

## **GST on works contract**

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# Taxability of Works Contract under GST!!!

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## Coverage:

1. Definition of Works Contract Services
2. Judicial Position – Immovable Property
3. Case Study on Determination of immovable property under Works contract services
4. Value of Supply – FOC Material
5. Input Tax Credit
6. Entries not allowing ITC
7. Telecommunication Towers – ITC under GST
8. Rate of Tax
9. Inverted Duty Mechanism and Refund
10. Claims related to period before 1.04.2017 awarded through Arbitration
11. Registration under GST Law
  - ITC: CGST + SGST paid in other State



# 1. Definition of Works Contract Services

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## Works contract services

- Section 2(119) of CGST Act defines **Works contract** as 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

## Immovable Property

- **General Clauses Act [Section 3(26)]**: Immovable property shall include land, benefit to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.
- **Transfer of Property Act**: Immovable Property does not include standing timber, growing crops or grass.

# Contd...

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## **Components of Definition**

- 'means' clause
- Only for Immovable Property – Not for Movable property as in previous tax regime
- Requires transfer of property in goods along with the specified services

## **Works Contract- Deemed to be Supply of Service**

- Para 6 (a) of Schedule II to the CGST Act, 2017:

### *6. Composite supply*

*The following composite supplies **shall be treated as a supply of services**, namely:-*

*(a) works contract as defined in clause (119) of section 2;*

*(b) .....*

## 2. Judicial Position – Immovable Property

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- **Municipal Corporation of Greater Bombay and others vs. the Indian Oil Corporation Ltd:**

*“The Division Bench laid down two tests to determine whether it was attached to the land and thereby became immovable property, namely, **the degree or mode of annexation and the object of annexation**. Of the two tests the latter is more important, and it is a question of fact to be determined upon the particular facts and circumstance of each case..... Permanency is the test. The chattel whether is movable to another place of use in the same position or liable to be dismantled and re-erected at the 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...”*

## Contd...

- **Triveni Engineering & Industries Ltd. & Anr. Vs Commissioner of Central Excise and Anr:**

*“..in the instant case, it is a common ground that a turbo alternator comes into existence only when a steam turbine and alternator with all their accessories are fixed at the site and only then it is known by a name different from the names of its components in the market. .... In our view, the findings recorded do not justify the conclusion of the Tribunal in as much as on removal a turbo alternator gets dismantled into its components: steam turbine and alternator... Thus in our view the test of permanency fails.”*

- **Sirpur Paper Mills Ltd. V Collector of Central Excise, Hyderabad, (1998 1 SCC 400):**

*“the test is whether the paper making machine can be sold in the market. The Tribunal has found as a fact that it can be sold. In view of that finding, we are unable to uphold the contention of the appellant that the machine must be treated as a part of the immovable property of the company. Just because a plant and machinery are fixed in the earth for better functioning, it does not automatically become an immovable property.”*

# Contd..

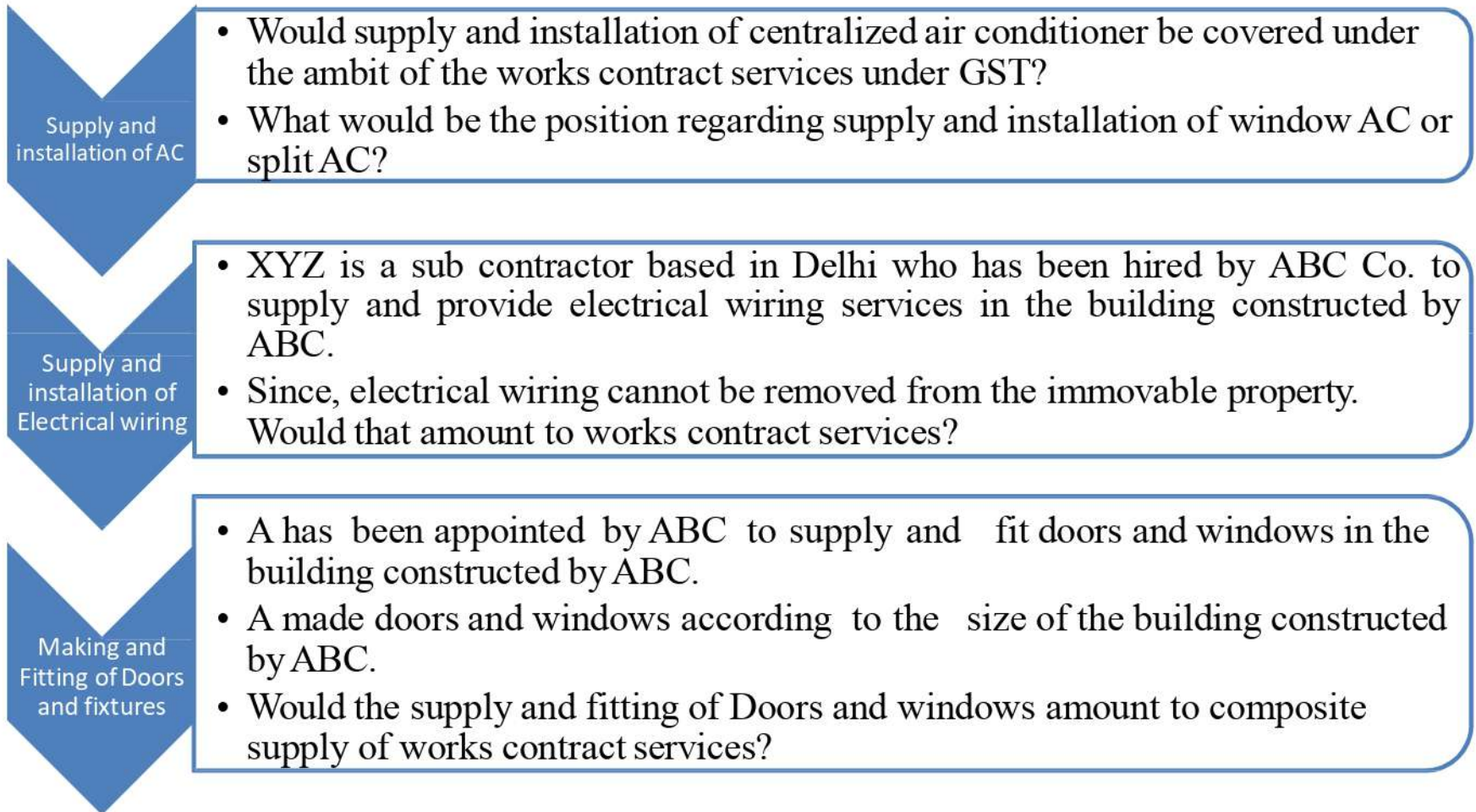
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## **Intention of the Parties**

- Duncans Industries Limited v. State of UP and Others (2000) 1 SCC 633
- Solid and Correct Engg Works & Ors. (2010 (175) ECR 8 (SC))
- Sri Velayuthaswamy Spinning Mills v. The Inspector General of Registration and the Sub Registrar (2013 (2) CTC 551)
- Perumal Naicker v. T. Ramaswami Kone and Anr. (AIR 1969 Mad 346)

### 3. Case Study on Determination of immovable property under Works contract services

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## 4. Value of Supply – FOC Material

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- **Value of Supply**

- Value of Works Contract Service – Transaction Value [Section 15(1)]

- Value *interalia* includes [Section 15(2)]:

- 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*

- ***Bhayana Builders (P) Ltd., (2018) 3 SCC 782 – Supreme Court* – FOC material not to be added in Gross amount charged**

## Contd...

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- **Case 1:**

Steel Constructions Ltd. awards a contract to A Ltd for Construction of Building for Rs. 10 Crores. The terms of contract provide that steel shall be provided by the Steel Constructions Ltd itself.

VALUE OF SUPPLY - 10 crores

- **Case 2 :**

Steel Constructions Ltd. awards a contract to A Ltd for Construction of Building for Rs. 11 Crores. The terms of contract provide that all materials shall be arranged by A Ltd. A Ltd asks Steel Constructions Ltd to arrange steel worth 1.20 crores and pays balance amount of 9.80 Crores.

VALUE OF SUPPLY-  $9.80 + 1.20 = 11$  crores

## 5. Input Tax Credit

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- **Section. 17(5)**

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

*....*

*(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.*

- ***Safari Retreats Private Limited (W.P.(C) No.20463 OF 2018 – read down Section 17(5)(d)***

## Contd...

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*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.*

## 6. Telecommunication Towers – ITC under GST

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- The Hon'ble Delhi High Court in the case of Vodafone case, 2018-TIOL-2409-HC-DEL-ST conclusively stated that telecommunication towers are not immovable property. The Judgment relied upon the **permanence test** laid down by the Hon'ble Supreme Court in Solid and Correct Engineering (supra).
- “Telecommunication towers” would be out of the ambit of “immovable property” and the restriction provided by Section 17(5)(d) of the CGST Act would not disallow the telecommunication service providers from taking Input Tax Credit.
- Further, Telecommunication Towers are out of the ambit of “plant and machinery” by the virtue of Explanation to Section 17.
- The Revenue could contend that telecommunication service providers cannot not avail Input Tax Credit as they do not come under “plant and machinery”, but they also do not come under the ambit of “immovable property” which is the main restriction provided in Section 17(5)(d).
- The main ingredient to be satisfied for denying credit is construction of an “immovable property”, which is not the case at all

## 7. Unutilised ITC and payment of tax using cash ledger

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- **1.4.2019 onwards**
- in residential projects:
  - Cannot avail ITC
  - Cannot utilise ITC
- Unutilised ITC available for previous periods is like cash stuck
- Section 16:
  - *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*

## Contd...

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- **S. 17(5)**

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

*.....*

*(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.*

## Contd...

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- **Notification 11/2017 – CT Rate (conditions)**
  - *Provided that the central tax at the rate specified in column (4) shall be paid in cash, that is, by debiting the electronic cash ledger only;*
  - *Provided also that credit of input tax charged on goods and services used in supplying the service has not been taken except to the extent as prescribed in Annexure I in the case of REP other than RREP and in Annexure II in the case of RREP;*

## Contd...

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- Similar cases
- Indian Catering Association case (Del HC)
- **Way forward:**
  - *Challenge the notification*
  - *In the meanwhile take ITC and reverse*
  - *If notification quashed, the balance ITC and the ITC availed later would become available*

## 8. Rate of Tax – [Entry 38]

Notification 11/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
38	9954 or 9983 or 9987	<p>Service by way of construction or engineering or installation or other technical services, provided in relation of setting up of following, -</p> <ul style="list-style-type: none"> <li>(a) Bio-gas plant</li> <li>(b) Solar power based devices</li> <li>(c) Solar power generating system</li> <li>(d) Wind mills, Wind Operated Electricity Generator (WOEG)</li> <li>(e) Waste to energy plants / devices</li> <li>(f) Ocean waves/tidal waves energy devices/plants</li> </ul> <p>Explanation:-This entry shall be read in conjunction with <b>serial number 234</b> of Schedule I of the <b>notification No. 1/2017-Central Tax (Rate)</b>, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) dated 28th June, 2017 vide GSR number 673(E) dated 28th June, 2017.</p>	9	-

## 8. Rate of Tax – [Entry 234]

Notification 1/2017, CT(R) dated 30.06.2017, Schedule I

S.No.	Chapter / Heading / Sub-heading / Tariff item	Description of Goods
234	84, 85 or 94	<p>Following renewable energy devices &amp; parts for their manufacture (a) to (f) as mentioned N.NO-11/2017</p> <p>Additional entries:</p> <p>(f) Solar lantern / solar lamp</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 other goods and services, one of which being a taxable service specified in the entry at S. No. 38 of the Table mentioned in the 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 per cent. of the gross consideration charged for all such supplies, and the remaining thirty per cent. of the gross consideration charged shall be deemed as value of the said taxable service.</p>

# Issues

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- In solar Projects – Value of Material is 85 - 90%
- What if parties enter into two separate contracts – is it still works contract?

# Two Separate Agreements

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- **State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd., (1958) 9 STC 353**

*36. To avoid misconception, it must be stated that the above conclusion has reference to works contracts, which are entire and indivisible, as the contracts of the respondents have been held by the learned Judges of the Court below to be. The several forms which such kinds of contracts can assume are set out in Hudson on Building Contracts, at p. 165. **It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration, and the other for payment of remuneration for services and for work done.** In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell, from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment.*

## Contd...

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- **Larsen & Toubro Ltd. v. State of Karnataka, (2014) 1 SCC 708**

*77. It has been clarified that in some cases it may be that even while entering into a contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction will not be one and indivisible but will fall into the two separate agreements, one of work or service and the other of sale.*

## Contd...

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- **Kone Elevator India (P) Ltd. v. State of T.N., (2014) 7 SCC 1**

*70. It is necessary to state here that if there are two contracts, namely, purchase of the components of the lift from a dealer, it would be a contract for sale and similarly, if a separate contract is entered into for installation, that would be a contract for labour and service. But, a pregnant one, once there is a composite contract for supply and installation, it has to be treated as a works contract, for it is not a sale of goods/chattel simpliciter.*

*133. It further makes it abundantly clear that the **right of the petitioner to realise the full value of the materials of the lift to be supplied does not entirely depend upon the installation part of it.** In other words, supply of materials of the lift and installation costs are separately worked out in order to ensure that irrespective of the installation, the petitioner will be able to realise the value of the material cost. This conclusion which is based on the above terms, also strengthens the reasoning that the contract is not an indivisible one and is always separable i.e. one for supply of materials and the miniscule part of the work involved.*

## Contd...

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- **When two separate agreements for supply of goods and service would be considered as one Composite Contract?**
  - *Cross fall breach clause*
  - *Cross performance*
  - *Where contract is actually one but contained in two different documents*
  - *Payment terms are linked*

## 8. Rate of Tax- [Entry No 3(iv)]

Notification 11/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
3	9954 (Construction Services)	(iv) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-  (a) a road, bridge, tunnel, or terminal for road transportation for use by general public; (b) .....	6	-

- Not recipient Specific Entry
- Service by sub-contractor shall also get covered

## 8. Rate of Tax- [Entry No 3(v)]

Notification 11/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
3	9954 (Construction Services)	(v) Composite supply of works contract as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, supplied by way of construction, erection, commissioning, or installation of original works pertaining to,- <b>(a) railways</b> , including monorail and metro; (b) (b) a single residential unit otherwise than as a part of a residential complex; (c) low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India; (d) .....	6	-

# Case Studies

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## **Work for Indian Railway**

1. Shed on Railway Platform.
2. Maintenance and repair of Railway tracks
3. Pure Service - project management service for construction of Railway track
4. Installation of Electric Sub-station

## **Service by Sub-Contractor**

1. Sub-Contractor has provided service to main contractor who have been awarded above services

# Case Studies

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## **Private Railway Siddings**

1. Railway Siding for NTPC – diversion of track to factory of NTPC.
  - *Afcons Infrastructure Ltd., 2015 (38) STR 194, Sub-Contract*
  - *SMS Infrastructure Ltd. 2017 (47) S.T.R. 17 (Tri.- Mumbai)*
  - *Rites Limited, West Bengal Authority for Advance Ruling vide its Order No. 27/WBAAR/2018-19 dated 21.12.2018*

## 8. Rate of Tax- [Entry No 3(vi)]

Notification 11/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
3	9954 (Construction Services)	<p>(vi) <b>Composite supply of works contract</b> as defined in clause (119) of section 2 of the Central Goods and Services Tax Act, 2017 other than that covered by items (i), (ia), (ib), (ic), (id), (ie) and (if) above, <b>provided to the Central Government, State Government, Union Territory, a local authority, a Governmental Authority or a Government Entity</b> by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of-</p> <p>(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;</p>	6	Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be.-

## 8. Rate of Tax- [Entry No 3(vi)]

Contd...

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
3	9954 (Construction Services)	<p>(b) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment; or</p> <p>(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in paragraph 3 of the Schedule III of the Central Goods and Services Tax Act, 2017.</p> <p>Explanation. - For the purposes of this item, the term 'business' shall not include any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities.</p>	6	Same as previous slide

# Contd...

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## 1. Definition of 'Government Entity' -

*4(x) "Government Entity" means an authority or a board or any other body including a society, trust, corporation,*

*i) set up by an Act of Parliament or State Legislature; or*

*ii) established by any Government,*

*with 90 per cent. or more participation by way of equity or control, to carry out a function entrusted by the Central Government, State Government, Union Territory or a local authority.*

## 2. Condition of 90% is to be read with (i) or (ii) or both ?

***Shapoorji Paloondi & Company Pvt Ltd., 2016 (42) STR 681 (Patna)***

*11. ....The clause (i) is followed by ";" and the word "or". Therefore, each of the sub-clauses is independent provision. The condition of 90% or more participation by way of equity or control to carry out any function entrusted to a municipality under Article 243W of the Constitution is relatable to only sub-clause (ii) of Clause 2(s). .....*

# Contd...

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## **Important Considerations:**

1. Recipient Specific Entry
2. Services by sub-contractors – covered under Entry 3(ix)
3. Pure services – Main Contractor & Sub-Contractor
4. Meaning of ‘Educational Establishment’ not defined under 11/2017-CT(R). Meaning of ‘Educational Institution’ under 12/201-CT(R) having narrow meaning and cannot be applied for this.

## **Case Study:**

- LIC allots contract for construction of staff quarters for sale it to its employees

## 8. Rate of Tax- [Entry No 3(vii)]

Notification 11/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Service	Rate (%)	Condition
3	9954 (Construction Services)	(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</b> (that is, constituting more than 75per cent, of the value of the works contract) provided to the Central Government, State Government, Union territory, local authority, a Governmental Authority or a Government Entity.	2.5	Provided that where the services are supplied to a Government Entity, they should have been procured by the said entity in relation to a work entrusted to it by the Central Government, State Government, Union territory or local authority, as the case may be

# Case Study

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1. Ministry of Jal Shakti awards a contract to XYZ Ltd. for excavation and construction of Bank embankments at River Ganga
  - Technical Meaning of Earth Works and its percentage - take confirmation from an Engineer of the Client

# Pure Services

Notification 12/2017, CT(R) dated 28.06.2017

S No	Chapter, Section or Heading	Description of Services	Rate (%)	Condition
3	Chapter 99	Pure services (excluding works contract service or other composite supplies involving supply of any goods) provided to the Central Government, State Government or Union territory or local authority or a Governmental authority or a Government Entity by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution or in relation to any function entrusted to a Municipality under article 243W of the Constitution.	Nil	Nil
10	Heading 9954	Services provided by way of pure labour contracts 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 Housing for All (Urban) Mission or Pradhan Mantri Awas Yojana.	Nil	Nil

# Pure Services (Contd...)

Notification 12/2017, CT(R) dated 28.06.2017

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S No	Chapter, Section or Heading	Description of Services	Rate (%)	Condition
11	Heading 9954	Services by way of pure labour contracts of construction, erection, commissioning, or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex.	Nil	Nil

## 9. Inverted Duty Mechanism and Refund

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### **Issue:**

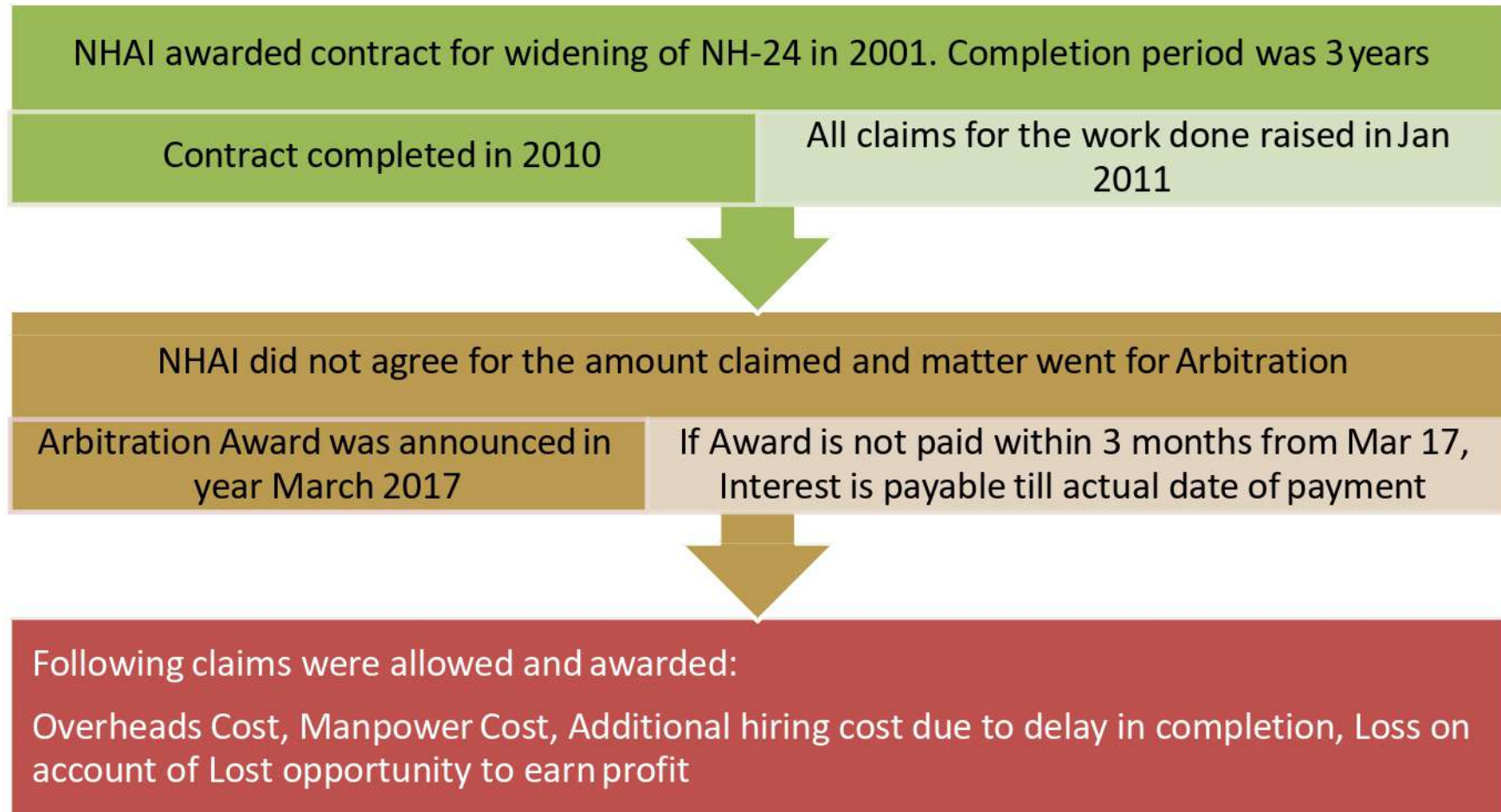
- i. Few works contract services are chargeable @ 12%
- ii. Inputs used such as cement, MS Pipe, Steel- Bar TMT, PVC- Pipe, etc. are charged to GST @ 18%/ 28%.
- iii. Result is the accumulation of ITC because of inverted duty structure either in the hands of Contractor or Sub-Contractor

### **Refund:**

- Notification No. 15/2017 CT(R) dated 28.06.2017- Bars refund on services falling within para 5(b) of Schedule II
- Contractor has provided works contractor services – Para 6(a) of Schedule II
- Refund u/s 54(3) is eligible

## 10. Claims related to period before 01.07.2017 awarded through Arbitration

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# Contd..

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## **Important Considerations:**

- i. The taxability under GST is only with effect from 01.07.2017.
- ii. If taxable event has happened prior to 01.07.2017, no GST is chargeable.
- iii. Transitional provision – Section 142(11) states that GST shall not be leviable to the extent tax was leviable under erstwhile provisions.
- iv. Present like cases are facts specific.
- v. In present facts - Goods or services or both, were supplied prior to 01.07.2017, Hence no GST is chargeable.
- vi. Section 142(2)(a) states where price of goods or service in a contract entered prior to 01.07.2017 is revised upwards after said date, a supplementary invoice or debit note shall be issued – Not applicable on present like cases

# 11. Registration under GST Law

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## ■ Registration Requirements

- i. Section 22(1): Every supplier is liable to be registered in the State **from where he makes a taxable supply** of goods or services or both, subject to turnover limit.
- ii. Section 2(71) : Location of Supplier of Service means-
  - (a) *where a supply is made **from a place of business** for which the registration has been obtained, the location of such place of business;*
  - (b) *where a supply is made from a place other than the place of business for which registration has been obtained (a fixed establishment elsewhere), **the location of such fixed establishment**;*
  - (c) ....
- iii. Section 2(50): Fixed Establishment means –  
*a place (other than the registered place of business) which is characterised by a sufficient degree of permanence and suitable structure in terms of human and technical resources to supply services, or to receive and use services for its own needs*

## Contd...

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### **Example:**

Contractor is having a site office for a project in a State which is not his principal place of business. Whether separate registration is required for such Site office in other State for a Project?

Ans: In our view, YES

However, a contrary view has been taken by Authority for Advance Ruling, Karnataka, in the case of M/s T and D Electricals, KAR ADRG 18/2020 dated 31.03.2020

# ITC: CGST + SGST paid in other State

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- **Whether tax paid in one state is allowed as credit in other State**
  - i. Input tax is defined u/s 2(62) to mean Central Tax, State Tax, Integrated tax and Union Territory Tax
  - ii. Input Tax credit is defined u/s 2(63) to mean credit of input tax
  - iii. State tax is defined u/s 2(104) to mean the tax levied under **any** State Goods and Services Tax
  - iv. Thus, credit of input tax would include credit of any State tax paid on inward supplies.
  - v. Section 16(1) uses the words *credit of input tax charged*. Thus, unless expressly restricted elsewhere in the GST Law, Section 16(1) of the CGST Act allows credit of all taxes levied under CGST Act, IGST Act, UTGST Act and all State SGST Acts irrespective of the “place of supply”.

## Contd...

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- vi. Section 41(1) of CGST Act entitles every registered person, subject to conditions and restrictions as may be prescribed, to take credit of eligible input tax on self-assessment basis and the same shall be credited to his ECL on a provisional basis.
- vii. Rule 86(1) provides that every claim of ITC **under the Act** shall be credited to Electronic Credit ledger
- viii. ITC on inward supplies having place of supply outside the state where a person is registered is not restricted under any provision of the CGST Act. Since the credit of such input taxes are not restricted under the CGST Act or rules made thereunder, ITC of the same shall be available under the CGST Act.

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