



GST ON CONSTRUCTION OF SOLAR POWER SYSTEM/PLANT

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Recently Authority of Advance Ruling (AAR) in the state of Maharashtra has given an order confirming that construction of solar power system is a works contract and GST Rate would be 18%.

They have passed two orders pertaining to M/s Giriraj Renewables Private Limited and M/s Fermi Solar Farms Private Limited. The orders have been passed after detailed evaluation of all the relevant documents, different case laws of Apex Court and High Courts also. I have tried to make an analysis of one order out of the two orders passed by AAR - Maharashtra.

Analysis of order passed for M/s Giriraj Renewable Private Limited –

The applicant has filed the application for seeking an advance ruling. The main question in this regard was:

- Whether supply of turnkey Engineering, Procurement and Construction (EPC) Contract for construction of a solar power plant wherein both goods and services are supplied can be constructed to be a composite supply in terms of section 2(30) of CGST Act, 2017.

Submission of the Applicant –

1. The applicant has submitted that the main intent of the contract is provision of the solar power generating system which consists of various components such as solar modules, MS structures, inverter transformers, cables, SCADA, transmission line etc. Services like civil foundation are merely incidental to supply of such goods and ancillary part of the contract. Out of the total contract value, service portion is only 10 to 15% and balance is supply of goods. This also substantiates the fact that provision of service is incidental to supply of goods and hence supply of goods is the principal supply and entire contract would be supply of goods. The entire contract is one turnkey EPC contract and qualifies as a composite contract. The principle supply is solar power generating system and should be taxable @5%.

2. Contract does not constitute works contract- *“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.*

Therefore, in order to determine whether the supply made by the applicant is a works contract, the following points are imperative to understand-

- a. The essence of the contract and intention of the parties. Whether the parties intend to undertake works contract or supply of solar power plant/ generating system; and
 - b. Whether the activity amounting to immovable property to qualify as works contract.
- a. The essence and intention of the parties involved in the contract is clearly supply of solar power plant
 - b. Solar power plant is not an immovable property –

It can be inferred from the various pronouncements of the judicial authorities that where the object is installed/ fastened to the land for better running of the object, and not for the benefit of the land, the object will not be considered as immovable property. Further, it has been held that if fixing of plant to a foundation is only meant to give stability to the plant and where there is no intention to make such plant permanent, the foundation would not change the nature of the plant and make it an immovable property.

Reliance is placed on the judgments delivered by Hon'ble Apex court in the matter of

- i. **Sirpur Paper Mills vs. Collector of Central Excise, Hyderabad (1998) 1 SCC 400 (SC)**
- ii. **Commissioner of Central Excise vs. Solid and Correct Engg. Works & Others (2010) 175 ECR 8 (SC)**

In the instant case the solar power plant supplied by the applicant is commissioned and installed only for the purpose of better functioning only and are capable of removed and transferred from one place to another. Hence, the fact that plant is firmly but not permanently attached to the land and the same is not an immovable property. Reliance is also placed on the Chartered Engineer Certificate which clearly says that solar power plant if required can be shifted to another location and highly movable nature.

The solar power plant is a composite supply only instead of a works contract. It has been highlighted that mounted photovoltaic module (PV Module) comprises around 60% to 70% of the entire solar power plant and rest of the materials / equipment are merely parts or sub-parts. The rate of the PV Module is 5%. Reliance is also placed on Chartered Engineer Certificate which provides that the most critical component is PV Module both in terms of value and functionality. It is clear that PV Modules qualify as a "Principal Supply" and hence whole contract being a composite supply would be taxed at the rate of 5% only.

Observation of the Authority and order thereof-

It is not in a dispute that the contract as a whole is a single contract. The moot question is whether the subject contract will fall under the preview of "**composite contract**" or "**works contract**". Applicant has been contenting that the contract is not a works contract but to be treated as a composite supply.

The contract is not for supply of goods but also for provision of services also and such type of contract commonly understood as works contract under pre GST regime. However, it is equally true that this contract has to be understood from new Goods and Service Tax Laws without set aside the contention of the applicant. Works Contract as defined under in clause 119 of section 2 of CGST as-

"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.

It can be seen that new definition of works contract is exhaustive one and containing only fourteen (14) specific activities but these activities are in terms of an immovable property only. Earlier under the sales tax/ VAT regime, works contract was defined as activities of building, construction, manufacture, processing, fabrication, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property. Thus, activities in relation to both movable and immovable property were covered earlier VAT/ service tax regime whereas under GST regime it is restricted only to immovable property. The contention of the applicant that transaction of supply of solar power plant (SPP) does not result into an immovable property as the SPP is a movable.

The applicant has to perform all activities from engineering, design, procurement of materials and also perform installation, commissioning of such equipment. The contract of such a nature generally referred to as works contract but we have to decide whether it is works contract in terms of GST Act. Whether such activity is in the nature of immovable property or not, which is the important issue for determination of works contract.

Immovable property has not been defined under GST Act. Section 3 of the General Clauses Act, 1897 does not provide any exhaustive definition of works contract.

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. The term "attached to the earth" has not defined under General Clauses Act. But, section 3 of the Transfer of Property Act, 1882 has defined the expression "attached to the earth"-

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

In the case of Commissioner of Central Excise vs. Solid and Correct Engg. Works & Others,

"24. Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:

- i. **The plants in question are not per se immovable property.**
- ii. **Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.**

- iii. **The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.**
- iv. **The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.”**

The following general points are very essential to determine the nature of subject contract-

- i) The contract would be to develop 60MWAC/ 81MWDC solar power plant for onward sale of power to its customers. It is a big project and has a permanent location. Such plant would therefore have an inherent element of permanency.
- ii) Output of the project i.e. power would be available to an identified segment of customers. Thus the output element involves the nature of permanency and it would not be possible and prudent to shift base from time to time or locate the plant elsewhere at frequent intervals.
- iii) Such renewable energy project would have an essential element of permanency. The project would be established under Government Rules and Regulations. It would not be moved frequently after obtaining the essential permits and licenses.
- iv) The owner has to obtain necessary approvals and permits required for commissioning and operation of the plant. Such permission has an essential element of permanency.

The applicant has relied on the case law of M/s Solid and Correct Engg. Works. The Hon'ble court has held that the products as movable for the reason that the plant was not intended to be permanent at a given place and the plant can be moved and is indeed moved after road construction or repair for which it's setup is completed. But the present case is not similar to the case as cited by the applicant. Here solar power plant is in the nature of permanency. The applicant has not understood the case law in correct sense. The plant is permanently attached to the earth by civil foundation.

ORDER-

Supply of turnkey Engineering, Procurement and Construction (EPC) Contract for construction of a solar power plant is a "Works Contract" as defined in section 2(119) and not a composite supply as per section 2(30) of the CGST Act.