractors are eligible to avail ITC

## Build – Operate – Transfer (BOT) model

- NHAI/SHA owner of project
- Project financed by Private Players (Consortium)
- Concessionaire/Contractor is liable for construction, operation, and maintenance of a highway for certain duration and thereafter transfers it to NHAI.
- In BOT (Toll model) - toll collection Right vests with Contractor
- In BOT (Annuity model) - Contractor is paid in the form of Annuity instead of Toll charges
- BOT (Toll model) Service provided by the private player by way of access to a road or a bridge on payment of toll charges is exempt from GST – Sl# 23 of NN. 12/2017 – CT(R)
- No ITC in BOT Toll model as outward supply is exempt
- BOT (Annuity) – taxability same as HAM Annuity

## Hybrid Annuity Model (HAM)

- In HAM a certain percentage of the project's cost (say appx. 40%) is paid by NHAI/SHA to the concessionaire at pre-agreed milestones during the **construction period**.
- Balance payment along with payments for maintenance would be paid proportionately over a period of 7–15 years post-construction along with interest.
- HAM is a combination of EPC and BOT Models.

## Taxability of HAM

- Sl # 23A NN 12/2017-CT(R) - exempts “Service by way of access to a road or a bridge on payment of annuity”
- CBIC Circular No. 150/06/2021-GST dated 17.06.2021
- Consideration received **Construction phase** – Works contract Services – HSN 9954 – Taxable
- Consideration received during the **Operation and Maintenance phase** – HSN 9967- Exempt – Sl# 23A above

## Karnataka HC in case of DPJ Bidar-Chincholi (Annuity) Road Project Pvt. Ltd.

- Annuity is paid in lieu of toll charges.
- Circular which clarifies the notification cannot have the effect of overruling the notification
- HC set aside the Circular as it was going against the exemption notification.
- Entire consideration received by contractors for construction and maintenance of the road is exempt from GST
- However, the Karnataka High Court noted that the Government can issue fresh notifications amending entry 23A in the exemption notification



## Notification No 15/2022- Central Tax (Rate) dated December 30, 2022

- Exemption is withdrawn on supply of service by way of access to a road or a bridge on payment of annuity w.e.f 1<sup>st</sup> January 2023
- Withdrawal of the exemption is in response to Judgement of DPJ Bidar-Chincholi (Annuity) Road Project Pvt. Ltd

### Turn of Events:

- **22<sup>nd</sup> GST Council Meeting:** Entry No. 23A was inserted to exempt Service by way of access to a road or a bridge on payment of annuity
- **45<sup>th</sup> GST Council Meeting:** CBIC circular 150 – Consideration received during Construction phase taxable
- **48<sup>th</sup> GST Council meeting:** Entry 23A deleted w.e.f. 1<sup>st</sup> January 2023

## Taxability of Annuity

- 12% GST liability on HAM and BOT annuity w.e.f. 1st January 2023
- Consideration received for the construction phase between 13th Oct 2017 to 31st December 2022 - Dispute
- Whether Concessionaire needs to re-examine exemption stand on Toll collection as per Sl# 23 of NN 12/2017?



- GST Compensation Cess @ Rs. 400/ MT on coal
- EPC contract of setting up Thermal Plant – WC Services – 18% GST
- Supply of electricity is exempted vide NN 02/2017 –CT(R) dated 28.06.2017. NN 12/2017-CT(R) exempts the services provided by way of transmission or distribution of electricity by an electricity transmission or distribution utility.
- No ITC as outward supply is exempted .Section 17(2)/17(3)/Rule 42 and 43

Sl. No.	Chapter/ Heading/ Sub-heading/ Tariff item	Description of Goods
(1)	(2)	(3)
SCH I – 234.	84 or 85	<p>Following renewable energy devices &amp; parts for their manufacture</p> <ul style="list-style-type: none"> <li>(a) Bio-gas plant</li> <li>(b) Solar power-based devices</li> <li>(c) <u>Solar power generating system</u></li> <li>(d) Windmills, Wind Operated Electricity Generator (WOEG)</li> <li>(e) Waste to energy plants/devices</li> <li>(f) Solar lantern/solar lamp</li> <li>(g) Ocean waves/tidal waves energy devices/plants</li> </ul>
<p>SI# 38 NN 11/2017-CT(R) Construction or engineering or installation or other technical services,</p>		<p><b>Explanation (inserted Vide NN. 24/2018 (CT Rate) dated w.e.f. 1/1/19)</b></p> <p>“If the goods specified in this entry are supplied, by a supplier, along with supplies of <u>other goods</u> and service, one of which being a taxable service specified in the entry at Serial No. 38 of the table mentioned in the Notification No. 11/2017- Central Tax (Rate), dated 28th June, 2017, the value of supply of goods for the purposes of this entry shall be deemed as seventy percent of the gross consideration charged for all such supplies, and the remaining thirty percent of the gross consideration charged shall be deemed as value of the said taxable service.”</p>

**GST Rate 5%**

$5% \cdot .7 + 18% \cdot .3 = 8.9%$

Sl. No.	Chapter/ Heading/ Sub-heading/ Tariff item	Description of Goods
(1)	(2)	(3)
SCH II 201A	84, 85 or 94	<p>Following renewable energy devices and parts for their manufacture:-</p> <p>(a) Bio-gas plant;</p> <p>(b) Solar power-based devices;</p> <p>(c) <u>Solar power generator</u>;</p> <p>(d) Windmills, Wind Operated Electricity Generator (WOEG);</p> <p>(e) Waste to energy plants/devices;</p> <p>(f) Solar lantern/solar lamp;</p> <p>(g) Ocean waves/tidal waves energy devices/plants;</p> <p>(h) Photo voltaic cells, whether or not assembled in modules or made up into panels.</p> <p>Explanation :- If the goods specified in this entry are supplied, by a supplier, along with supplies of <u>other goods</u> and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in Notification No. 11/2017-Central Tax (Rate), dated 28th June 2017 [G.S.R. 690(E)], the value of supply of goods for the purposes of this entry shall be deemed as seventy percent of the gross consideration charged for all such supplies, and the remaining thirty percent of the gross consideration charged shall be deemed as value of the said taxable service.”;</p>

**GST  
Rate  
12%**

$12\% \cdot 0.7 + 18\% \cdot 0.3 = 13.8\%$



- CBIC Circular No. 163/19/2021-GST dated October 06, 2021
- GST Council has now decided to clarify that GST on such specified Renewable Energy Projects can be paid in terms of the 70:30 ratio for goods and services, respectively, for the period of July 01, 2017, to December 31, 2018, in the same manner as has been prescribed for the period on or after January 01, 2019, as per the explanation in the Notification No.24/2018 dated December 31, 2018. However, it is specified that, no refunds will be granted if GST already paid is more than the amount determined using this mechanism.
- Position as on 15<sup>th</sup> March 2023 - Andhra Pradesh HC had issued Notice in Writ filed by Solar & Wind Power Developers Association challenging to 70:30 valuation provision under GST for solar-power projects vide explanations inserted w.e.f. January 01, 2019, to erstwhile Entry 234 (new Entry 201A) of the GST Rate Schedule for Goods and Entry 38 of GST Rate Schedule for Services; Petitioner submits that the Explanations in Notification no. 24/2018 and Notification no. 27/2018 dated December 31, 2018, **are against the concept of 'composite supplies' as also the rule-making power u/s 15 of the Act**

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