THE MAHARASHTRA APPELLATE AUTHORITY FOR ADVANCE RULING FOR GOODS AND SERVICES TAX
(Constituted under Section 99 of the Maharashtra Goods and Services Tax Act, 2017)

ORDER NO. MAH/AAAR/SS-RJ/4/2019-20 Date- 23.08.2019

BEFORE THE BENCH OF

(1) Smt. Sungita Sharma, MEMBER

(2) Shri Rajiv Jalota, MEMBER

GSTIN Number	27AAACS0764L1Z6
Legal Name of Appellant	Siemens Limited
Registered Address	Plot No. 2, Siemens Limited, Sector 2, Kharghar Node, Navi Mumbai- 410210
Details of appeal	Appeal No. MAH/GST-AAAR-4/2019-20 dated 27.05.2019 against Advance Ruling No. GST-ARA-69/2018-19/B-164 dated 19.12.2018
Jurisdictional Officer	Dy. Commissioner of SGST (RAI-VAT-E004)

PROCEEDINGS

(Under Section 101 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017)

At the outset, we would like to make it clear that the provisions of both the CGST Act and the MGST Act are the same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the CGST Act would also mean a reference to the same provisions under the MGST Act.

The present appeal has been filed under Section 100 of the Central Goods and Services Tax Act, 2017 and the Maharashtra Goods and Services Tax Act, 2017 [hereinafter referred to as "the CGST Act and MGST Act"] by Siemens Limited (herein after referred to as the "Appellant") against the Advance Ruling No. GST-ARA-69/2018-19/B-164 dated 19.12.2018.

Brief Facts of the Case

A. M/s Siemens Limited (hereinafter referred as the 'Appellant') is registered under the Central and State GST legislations vide **GSTIN 27AAACS0764L1Z6** and is situated at Plot No 2, Siemens Limited, Sector 2, Kharghar Node, Navi Mumbai 410210, Maharashtra. The Appellant is a leader in technology solutions for intelligent (smart), sustainable cities, smart grid, building technologies, mobility and power distribution.

B. The Appellant has entered into six contracts with one of the major Public Sector Undertakings in the State of Haryana (herein after referred as **'the Customer'**)

for on – shore and offshore supply of goods and services on a joint venture ('JV') basis with M/s Siemens AG, Germany as the Lead Partner and M/s Sumitomo Electric Industries Ltd. Japan as another Partner.

C. The six contracts cover specific and detailed nature of supply of various goods and services. Out of which two contracts are required to be executed by the Appellant as a JV's Associate. The Third Contract vide Ref. No. CC-CS/698 – SR2/HVDC – 3249/7/G10/R/NOA-III/7215 dated 22.03.2017 (hereinafter referred to as **'on-shore Supply Contract/ Third Contract'**) provide for supply of goods on 'ex-works' basis. The Third Contract is in relation to placing of orders by customers for supply of VSC (Voltage Source Converters) based HVDC Terminals between Pugalur and North Trichur. This involves supply of equipment and services, both on off-shore as well as on-shore basis.

D. The Fifth Contract vide Ref. No. CC-CS/698 – SR2/HVDC – 3249/7/G10/R/NOA-V/7217 dated 22.03.2017 termed as 'on shore Service Contract (VSC part) (NOA-V)' (hereinafter referred to as **'on-shore Service Contract/ Fifth Contract'**). The scope of work under this contract as referred at 3.1 Clause of the Fifth Contract is as follows:

a. Local transportation, insurance and other incidental services
b. Installation charges
c. Training charges

E. The present query relates to the 'service activities' involved in their Fifth Contract. The Appellant, through an independent 'Service Contract vide Ref. RPT-HVDC/C&M/3429/CA-V/7217/BBU-03/18/533 dated 14.03.2018 (hereinafter referred to as 'Service Contract') is entrusted with the responsibility of delivery of the goods at Customer's site. For this, the Appellant engages local transporters who issue consignment notes to the Appellant for such transportation of goods and issue their freight invoices on the Appellant.

F. In turn, the Appellant discharges the GST liability under reverse charge mechanism on such freight amount being paid by it to these transporters as provided under Notification no. 13/2017 – Central Tax Rate F. No. 334/1/2017, dated 28 June 2017.

G. The Appellant charges local transportation from the customer as per the terms of the Service Contract. However, since the consignment note is already issued by

the transporters engaged by the Appellant, no subsequent additional consignment note is issued by the Appellant.

H. In terms of Serial no. 18 of Notification no. 12/2017 – Central Tax Rate F. No. 334/1/2017, dated 28 June 2017, an exemption from Central GST has been provided for services by way of transportation of goods. The relevant extract of the notification is given below:

Sr. no.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (percent)	Condition
18	Heading 9965	Services by way of transportation of goods- a. by road except the services of- i. a goods transportation agency; ii. a courier agency; b. by inland waterways	NIL	NIL

I. There is a similar exemption which has been provided under the Maharashtra Goods & Services Tax Act, 2017 vide Serial no. 18 in Notification no. 12/2017 – State Tax (Rate) no. MGST 1017/C.R.103(11)/ Taxation-1 dated 29 June 2017.

J. With respect to the local transportation charges and recovered by the Appellant from the Customer, the Appellant sought the Advance Ruling under Section 97(2) of Central Goods & Services Act, 2017 as amended ('CGST Act') and the Maharashtra Goods & Services Tax Act, 2017 as amended ('SGST Act') on the applicability of tax exemption as provided under Serial no. 18 of the Notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017.

Questions for Advance Ruling:

a. Whether the freight charges recovered by the Appellant under the aforesaid contract from the customer without issuance of consignment note will be eligible for exemption from CGST as prescribed in Serial no. 18 of Notification no. 12/2017 – Central Tax Rate F. No. 334/1/2017, dated 28 June 2017?

b. Whether the freight charges recovered by the Appellant under the aforesaid contract from the customer without issuance of consignment note will be eligible for exemption from SGST as prescribed in Serial no. 18 in Notification no. 12/2017 – State Tax (Rate) no. MGST 1017/C.R.103(11)/ Taxation-1 dated 29 June 2017?

Observations of AAR:

K. Vide the Maharashtra Advance Ruling Authority Order No. GST – ARA – 69/2018 – 19/B – 164, Mumbai dated December 19, 2018 (hereinafter referred to as '**AAR Ruling**') and received by the Appellant via email on 25 April 2019 (copy of order received on 30th April, 2019), the AAR Ruling was issued wherein both the questions put forth by the Appellant regarding the applicability of Exemption Notification were answered in negative. In order to reach such conclusions, the Ld. Member, AAR observed as follows:

i. That the scope of work is a package, for performance of all other activities *inter alia* including port handling of the plant and Equipment including mandatory Spares (except +320kV HVDC Cable and some of its associated items) to supplied from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied.

ii. That the contract is awarded for total Contract Price for the entire scope of work under this Contract. It means, it is awarded for single price which covers all activities as required for competition of the project.

iii. That there is no break – up of the Contract Price, the Contract shall, at all the times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract.

iv. That the Appellant is one of contract party in this JV to complete the work in stipulated time who is supplying the goods and services to complete the project undertaken. The Appellant is also equally responsible to this contract to achieve the target within time, otherwise it is breach of contract.

v. That the First Contract including on-shore Ex works supply of all equipment and materials cannot be executed independent of the Second Contract which is for the on-shore supply of services. It is further observed that there cannot be any 'supply of goods' without a place of supply. As the goods to be supplied under the First Contract involves movement and/ or installation at the site, the place of supply shall be location of the goods at the time when movement of goods terminates for delivery to the recipient or moved to the site for assembly or installation refer to Section 10 (1) (a) and (d) of the IGST Act, 2017. The First Contract however does not include the provision and cost of such transportation and delivery. Therefore, it does not amount to a contract for 'supply of goods' unless tied up with the Second Contract. The First Contract has 'no leg' unless supported by the Second Contract.

vi. That although awarded under two separate contract agreements, clauses under both them make it abundantly clear that notwithstanding the breakup of Contract Price, the contract shall, at all times, be construed as a single source responsibility and the Application shall remain responsibility to ensure execution of both the contracts to achieve successful competition. Any breach in any part of the First Contract shall be treated as a breach of the Second Contract, and vice versa.

vii. That the two contracts are linked by a cross fall breach clause deeming that any breach in either of the contracts is to be considered to be a breach of the other contract as well. Thus, it provides the recipient with an absolute right to either terminate both the contract or claim damages accordingly. That the 'cross fall breach clause', settles unambiguously that supply of goods, their transportation to the contractee's site delivery and related services are not separate contracts, but only form parts of an indivisible composite works contract supply, as defined under Section 2 (119) of the GST Act, with single source responsibility.

viii. That the composite nature of the contract is clear from the facts that first Contract cannot be performed satisfactorily unless the goods have been transported and delivered to the contractee's site. The two contracts for supply of the goods and allied services are not separately enforceable. The recipient has not contracted for ex – factory supply of material, but for the composite supply, namely Works Contract for Supply for VSC based HVDC Terminal and DC XLPE Cable System. Reliance was placed on decision of Hon'ble SC in case of **M/s Indure Ltd. Vs. CTO** in Order dated 20.09.2010 in C.A. No. 1123 of 2003.

ix. Placing reliance on **AAR Order No. GST – ARA – 36/ 2017 – 18/ B – 43** dated 04.06.2018 in case of Shri Dinesh Kumar Agarwal, it is held that the first and

second contracts have cross fall breach clause and thus, are in nature of 'Composite Supply of Works Contract', therefore should be taxable @18%.

x. Aggrieved by the order of Maharashtra Authority for Advance ruling, appellant wish to file an appeal with The Maharashtra Appellate Authority for Advance Ruling, Goods and Services Tax in terms of rule 106(1), Central Goods and Service Tax Rules,2017. However, appellant would like to state that, it could not submit the appeal application online as the status of order is not yet updated on GST portal and hence is filing the application manually with your good office.

GROUNDS OF APPEAL

I. Exemption Notification is applicable to the Appellant

1. On a plain reading of Entry No. 18 of the Exemption Notification, it can be seen that the following conditions would have to be cumulatively satisfied by the Appellant in order to avail the benefit of the exemption:

(i) Services are to be provided by way of transportation of goods by road.
(ii) Services are not that of Goods Transportation Agency ('GTA').

2.1 In order to determine whether the aforementioned conditions get satisfied, it is relevant to refer to the term 'GTA'. In this regard, the term 'GTA' is defined in para 2(ze) of the Exemption Notification to mean any person who provides service in relation to transport of goods by road and issues consignment note. The extract of para 2(ze) is reproduced below:

'(ze) "goods transport agency" means any person who provides service in relation to transport of goods by road and issues consignment note, by whatever name called;'

2.2 This position on taxability of GTA services is very similar to the erstwhile Service Tax regime wherein Service Tax was applicable on GTA, provided the service provider issues a consignment note to the service recipient.

2.3 In light of the above, it is amply clear that a GTA clearly includes any person who provides services in relation to transportation of goods by road and who issues a consignment note. Accordingly, it can be said that the key determining factor for qualifying as a GTA is the issuance of a consignment note. In this regard, the Appellant submits that once a consignment note is issued, there can be no doubt that the service qualifies as a GTA service. Reference in this regard is made to the decision in the case of **Bharathi Soap Works vs. CCE&C, Guntur [2008 (9) STR 80**

(Tri-Bang)] wherein, on a similar issue of consignment note pertaining to the erstwhile Service Tax regime, it was held as follows.

'The transporters are bound to issue the consignment note or Bills or Challans as defined in Rule 4(B) of Service Tax Rules or any other serially numbered bills. Failure to do so would be a violation of law."

2.4 Similar effect was also given to the decision in the case of **Essar Logistics Ltd. vs. CCE, Surat [2014 (33) STR 588 (Tri-Ahmd)].**

2.5 Further, in the decision of **M/s Om Telecom Logistics vs. CCE, Delhi (2018-TIOL-1430), Delhi – CESTAT**, it was held that a person is to be categorized as a 'goods transport agent', only when he issues the 'consignment note' in the manner prescribed in the statute.

2.6 Similar view has been taken by the Tribunals in the following matters:

a. **CCE Guntur vs. Kanaka Durga Agro Oil Products Pvt. Ltd. (2009) 15 STR 399 – Bangalore CESTAT**
b. **South Eastern Coal Fields Ltd. vs. CCE, Raipur (2016-TIOL- 2773) – Delhi CESTAT**
c. **Birla Ready Mix vs. CCE, Noida (2012-TIOL-2200) – Delhi CESTAT**
d. **Northern Coal Fields vs CCE, Allahabad (2015-TIOL-2459) – Allahabad CESTAT**
e. **Nandganj Sihori Sugar Co. Ltd. vs. CCE (MANU/CE/0194/2014) – Delhi CESTAT**

2.7 In the present case, the Appellant, by virtue of an independent and separate Service Contract is entrusted with the responsibility of delivery of the goods to the customer's premises. Given this, the Appellant engages local transporters who issue consignment notes to the Appellant for such transportation of goods. Further, the Appellant discharges the GST liability on such freight amount on reverse charge basis. Thereafter, the Appellant provides services in relation to transport of goods by road and recovers charges for local transportation from the customer.

2.8 In light of the above, it is can be seen that any person who provides services in relation to transport of goods by road and issues consignment notes will be covered under the ambit of service category of GTA services.

2.9 In the present case, it can be seen that the Appellant is purely providing the service of transportation of goods to the customer and is not issuing any

consignment note. Accordingly, it is clear that the services provided by the Appellant are that of transportation of goods by road and not that of GTA. Accordingly, given that the conditions specified in the Exemption Notification are satisfied, the Appellant is eligible for exemption contained in Entry No. 18 of the Exemption Notification.

2.10 Lastly, the Appellant also submits that it is a settled principle in law that exemption notifications have to be accorded a liberal interpretation. In this regard, the Appellant places reliance in the judgement of **Commissioner of Cus. (Prv.), Amritsar Vs Malwa Industries Ltd [2009(235) E.L.T. 214 (S.C)]**, wherein the Honourable Supreme Court had held that an exemption notification should be read literally and the same is to be construed liberally if it is found that the notification is applicable to the assessee. In this regard, the relevant extract of the judgement is reproduced below:

'10. An exemption notification should be read literally. A person claiming benefit of an exemption notification must show that he satisfies the eligibility criteria. Once, however, it is found that the exemption notification is applicable to the case of the assessee, the same should be construed liberally.'

2.11 The Appellant further submits that, it is a settled principle of law that when the language is clear and unambiguous, the intention of the legislature is to be gathered from the language used. The court cannot add words to a statute or read words into it which are not there. In this regard, the relevant extract of the judgement is reproduced below:

'The court cannot add words to a statute or read words into it which are not there. The court cannot, on an assumption that there is a defect or an omission in the words used by the legislature, correct or make up assumed deficiency, when the words are clear and unambiguous.'

II. <u>The Appellant has entered into separate contracts for supply of goods and supply of services and the same does not constitute a composite supply</u>

2.12 Before we proceed to counter the observations made by the Ruling Authority, the summary of the findings contained in the AAR Ruling are outlined in the ensuing paragraphs.

2.13 The AAR Ruling has primarily observed that two contracts i.e. Third Contract and Fifth Contract for on – shore supply of the goods and on-shore supply of services, respectively, are to be read conjointly and thus, disregarded the claim of the Appellant that both the contracts are separately enforceable. In this regard, the

main observations concluding the abovesaid understanding of the Ruling Authority are enlisted below:

- The contract is awarded for a single price which covers all the activities as required for completion of the project. There is no break-up of the contract price and the contract shall, at all the times, be construed as a single source responsibility contract and any breach in any part of the contract shall be treated as a breach of the entire contract.

- The contract is a composite supply of services of works contract as defined under Section 2(119) of the CGST Act, wherein the transportation is merely a component of the same and not a separate supply. Since the contract for on–shore supply of goods cannot be performed satisfactorily unless the goods have been transported and delivered to the contractee's site, the recipient has not contracted for ex-factory supply of material but for the composite supply.

- The two contracts are linked by a cross fall breach clause, thus, any breach in either of the two contracts will result in a breach of the other contract as well, providing the recipient with an absolute right to terminate both the contracts or claim damages accordingly. Thus, the 'cross fall breach clause' present in the contract, settles unambiguously that supply of goods, their transportation to the contractee's site delivery and related services are not separate contracts, but only forms part of an indivisible composite works contract supply.

- Reliance is placed on *M/s Indure Ltd. V. CTO in Order dated 20.09.2010 in C.A. No. 1123 of 2003* and *AAR Order No. GST – ARA – 36/ 2017 – 18/ B – 43 dated 04.06.2018* in case of *Shri Dinesh Kumar Agarwal*, to observed that the first and second contracts have cross fall breach clause and thus, they are in nature of 'composite supply of works contract' taxable @18%.

Divisibility of Contracts

2.14 At the outset, the Appellant has entered into 6 separate contracts for different on-shore and off-shore supply of goods and services. More specifically, out the six contracts, the present issue relates to two contracts i.e. Third Contract and Fifth Contract for the supply of VSCs and the supply of services respectively.

2.15 On a plain perusal of the Third and Fifth Contract, it can be clearly seen that there are separate clauses, terms/conditions which are expressly outlined in the contract governing contract price, scope of work, lead partner, other partners,

joint ventures, performance securities, bank guarantees, price components, pricing mechanism, raising of invoices, time period for completion of services, duration of the contract, etc.

2.16 In this regard, it is submitted that as exclusive clauses and conditions are clearly outlined in the Third and Fifth Contract respectively, the two contracts are separate and distinct in nature. The Third Contract contains terms governing supply of goods and the Fifth Contract contains terms governing supply of services. The scope of works and contract price for the Third Contract is reproduced below:

'Design, Ex – works supply of equipment and materials including mandatory spares from within India, Type Testing (as applicable), required for the complete execution of the +(-) 320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu – North Trichur, Kerela),....'

3.0 CONTRACT PRICE

S. No.	***Price Component***	***Amount***
i)	*Ex – works Price Component*	*EURO 82,463,172 +USD 235,584*
ii)	*Type Test Charges*	*+INR 8,345,326,393 Included*
		EURO 82,463,172 +USD 235,584 +INR 8,345,326,393

2.17 Similarly, the scope of work and contract price for the Fifth Contract is reproduced below:

'for performance of all other activities inter – alia including port handing of the Plant and Equipment including mandatory Spares (except +- 320kV HVDC Cable

and some of it's associated items) to be supplied from abroad, loading, inland transportation & insurance for delivery at site, insurance, unloading, storage & handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'First Contract' and 'Third Contract' any other services specified in the Bidding Documents referred to hereinabove.'

3.0 CONTRACT PRICE

S. No.	Price Component	Amount
i)	Local Transportation, Insurance and other Incidental Services (VSC Portion)	INR 623, 073, 872
ii)	Installation Charges (VSC Portion)	INR 2,174, 363, 480
iii)	Training Charges	Included
	Total for Fifth Contract (i+ii+iii)	**INR 2,797, 437, 352**

2.18 Further, given that the transaction with the customer is on ex-works basis where the ownership in the goods is transferred at the premises of the Appellant, it can be said that the Fifth Contract would commence only when the ownership in the goods is transferred to the customer.

2.19 Therefore, in light of the above, it is evident that each of the activities to be carried on by the Appellant under the aforementioned two contracts are independent and distinct. Accordingly, the two contracts cannot be regarded as one single contract.

2.20 Both the contracts have different scope of work, separate consideration and separate invoices. Therefore, in no circumstances, the two contracts can be said to form one composite contract.

2.21 Reliance in this regard is placed on the case of ***Ishikawajma-Harima Heavy Indus. Ltd. Vs Dir. Of Income Tax, Mumbai 2007 (6) STR 3 (S.C.)***, the assessee was to develop, design, engineer and procure equipment, materials and supplies, to erect and construct storage tanks and some other services for Petronet LNG in India. The contract, *inter alia* involved onshore services as well as offshore services. Separate prices were mentioned in the contract. One of the contentions

of the Income Tax department was that the entire contract is one composite contract and therefore, income tax is payable even on offshore services. The Supreme Court in this case held as under:-

'30. The contract is a complex arrangement. Petronet and the appellant are not the only parties thereto, there are other members of the consortium who are required to carry out different parts of the contract. The consortium included an Indian company. The fact that it has been fashioned as a turnkey contract by itself may not be of much significance. The project is a turnkey project. The contract may also be a turnkey contract, but the same by itself would not mean that even for the purpose of taxability the entire contract must be considered to be an integrated one so as to make the appellant to pay tax in India. The taxable events in execution of a contract may arise at several stages in several years. The liability of the parties may also arise at several stages. Obligations under the contract are distinct ones. Supply obligation is distinct and separate from service obligation. Price for each of the component of the contract is separate. Similarly, offshore supply and offshore services have separately been dealt with. Prices in each of the segment are also different.

31. The very fact that in the contract, the supply segment and service segment have been specified in different parts of the contract is a pointer to show that the liability of the appellant thereunder would also be different.

32. This case is clearly distinguishable from the facts of the present case, since the payment for the offshore and onshore supply of goods and services were in itself clearly demarcated and cannot be held to be a complete contract that has to be read as a whole and not in parts.

48. We would in the aforementioned context consider the question of division of taxable income of offshore services. Parties were ad idem that there existed a distinction between onshore supply and offshore supply. The intention of the parties, thus, must be judged from different types of services, different types of prices, as also different currencies in which the prices are to be paid.'

2.22 Similarly, reliance is placed on the decision of ***Linde Engineering Division v. Income Tax, (2014) 365 ITR 1,*** wherein the Hon'ble Delhi High Court relied on the decision of *Ishikawajima* (supra) and held that the impugned contract for different scope of works ranging from supply of equipment to the services, is not a composite contract and the same can be split for the purposes of taxation.

2.23 Moreover, the Hon'ble High Court of Kerala in a matter concerned with an identical issue in the case of the Appellant [***Siemens India Limited vs. State of Kerala 2003-(132)-STC-0418]***, held that when two separate contracts have been

entered into by either parties, identifying two separate works viz. supply and service, then it is wrong in holding the same as indivisible contract. In this regard, the relevant extract of the judgement is reproduced below:

'After hearing the parties, and after going through the records, we are of the opinion that the matter has to be considered again by the assessing authority. The assessing authority takes the view that in this case, there is indivisible contract. So far as this case is concerned, according to us, it is not indivisible. It contains two parts: supply order and service order. According to us, the Tribunal was not correct in holding that there was only one contract. The work order will show that it contains two parts; supply order and service order. Price is also shown separately. The right of the buyer to inspect the goods before they are transported is also preserved. So also, the goods are insured. When the goods were transmitted, the assessee transferred the title to the property to Cominco Binani Zinc Limited.'

Contracts entered into by the Appellant are not composite supply of services as work contract

2.24 It is submitted that the Appellant has not entered into a composite supply contract with the customer as erroneously observed by the Ruling Authority. In this regard, reference is made to the decision of Hon'ble High Court of Madras in ***State of Tamil Nadu v. Titanium Equipments and Anode Manufacturing Corporation, (1998) 110 STC 43*** wherein two divisible contracts, one for supply and another for supervision and installation were held not to be considered as works contract, when the clauses of both the contracts including the charges payable therein were independent. Relevant portion of the decision is extracted herein:

'5. There can be no doubt whatsoever that this contract is clearly a divisible contract, one for the supply of the TSIAs and another for supervision and installation and undertaking recoating maintenance. ***The price payable for the supply of the material was distinct from the consideration payable for the supervision of installation and commissioning and for recoating maintenance.'***

6. The parties themselves had no doubt to the nature of the arrangement they had entered into and have specifically provided for the payment of the excise duty, sales tax and all other statutory levies by the buyer.

7. It is unfortunate that the Tribunal, instead of examining the contract with reference to the various clauses therein has ***thoroughly mislead itself into***

embarking on discussion of the law relating to works contract without first making sure that this is a contract which can come within the category of works contract. The Tribunal has completely overlooked the clauses providing for the maintenance charge irrespective of the period for which the TSIA were to be maintained as also to the charges payable for the supervising engineer. It is clear from a reading of this contract that the parties intended to sell the goods, viz., titanium anodes had also entered into another arrangement for the supervision of the erection and installation of the anodes, as also the maintenance for which separate charges were payable.'

2.25 Thus, in view of the abovesaid decision, it is submitted that the view of the Ruling Authority that the Third Contract is a composite supply of works contract as defined u/s 2 (119) of the GST Act, of which transportation is merely a component and not a separate supply is erroneous. In the present case, the contractual terms of both the contacts for supply of goods and services are different from each other with different prices and conditions thereof. Hence, the Third Contract is merely for the supply of goods and is distinct vis-à-vis the terms and conditions as stipulated in the Fifth Contract. Thus, the Service Contract for the transportation of goods supplied as per Third Contract is not to fulfil the terms of the composite supply under works contract as suggested by the Ruling Authority.

2.26 In this regard, it is submitted that the Ruling Authority has failed to understand that the fact that the contracts have different price considerations for distinct activities undertaken therein, itself indicates the divisibility of the contract. It is submitted that there is no interdependence in the Third and Fifth contract. Both the contracts are two separate documents entered for two separate activities to be undertaken and invoiced separately, which are not even inclined to be bundled together. Hence, the Ruling Authority has misunderstood the divisible and distinct contract to be a works contract for composite supply without analyzing the clauses of the contracts.

2.27 Therefore, in view of the above, it is submitted that the Ruling Authority has ignored the factual position and contractual terms of both the contracts and decided the matter accordingly. It is reiterated that the two contracts for supply of goods and services are divisible contracts with different pricing mechanism and invoice. Hence, it cannot be said that the contract is indivisible and that the Appellant is providing a composite supply of services in the nature of works contract.

Services of transportation of goods are not naturally bundled with the supply of goods

2.28 Without prejudice to the above, in order to qualify two or more taxable supplies as a 'composite supply', it is essential that the supplies should be naturally bundled. In this regard, the term 'composite supply' as defined under Section 2(30) of the CGST Act as follows:

> *'(30) "composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;'*

2.29 On a plain reading of the aforesaid extract of Section 2(30) of the CGST Act, it can be seen that in order to qualify as a composite supply, the supply would have to be bundled in the ordinary course of business.

2.30 The concept of naturally bundled services was explained in the Education Guide issued by the CBEC in the year 2012 ('the Education Guide'). In this regard, the relevant extract of the Education Guide is reproduced as under for ease of reference:

> *'Bundled service means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of 'bundled service' would be air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.'*

2.31 The Education Guide also clarifies that in cases of composite transactions, the nature of such transaction would be determined by the application of the dominant nature test. Further, the Education Guide lays down the manner to determine whether services are bundled in the ordinary course of business or not. In this regard, the Education Guide specifies that the same would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below:

- The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package, then such a package could be treated as naturally bundled in the ordinary course of business.

- Majority of service providers in a particular area of business providing similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.

- Nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidentally or ancillary services which help in better enjoyment of a main service. For example, service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

- The different elements are not available separately.
- The elements are normally advertised as a package.

2.32 In light of the above, going solely by the parameters for determining whether the services of transportation are bundled, the Appellant submits that the services of transportation of goods do not *per se* get covered under the ambit of bundled services on account of the fact that the Contract with the customer is on ex-works basis, where the ownership of the goods gets transferred to the customer at the factory premises of the Appellant. Moreover, the customer had the option/right to engage any other party/person for availing the service of transportation of goods by road. However, the customer has chosen to enter into the Service Contract with the Appellant for the said transportation in an independent capacity.

Services provided by the Appellant are not in relation to immovable property

2.33 The Advance Ruling Order has stated that the contract qualifies as a works contract as defined under Section 2(119) of the CGST Act. In this regard, the Appellant humbly submits that the Order is grossly incorrect in holding that the services provided by the Appellant are in the nature of works contract services on account of the following submissions in the ensuing paragraphs.

2.34 It is relevant to refer to the term 'works contract' as defined in Section 2(119) of the CGST Act as amended. As per the said term, works contract *inter alia* includes a contract for building, construction, fabrication, completion, erection, installation 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. The extract of Section 2(119) of the CGST Act is reproduced below:

'(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;'

2.35 On a plain reading of the Section 2(119) of the CGST Act, it can be clearly seen that the term 'works contract' is in relation to immovable property. Given this, it is relevant to refer to the term 'immovable property'.

2.36 The term 'immovable property' is not defined under the GST law. Therefore, it would be relevant to refer to the meaning of the said term used in other legislations as well as judicial pronouncements which have interpreted the said term. Accordingly, reference is made to the General Clauses Act, 1897 ('General Clauses Act'). In this regard, the term is defined under Section 3(26) of the General Clauses Act as follows:

'26. "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.'

2.37 Further, it has been highlighted in various pronouncements by the judicial authorities that in cases where an object is installed/fastened to the land for better/improved efficiency of the said object, and not for the benefit of land, such object will not be considered as immovable property. Further, it has been held that if fixing of a plant to a foundation is only for providing stability to the plant and where there is no intention to make such plant permanent, the foundation provided would not change the nature of the plant and make it an immovable property.

2.38 Reliance in this regard can also be placed on the judgement of the Hon'ble Supreme Court in the matter of **Sirpur Paper Mills vs. CCE, Hyderabad [1998 (1) SCC 400]**, wherein in case of a paper making machine, it was held that merely because the machinery was attached to the earth for operational efficiency, it

does not automatically become an immovable property. If the appellant wanted to sell such goods, it could always remove it from the base and sell it. Hence, in this case as well, there was no movement indeed, however, the machine was capable of being moved which was enough for the machine to not be classified as an immovable property.

2.39 Similar view is also taken in the following judicial pronouncements:

- **Commissioner of Central Excise v. 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)**

2.40 In view of the aforesaid judgements, it can be said that goods cannot be termed as immovable property for the following reasons:

- Such plants/systems cannot be said to be 'attached to the earth'.
- The fixing of the plants/ systems to a platform/foundation is meant only to give stability to the plant/ system and keep its operation vibration free.
- The setting up of the plant/ system itself is not intended to be permanent at a given place.

2.41 In view of the aforesaid judgments, the Appellant submits that the aforesaid parameters/factors governing determination of immovable property are *per se* not fulfilled by the Appellant as the goods specified in the contracts are not such that would be attached to the earth and are not intended to be affixed permanently. Further, in the present case, specific goods supplied by the Appellant are installed only for the purpose of better functioning of the said goods and are capable of being removed and transferred from one place to another. Hence, the fact that the said goods are firmly but not permanently attached to the land, clearly means that the goods in question do not *per se* come under the ambit of immovable property.

Underlying intention of the parties to the agreement are final and conclusive

2.42 As elaborated above in detail, the Appellant reiterates that the Third and the Fifth Contract are separate and distinct contract whose terms are independent to each other. The impugned Third contract contains explicit terms indicating the ex-works price of the Contract for the on – shore supply of goods. In this regard, the Appellant submits that the intention of the Appellant was not to provide the transportation services in relation to the supply of the goods, otherwise it would

have intended to have cost+ insurance+ freight contract as opposed to Ex – works price contract. Furthermore, the ex-works price of the Contract clearly indicates that the ownership of the goods to be supplied to the customers is transferred by the Appellant at its premise itself. However, the Advance Ruling Authority ignored the factual position indicated in the terms and conditions of the contract and artificially interlinked the Third Contract and the Fifth Contract to imply the arrangement as a composite supply.

2.43 As stated above, the Appellant submits that in the present case, the Appellant has one exclusive and separate 'Third Contract' for the on-shore supply of goods and the price determination in the said contract has been done on ex-works basis. Further, the transporter undertook the local transportation activity as per an independent 'Service Contract' and the said transportation costs were charged from the customer. Hence, there is no iota of doubt in the intention of the parties entering into separate contracts for carrying out distinct and different activities of supply of goods and transportation. The subsequent transportation of the said goods are done as per the independent 'Service Contract' which is purely for the transportation activities. Thus, the Ruling Authority has erroneously read the Third Contract for supply of goods and Fifth Contract for supply of services, conjointly, to observe that the independent 'Service Contract' covers the obligations of the Appellant as promised in the Fifth Contract for the on-shore supply of services. However, the same was not the intention of the parties.

2.44 Appellant submits that in the present case, the various contracts entered by the parties are to fulfil distinct and separate obligations. It was merely for the ease of functioning and commercially viability that all the six contracts for different transactions were entered with the JV, where the Appellant was one-on-one party to impugned contracts. As an industry practice, the particular range of contracts were awarded to the Appellant. The same does not necessarily mean or imply that they are interlinked or cannot exist independent of each other. It is further submitted that as a cardinal principle of interpretation of contracts, a commercially sensible construction of a contract must be favoured.

2.45 It is thus submitted that, the interpretation by the Ruling Authority of the contract being in the nature of composite supply of goods and services is merely a semantic and syntactical analysis of a commercial contract, which has led to a conclusion that flouts the commercial sense of the business. Thus, the contract should be interpreted in a way where it must be made to yield to business sense.

2.46 Reliance is also placed on the decision of the Hon'ble Supreme Court in **VISA International Limited v. Continental Resources (USA) Limited, [2009 (2) SCC 55]**, wherein it was held that what is required to be gathered is the intention of the parties from the surrounding circumstances including the conduct of the parties and the evidence, such as exchange of correspondence between the parties etc.

2.47 Appellant further submits that, unless the authorities can provide evidence to the contrary, an agreement is required to be read on the basis that it reflects the true intention of the parties thereto as regards their respective roles and obligations. The position has also been categorically upheld in the decision of the Hon'ble Supreme Court in the case **Union of India vs. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)]**, wherein in the context of price agreed under a contract, the Apex Court observed as under:

> *'[ ] There is no material nor was it suggested that the dealings between the parties are not at arm's length. No evidence is available to show that the payment of royalty to the collaborator induced any extra commercial obligation for the price of CKD packs, parts and components. Ordinarily the Court should proceed on the basis that the apparent tenor of the agreements reflect the real state of affairs. It is, no doubt, open to the revenue to allege and prove that the apparent is not the real and that the price for the sale of the CKD packs is not the true price, and the price was determined by reckoning or taking into consideration the lumpsum payment made under the collaboration agreement in the sum of 15 million French Francs.*
>
> [ ]
>
> *The collaboration agreement entered into between the parties is clear and it is not open to the revenue to construe it differently by reading into it something which is not there. In the result, we hold that the Judgment appealed against does not merit interference and this appeal deserves to be and is hereby dismissed with costs, which we quantify at Rs. 10,000/-[ ]'. (emphasis supplied)'*

2.48 The aforesaid position has also been adopted by various Courts and Tribunals in the following decisions:

- **Mirah Exports Pvt. Ltd. vs. Collector of Customs [1998 (98) E.L.T. 3 (S.C.)]**
- **Rajasthan Spg. & Wvg. Mills ltd. vs. Commissioner of C. Ex., Jaipur [2001 (131) E.L.T.594 (Tri.-Del.)], as affirmed by the Hon'ble Supreme Court in [2007 (218) E.L.T. 641]**
- **S.S. Associates vs. Commissioner of C. Ex., Bangalore [2010 (19) S.T.R. 438 (Tri.-Bang.)]**

2.49 Therefore, in the view of above, it is submitted that the understanding of the Ruling Authority is flawed as the intentions of the parties are clear to the extent that Third and Fifth Contract are independent in nature.

Decisions relied upon by Ruling Authority are inapplicable in the present case

2.50 It is submitted that Department has placed reliance on the decision of Hon'ble Apex Court in *M/s Indure Ltd. V. CTO in Order dated 20.09.2010 in C.A. No. 1123 of 2003* to observe that both the contracts i.e. Third and Fifth Contract having cross fall breach provisions, are in the nature of composite supply of works contract, therefore taxable at the rate of 18% GST.

2.51 The Appellant submits that the reliance place on the decision in *Indure's* case is erroneous as the facts and legal issue involved therein are completely different from the present case. The main issue in the *Indure's case* was whether the import of MS Pipes and supply thereof by assessee was an inseparable part of the Contracts entered by the assessee with the other party, and the consequent eligibility to claim benefit of Section 5(2) of the Central Sales Tax Act, 1956 ('CST Act'). On the contrary, there is no such issue in the present matter as the impugned contracts have the clear absolute and unambiguous scope of work for different activities. Moreover, the relevant portion of the decision as relied upon by the Ruling Authority is mere factual observations made by the Hon'ble Apex Court as oppose to the *ratio decidendi* of the case holding that the benefit of Section 5(2) of the CST Act is available to the assessee which clearly signifies that the Court itself split the contract to determine the on-shore and off-shore supplies made by the assessee.

2.52 Further, the reliance place on the *AAR Order No. GST – ARA – 36/ 2017 – 18/ B – 43 dated 04.06.2018* in case of *Shri Dinesh Kumar Agarwal* is also erroneous as it has relied upon the factual observations made in the *Indure case* to determine whether the contract is for the composite supply.

2.53 Therefore, in the view of above, it is submitted that the Ruling Authority has erroneously placed reliance on the judicial precedents which are totally inapplicable to the present case on both factual as well as principle basis.

III. <u>The on–shore contract for supply of goods is an ex-works supply, thus the place of supply is Appellant's premise</u>

2.54 The Ruling Authority in the AAR has observed that the Third Contract with respect to on-shore ex-works supply of all equipment and materials cannot be

executed independent of the Fifth Contract. It has further observed that, there cannot be any 'supply of goods' without a place of supply. As the goods to be supplied under the Third Contract involves movement and/or installation at the site, the place of supply shall be the location of the goods at the time when movement of goods terminates for delivery to the recipient or moved to the site for assembly or installation in term of Section 10 (1) (a) and (d) of the Integrated Goods and Services Tax Act, 2017 ('IGST Act') as amended.

2.55 The Ruling Authority has further observed that, since the Third Contract does not include the provision and cost of such transportation and delivery, it therefore, does not amount to a contract for 'supply of goods' unless tied up with the Fifth Contract. The Third Contract has 'no leg' unless supported by the Fifth Contract.

2.56 The Appellant submits that the observations of the Ruling Authority is based on the incorrect understanding of the contractual terms and statutory provisions governing the concept of 'place of supply'. It has erroneously observed that there is no 'supply of goods' in the present case as there is no place of supply. With the understanding that the Third Contract involves movement and/ or installation at the site, the Ruling authority has observed that the place of supply shall be location of the goods at the time when movement of goods terminates for delivery to the recipient or moved to the site for assembly or installation in terms of Section 10 (1) (a) and (d) of the IGST Act.

2.57 The Appellant submits that the present on-shore contract for supply of goods is on the basis of ex-works price, wherein the 'place of supply' is the premise of the Appellant who is the supplier. In this regard, firstly, it is pertinent to analyze the definition of place of supply as given in Section 10 of IGST Act:

'10. (1) The place of supply of goods, other than supply of goods imported into, or exported from India, shall be as under,—

(a) where the supply involves movement of goods, whether by the supplier or the recipient or by any other person, the place of supply of such goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient;

....

(d) where the goods are assembled or installed at site, the place of supply shall be the place of such installation or assembly;'

2.58 With respect to the clause (a) of the Section 10 of IGST Act, it is submitted that the provision clearly states that where the supply involves movement of goods,

the place of supply of goods shall be the location of the goods at the time at which the movement of goods terminates for delivery to the recipient. The Third Contract contains terms and procedures of payment which clearly shows the ex–works price of the contract, which indicates that the ownership of the property in the goods passes to customer at the Appellant's premise. Therefore, the place of supply under the Third Contract will be the Appellant's premises.

2.59 In view of the above, it is submitted that in case of the ex-works contract, the supplier delivers the goods to the buyer at his factory gate. Therefore, the goods stand delivered to the buyer at the factory gate of the supplier, the movement of goods terminates at the factory gate itself. Consequently, the factory gate of the supplier becomes the place of supply. In the present case, the place of supply is the factory gate of the Appellant as the movement of the goods as per the contractual terms terminates at the Appellant's factory gate. It is for mere convenience of the customer that the Appellant has provided the transportation activities under a separate Service Contract. Hence, the understanding of the Ruling Authority is flawed in the present matter.

2.60 Similarly, with respect to clause (d) of Section 10 of IGST Act, it is submitted that the Third Contract for the supply of goods nowhere mentions that the installation and other related activities are to be carried out by the Appellant. The Ruling Authority has merely attributed such obligations based on the presumption that the Third and Fifth Contract are dependent on each other.

2.61 The abovesaid is further strengthen by the fact that the Appellant has a separate Service Contract and raise invoices for the exclusive transportation activities undertaken by a third party. It is submitted that, had the transportation activities been part of the Third Contract, the said price for the Third Contract would not have been on ex-works, but on cost+ insurance + freight basis. However, the same is not the case here. Thus, the observations of the Ruling Authority that there is no place of supply in case the goods are cleared from the factory premises of the Appellant is wrong.

2.62 Reliance in this regard is place on the decision of ***CCE, Nagpur v. Ispat Industries, 2015 (324) ELT 670 (SC)*** in relation to the erstwhile Service Tax law, wherein it was held that the buyer's place cannot be 'place of removal' in case of the Ex – works contract. Drawing an analogy from the said decision, it can be said that the buyer's place cannot qualify to be the 'place of supply'. Thus, the actual place of supply in the present case is the Appellant's premise as oppose to the buyer's premise considering the contract being ex-works in nature. The ownership of the goods to be supplied stands transferred once the goods are cleared from the

Appellant's premise. Thereafter, the transportation activity is handed over to the third party and the charges are collected from the customers in this regard. Hence, the Ruling Authority has erroneously held that there is no supply in the present case if the Third Contract is read independent of the Fifth Contract. Further, the Third Contract being an ex-works price contract has an independent clause and activities to be undertaken, which are exclusive and has no link with the Fifth Contract for the on-shore services. The two contracts are distinct and thus, are erroneously and artificially linked by the Ruling Authority.

2.63 Therefore, in view of the above, it is submitted that the place of supply in the present case is the Appellant's premise and the observation of the Ruling Authority is contrary to the settled position of facts and law.

PRAYER

Thus, in view of the above the Appellant has pleaded to:

a) set aside the Maharashtra Advance Ruling Authority Order No. GST – ARA – 69/2018 – 19/B – 164, Mumbai dated December 19, 2018 passed by Advance Ruling Authority, Mumbai;

b) decide the eligibility of the Appellant for exemption from CGST as prescribed in Serial no. 18 of Notification no. 12/2017 – Central Tax Rate F. No. 334/1/2017, dated 28 June 2017.

c) decide the eligibility of the Appellant for exemption from SGST as prescribed in Serial no. 18 in Notification no. 12/2017 – State Tax (Rate) no. MGST 1017/C.R.103(11)/ Taxation-1 dated 29 June 2017.

And grant such further and other reliefs as the nature and circumstances of the case may require.

ADDITIONAL SUBMISSIONS DATED 14.08.2019 FILED BY APPELLANT:

At this outset, the Appellant submits that the additional submissions outlined below are without prejudice to the submissions already made by the Appellant in the Appeal filed before the Hon'ble AAAR.

Decisions relied upon by the Ruling Authority are not applicable to the present case.

3. It is submitted that the Ruling Authority has placed reliance on the decision of the Hon'ble Apex Court in M/s Indure Ltd. V. CTO in Order dated 20.09.2010 in C.A. No. 1123 of 2003 - copy attached as Annexure 1 to observe that both the

contracts i.e. third and fifth contract having cross fall breach clauses, are in the nature of composite supply of works contract, which is a service and is therefore taxable at the rate of 18% Goods and Services Tax ('GST').

4. The Appellant submits that the reliance placed on the aforementioned decision is erroneous as the facts and legal issue involved therein are completely different from the present case.

5. In the case of Indure, the issue which came up for determination was when can a transaction of sale be considered as one in the course of import as contained in Section 5(2) of the Central Sales Tax Act, 1956 ('CST Act'). In this regard, the Hon'ble Apex Court observed that there must be an integral connection or inextricable link between the first sale following the import and the actual import, provided by an obligation to import arising from the statute, contract or mutual understanding or nature of the transaction which links the sale to import.

6. The Apex Court held that the Department has failed to establish that the imported goods were not used in the plant of National Thermal Power Corporation. Further, it was held that the assessee had imported the goods into India for completion of the project and that the benefit claimed under Section 5(2) of the CST Act was allowed. In this regard, the relevant extract of the decision is reproduced below:

'Conversely, in order that the sale should be one in the course of import, it must occasion the import and to occasion the import there must be integral connection or inextricable link between the first sale following the import and the actual import provided by an obligation to import arising from statute, contract or mutual understanding or nature of the transaction which links the sale to import which cannot, without committing a breach of statute or contract or mutual understanding, be sapped (sic snapped)

.....

In the facts and circumstances of the case we are of the opinion that the order passed by Division Bench of the High Court as also the orders assed by Tribunal and other Authorities cannot be sustained in law. Same are hereby set aside and quashed. Appellant is held entitled to claim benefit of Section 5(2) of the Act '

7. On the contrary, there is no such issue in the present facts of the matter of the Appellant as the contracts have clear, absolute and unambiguous scope of work for different activities. Moreover, the relevant portion of the decision as relied upon by the Ruling Authority is merely factual observations made by the Hon'ble Apex Court as opposed to the ratio decidendi of the case.

8. The Ruling Authority has further placed reliance on the AAR Order No. GST-ARA - 36/ 2017 - 18/ B - 43 dated June 4, 2018 in case of Shri Dinesh Kumar Agarwal - copy attached as Annexure 2. In this regard, the Ruling Authority has stated that the facts of the said decision inter alia pertain to an agreement for setting up for

+320V, 2X 1000MW VSC based HVDC terminals and DC XLPE Cable system. In this regard, the relevant extract as mentioned in the Impugned Order is as follows:

'Thus from the detailed facts of the case as put before us, as per the first and second contracts referred above we have no doubt to rule that both the contracts having cross fall breach provisions are in the nature of 'Composite supply of Works Contract' which is a service and would be taxable @ 18% in terms of Notification No. 11/2017 - Central tax (Rate) dated 28.06.2017. This is our consistent view as evidenced from the ruling Order No. GST-ARA- 36/2017-18/8-43 dated 04.06.2018 in case of Shri Dinesh Kumar Agarwal and the reasoning ana decision as arrived in that case is as below.'

'From the conjoined and harmonious reading of various clauses of first contract and second contact, it can be safely concluded that the agreement for setting up for+ 320KV, 2 X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kera/a) Specification No: CC-CS/698- SR2/HVDC 3249/7/Gl0/R International Competitive Bidding Project is a single indivisible contract. As the contract consists of two or more taxable supplies of goods and services and their combination, is a composite supply as defined u/s 2(30) of the GST Act. For the proposition of law that the first contract and the second contract is one single individual contract, we may find support from the decision of Supreme Court of India in case of M/s. Indure Ltd. and Anr vs. Commercial Tax Officer and Ors on 20 September, 2010 CA. No. 1123 of 2003.'

9. The Appellant submits that the observations made by the Ruling Authority is erroneous as the aforesaid extract as contained in the Impugned Order does not find any mention in the Ruling Order No. GST-ARA-36/2017-18/B-43 dated lune 4, 2018 in the decision of Dinesh Kumar Agarwal.

10. Therefore, in the view of above, it is submitted that the Ruling Authority in the Impugned Order placed reliance on the decisions which are inapplicable to the present case on both factual as well as on principle basis.

Services provided by the Appellant are not in relation to immovable property

11. Without prejudice to the above, the Appellant humbly submits that the term 'works contract' is defined under Section 2(119) of the CGST Act to inter alia mean a contract for building, construction, fabrication, completion, erection, installation, 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.

12. In this regard, it is humbly submitted that the services provided by the Appellant will qualify as works contract services only if the said services are in relation to immovable property. In the present case, the goods supplied in terms of the

contracts entered with the customers, are such that, it can be permanently removed from the Project site upon termination of the contract. Further, in the case where the goods are to be repaired, the goods can be removed from the Project site for repairs and installed back at the Project site after carrying out the repair activity.

13. It is also submitted that the goods supplied as part of the contracts entered with the customers are not attached to the earth. Moreover, the nature and description of the goods are such that the installation of the goods are not intended to be permanent at a given place. In this regard, sample photographs of the goods installed at the Project site have been attached herewith. Accordingly, it is submitted that there is no element of permanence associated with the installation of goods at the Project site.

14. As a matter of fact, there have been instances in past, that incase of any fault in the installed transformer, it is removed from the site without causing any damage to it for repair and re- installed after the repair work is complete. The Appellant wishes to place on record one such instance with Power Grid Corporation itself (Annexure 4).

15. It has been highlighted in various pronouncements by the judicial authorities that in cases where an object is installed/fastened to the land for better/improved efficiency running of the said object, and not for the benefit of land, such object will not be considered as immovable property. Further, it has been held that if fixing of a plant to a foundation is only for providing stability to the plant and where there is no intention to make such plant permanent, the foundation provided would not change the nature of the plant and make it an immovable property.

16. Reliance in this regard can also be placed on the judgement of the Hon'ble Supreme Court in the matter of Sirpur Paper Mills vs. CCE, Hyderabad [1998 (1) sec 400]- copy attached as Annexure 5, wherein in case of a paper making machine, it was held that merely because the machinery was attached to the earth for operational efficiency, it does not automatically become an immovable property. If the appellant wanted to sell such goods, it could always remove it from the base and sell it. Hence, in this case as well, there was no movement indeed, however, the machine was capable of being moved which was enough for the machine to not be classified as an immovable property.

17. The Appellant would like to submit that the Ministry of New and Renewable Energy in the context of solar plants had issued a clarification vide Circular F.No. 283/11/2017 - GRID SOLAR dated 3 April, 2018 {hereinafter referred to as 'the MNRE Circular') to specified industry players wherein it has been categorically stated that 'structural' as such do not qualify as immovable property and hence are outside the domain of works contract. The relevant extract of the MNRE Circular is reproduced below:

'Structures, as such, do not qualify as immovable property and, hence, are outside the domain of 'works contract service'.

18. In view of the aforesaid extract, the Appellant submits that in the present case, an analogy can be drawn that goods in the nature of structurals, supplied as part of the contracts entered with the customers will not qualify as immovable property and hence will be outside the domain of works contract.

19. The Appellant also submits, that the Central Board of Customs and Excise, vide 37B Order No. 58/1/2002 - CX issued under F.No. 154/26/99 - CX4 dated 15 January, 2002 - copy attached with the additional submissions, issued the following clarifications with respect to plant and machinery assembled at site:

'(v) if items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods.

(vi) If any goods installed at site (example paper making machine) are capable of being sold or shifted as such after removal from the base and without dismantling into its components/parts, the goods would be considered to be movable and thus excisable. The mere fact that the goods, though being capable of being sold or shifted without dismantling, are actually dismantled into their components/parts for ease of transportation etc., they will not cease to be dutiable merely because they are transported in dismantled condition

20. Though, in terms of Section 103 of the CGST Act, advance ruling is binding only on the applicant and the concerned officer, the Ruling Authority has gone ahead and placed reliance on the AAR Order No. GST- ARA- 36/ 2017 - 18/ B - 43 dated June 4, 2018 in case of Shri Dinesh Kumar Agarwal which is not applicable in the appellant's case.

21. Further, it is pertinent to mention that in a similar case the same Ruling authority while deciding the case of M/s. NR Energy Solutions India Pvt. Ltd. (GST-ARA-83/2018-19/B-03 dated 8.01.19) - copy attached as Annexure 7 had taken a divergent view and held that supply of Relay & Protection Panels and Substation Automation System {SAS), complete design, manufacture, packing, insurance, transport and delivery to sites, training, installation, testing and commissioning of protection panels with SAS compatible to IEC 61850 protocol, to control and operate the 220 KV, 132 KV & 33 KV feeders, Power Transformers and equipment cannot be treated as works contract."

22. In view of the aforesaid submissions and clarifications relied upon, the Appellants submits that the goods installed at the Project site are not permanently affixed to the earth and can be dismantled/removed upon termination of the contract entered into with customers if any or at the time of carrying out repairs on the said goods. Therefore, it is submitted that the services

provided by the Appellant are not in relation to immovable property and will accordingly not qualify as works contract services.

23. On the basis of the aforesaid additional submissions, the Appellant prays that the Honorable AAAR set asides the Impugned Order passed by the Ruling Authority.

HEARING

A personal Hearing in the matter was conducted on 14.08.2019, wherein Shri Vikash Garg and Shri Mahesh Parnerkar, Chief Manager (Indirect Taxation) appeared on behalf of the Appellant, and reiterated their earlier written submissions, which were made at the time of filing of this appeal and also filed additional submissions (supra) at the time of the personal hearing. On behalf of the Respondent Shri Kamlesh Nagare, Dy. Commissioner, State Tax appeared and reiterated the same submissions, which they have made before the Advance Ruling Authority. Copy of the additional submission was enclosed to the appeal. Both the submissions of the appellant are kept on record.

FACTS OF THE CASE

24. We have gone through the facts of the case, oral and written submissions made by the Appellant as well as by the jurisdictional officer and the applicable provisions of the GST laws in this regard.

25. M/s Siemens Limited (hereinafter referred as the 'Appellant') is registered under the Central and State GST legislations vide **GSTIN 27AAACS0764L1Z6**. The Appellant is a leader in technology solutions for intelligent (smart), sustainable cities, smart grid, building technologies, mobility and power distribution.

26. The Appellant as Joint venture associate, has entered into contract with M/s Power grid corporation of India Ltd (in short 'PGCIL'), one of the major Public Sector Undertakings in the State of Haryana (herein after referred as 'PGCIL') on a joint venture ('JV') basis along with M/s Siemens AG, Germany as the Lead Partner and M/s Sumitomo Electric Industries Ltd. Japan as another Partner. The contract entered by appellant with PGCIL is for on-shore and off-shore supply of goods and services for complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur. The said contract of supply of goods and services is divided into 6 contracts by Joint Venture.

The six contracts cover specific and detailed nature of supply of various goods and services to be executed by members of JV. Out of these 6 contracts two

contracts i.e. third and fifth contract are required to be executed by the Appellant as a JV's Associate.

The Third Contract (hereinafter referred to as **'on-shore Supply Contract/ Third Contract'**) provides for supply of equipment and materials including mandatory spares except +320kV HVDC Cable (including some of its associated items) from within India and Type Testing (as applicable), required for the complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur.

The Fifth Contract termed as 'on shore Service Contract (VSC part) (NOA-V)' (hereinafter referred to as **'on-shore Service Contract/ Fifth Contract'**) provides for the subject package, for performance of all other activities inter-alia including port handling of the plant and Equipment including mandatory Spares (except +320kV HVDC Cable and some of its associated items) to be supplied from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'First Contract' and 'Third Contract' and any other services specified in the Bidding Documents referred to hereinabove. The scope of work under this contract as referred at 3.1 Clause of the Fifth Contract is as follows:

a. Local transportation, insurance and other incidental services
b. Installation charges
c. Training charges

27. The present query raised by the appellant in Advance Ruling as well in this appeal relates to the 'transportation activities' involved in their Fifth Contract. The Appellant is entrusted with the responsibility of delivery of the goods at PGCIL's site. For this, the Appellant engages local transporters who issue consignment notes to the Appellant for such transportation of goods and issue their freight invoices on the Appellant.

Appellant discharges the GST liability under reverse charge mechanism on such freight amount being paid by it to these transporters as provided under Notification no. 13/2017 – Central Tax Rate dated 28 June 2017.

The Appellant charges local transportation from the PGCIL as per the terms of the Service Contract. However, since the consignment note is already issued by the transporters engaged by the Appellant, no subsequent additional consignment note is issued by the Appellant.

With respect to the local transportation charges recovered by the Appellant under the aforesaid contract from the PGCIL without issuance of a consignment note, the Appellant sought the Advance Ruling under Section 97(2) of Central Goods & Services Act, 2017 as amended ('CGST Act') and the Maharashtra Goods & Services Tax Act, 2017 as amended ('SGST Act'), on the applicability of tax exemption as provided under Serial no. 18 of the Notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017.

28. In terms of Serial no. 18 of Notification no. 12/2017 – Central Tax Rate, dated 28 June 2017, an exemption from Central GST has been provided for services by way of transportation of goods. The relevant extract of the notification is given below:

Sr. no.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (percent)	Condition
18	Heading 9965	Services by way of transportation of goods- c. by road except the services of- iii. a goods transportation agency; iv. a courier agency; d. by inland waterways	NIL	NIL

Applicant submitted before the Advance Ruling Authority that an exemption from payment of GST has been provided for services by way of transportation of goods by road other than services of GTA and a courier agency in terms of the said notification. Applicant in support of his exemption claim has strongly relied on the fact that he has not issued consignment notes to the service recipient and thus not a GTA as defined in the said notification.

Applicant also submitted that support taken by the Advance Ruling Authority of Advance Rulings of other States are not binding and Contract under consideration is not a works contract as it does not result in an immoveable property. The applicant has separate contracts for supply of goods and services

and cross fall breach clause in the two contracts does not alter the nature of contracts to composite supply. Applicant supported his above contention by various judgment & documents which are reproduced in the first part of this order under the heading "Grounds of appeal".

ORDER PASSED BY THE ADVANCE RULING AUTHORITY

29. Advance ruling was issued by the advance ruling authority wherein both the questions put forth by the Appellant regarding the applicability of Exemption Notifications under MGST Act & CGST Act were answered in negative. In order to reach such conclusions, the Ld. Members, AAR observed as follows:

That the First Contract including on-shore Ex works supply of all equipment and materials cannot be executed independent of the Second Contract which is for the on-shore supply of services. It is further observed that there cannot be any 'supply of goods' without a place of supply. As the goods to be supplied under the First Contract involves movement and/ or installation at the site, the place of supply shall be location of the goods at the time when movement of goods terminates for delivery to the recipient or moved to the site for assembly or installation refer to Section 10 (1) (a) and (d) of the IGST Act, 2017. The First Contract however does not include the provision and cost of such transportation and delivery. Therefore, it does not amount to a contract for 'supply of goods' unless tied up with the Second Contract. The First Contract has 'no leg' unless supported by the Second Contract.

That although awarded under two separate contract agreements, clauses under both them make it clear that notwithstanding the breakup of Contract Price, the contract shall, at all times, be construed as a single source responsibility and the applicant shall remain responsible to ensure execution of both the contracts to achieve successful competition. Any breach in any part of the First Contract shall be treated as a breach of the Second Contract, and vice versa.

That the two contracts are linked by a cross fall breach clause deeming that any breach in either of the contracts is to be considered to be a breach of the other contract as well. Thus, it provides the recipient with an absolute right to either terminate both the contract or claim damages accordingly. That the 'cross fall breach clause', settles unambiguously that supply of goods, their transportation to the contractee's site delivery and related services are not separate contracts, but only form parts of an indivisible composite works contract supply, as defined under Section 2 (119) of the GST Act, with single source responsibility.

That the composite nature of the contract is clear from the facts that first Contract cannot be performed satisfactorily unless the goods have been transported and delivered to the contractee's site. The two contracts for supply of the goods and allied services are not separately enforceable. The recipient has not contracted for ex – factory supply of material, but for the composite supply, namely Works Contract for Supply for VSC based HVDC Terminal and DC XLPE Cable System. Reliance was placed on decision of Hon'ble SC in case of **M/s Indure Ltd. Vs. CTO** in Order dated 20.09.2010 in C.A. No. 1123 of 2003 and also on **AAR Order No. GST – ARA – 36/ 2017 – 18/ B – 43** dated 04.06.2018 in case of Shri Dinesh Kumar Agarwal.

It is held that the first and second contracts have cross fall breach clause and thus, are in nature of 'Composite Supply of Works Contract', therefore should be taxable @18%.

30. Aggrieved by the order of Maharashtra Authority for Advance ruling, the appellant has filed present appeal before us. Appellant has further stated that, he could not submit the appeal application online as the status of order is not yet updated on GST portal and hence is filing the application manually.

OBSERVATIONS

31. In this matter, the core issue raised before us is related to the applicability of exemption from levy of tax as provided under entry Sr. 18 of Notification No. 12/2017 of CGST Act, on the transaction of supply of transportation services to PGCIL under service contract (i.e. Fifth contract). Before deciding the applicability of notification entry, it is necessary to examine the terms of contracts made between the parties, nature of transaction and intention of the PGCIL.

32. The applicant as an associate of the Joint Venture of M/S SIEMENS AG, GERMANY (lead partner) and M/S SUMITOMO INDUSTRIES LIMITED, JAPAN (other partner) has been awarded contract for on-shore and off-shore supply of goods and services for complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur (hereinafter referred as 'whole contract')

33. The whole contract involves supply of equipment's and services both on off-shore as well as on-shore basis. For certain reasons the JV has proposed the division of scope into six contracts as given below:-

1. off shore supply contract (VSC part) (First Contract)

2. off shore supply contract (cable system part) (Second Contract)

3. **on shore supply contract (VSC part)** (Third Contract)

4. on shore supply contract (cable system part) (Fourth Contract)

5. **on shore services contract (VSC part)** (Fifth Contract)

6. on shore services contract (cable system part) (Sixth Contract)

The above mentioned division is as proposed by JV executing the entire contact. More specifically, out these six contracts, the present issue relates to two contracts i.e. Third Contract and Fifth Contract for the supply of goods and the supply of services respectively, awarded to the appellant as associates of JV.

34. The relevant portions of the Third and Fifth contracts are reproduced hereunder for the better understanding of the terms of contracts.

(i) The First contract - for On-Shore Supply Contract-I--

Sub.: Notification of Award for On-Shore Supply Contract-I for 320KV, 2 X 1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh. Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kerala)

Specification No: CC-CS/698-SR2/HVDC-3249/7/G10/R International Competitive Bidding. Clauses -

2.0 AWARD OF CONTRACT AND ITS SCOPE --

*2.1 We confirm having accepted the Bid of the JV of SIEMENS AG and SUMITOMO (referred to at para 1.4, 1.7 and 1.9 above) read in conjunction with all the specifications, terms and conditions of the Bidding Documents including Record Notes of Clarification Meetings referred to at para 1.3, 1.5 and 1.6 above (hereinafter referred to as "Bidding Documents') and specific confirmations recorded in the Record Notes of Post Bid Discussions (referred to at para 1.10 above), and award on you, the **'On-Shore Supply Contract-I' (also referred to as the 'Third Contract') for the subject package, for supply of equipment and materials including mandatory spares except +320kV HVDC Cable (including some of its associated items) from within India and Type Testing (as applicable), required for the complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur** associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North*

Trichur, Kerala), as detailed in the Bidding Documents referred to hereinabove. The scope of work under this Contract inter-alia includes the following:

Design, Ex-works supply of equipment and materials including mandatory spares from within India, Type Testing (as applicable), required for the complete execution of the 1320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kerala),

The scope of work under this Notification of Award (NOA) shall also include all such items which are not specifically mentioned in the Bidding Documents and/or the JV's bid but are necessary for the successful completion of the scope under the Contract for 1320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), unless otherwise specifically excluded in the Bidding Documents or in this NOA.

2.2 *As per para 1.4 above and as tied up in Clarification Meetings, we have also notified the following Notifications of Awards:*

(a) on the Lead Partner of JV i.e. SIEMENS AG on behalf of JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698 SR2/HVDC-3249/7/G10/R/NOA-17213 dated 22.03.2017 for award of 'Off-Shore Contract-1' (also referred to as the 'First Contract') for the subject package, covering inter-alia, all works to be performed in countries outside India including CIF supply of all equipment and materials including mandatory spares except +320kV HVDC Cable(including some of its associated items), to be supplied from abroad including corresponding type tests and training to be conducted abroad, required for the complete execution of the + 320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents.

(b) on the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO, vide our Notification of Award Ref. No. ***CC-CS/698-SR2/HVDC-3249/7/G10/R/NOA-11/7214 dated 22.03.2017*** *for award* ***of 'Off-Shore Contract-II*** *(also referred to as the 'Second Contract') for the subject package, for design, engineering, manufacture and CIF supply of +320kV HVDC Cable and some of its associated items* ***including mandatory spares (if any), Type Testing and Training to be conducted outside India,*** *required for the complete execution of the +320KV, 2X1000MW VSC based*

HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents;

(c) on the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698-SR2HVDC-3249/7/G10/R/NOA-IV/7216 dated 22.03.2017 for award of 'On-Shore Supply Contract-II' (also referred to as the 'Fourth Contract) for the subject package, for supply of some items including mandatory spares (if any) for +320kV HVDC Cable system from within India and Type Testing (as applicable), required for the complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents.

(d) on you vide our Notification of Award Ref. No. CC-CS/698 SR2/HVDC-3249/7/G10/R/NOA-V/7217 dated 22.03.2017 for award of On-Shore Services Contract-I' (also referred to as the 'Fifth Contract') for the subject package, for performance of all other activities inter-alia including port handling of the Plant and Equipment including mandatory Spares (except +320kV HVDC Cable and some of it's associated items) to be supplied from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'First Contract' and 'Third Contract and any other services specified in the Bidding Documents;

(e) on the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698-SR2/HVDC-3249/7/G.10/R/NOA-VI/7218 dated 22.03.2017 for award of 'On-Shore Services Contract-II (also referred to as the Sixth Contract) for the subject package, for performance of all other activities inter-alia including port handling of the Plant and Equipment including mandatory Spares for +320kV HVDC Cable and some of its associated items to be supplied from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'Second Contract and 'Fourth Contract and any other services specified in the Bidding Documents,

Notwithstanding the award of work under six separate Contracts in the aforesaid manner, the JV shall be overall responsible to ensure the execution of all the six Contracts to achieve successful completion and Taking Over of the works covered under the package and Operational Acceptance by the Employer as per the requirements stipulated in the Bidding Documents. It is expressly understood and agreed by the JV that any default or breach by the JV partners under the 'First Contract' and/or 'Second Contract and/or the 'Fourth Contract and/or the 'Sixth Contract and/or breach by the Associate of JV - SIEMENS-I under the 'Fifth Contract shall automatically be deemed as a default or breach of this 'Third Contract' also and vice-versa, *and any such default or breach or occurrence giving us a right to terminate the 'First Contract and/or 'Second Contract and/ or 'Fourth Contract and/ or 'Fifth Contract and/or the 'Sixth Contract', either in full or in part, and/or recover damages under those contract(s), shall give us an absolute right to terminate this Contract at your risk, cost and responsibility, either in full or in part and/or recover damages under this 'Third Contract as well. However, such default or breach or occurrence in the 'First Contract' and/or 'Second Contract' and/or 'Fourth Contract and/or 'Fifth Contract and/or the 'Sixth Contract', shall not automatically relieve you any of your obligations under this 'Third Contract.* ***It is also expressly understood and agreed by you that the equipment/materials supplied by you under this 'Third Contract, by SIEMENS AG on behalf of JV under the 'First Contract', by SUMITOMO on behalf of JV under the Second Contract and Fourth Contract identified scope of works in respective Contracts, when erected, installed and commissioned by you under the 'Fifth Contract'/ by SUMITOMO under the Sixth Contract shall give satisfactory performance in accordance with the provisions of the Contract(s).***

3.0 CONTRACT PRICE-

3.1. The total Contract Price for the entire scope of work under this Contract shall be EURO 82,463,172 + USD 235,584 + INR 8,345,326,393 (Euro Eighty Two Million Four Hundred Sixty Three Thousand One Hundred Seventy Two plus US Dollar Two Hundred Thirty Five Thousand Five Hundred Eighty Four plus Indian Rupees Eight Billion Three Hundred Forty Five Million Three Hundred Twenty Six Thousand Three Hundred Ninety Three only) as per the following break-up:

Sr. No	*Prise Component*	*Amount*
1	*Ex-works Price Component*	*EURO 82,463,172* *+USD 235,584* *+INR 8,345,326,393*
2	*Type Test Charges* *Total for Third Contract (1+2)*	*Included* *EURO 82,463,172*

		+USD 235,584 +INR 8,345,326,393

3.2 **.Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire Contract.**

5.0. For release of advance payment (admissible as per the Bidding Documents) equal to 10% of the

Ex-works Price component of the Contract Price for Main Equipment (excluding spares), you are,

inter-alia, required to furnish Bank Guarantee for the equivalent advance amount, as detailed at

APPENDIX (NOA)-3. Further, please note that furnishing of all the Contract Performance Securities

under the 'First Contract', 'Second Contract, 'Third Contract', 'Fourth Contract', 'Fifth Contract' and

'Sixth Contract by the JV and Contract Performance Securities under "Third Contract' and 'Fifth

Contract' by you (Associate of the JV i.e. SIEMENS-I) shall be one of the conditions precedent for

release of advance under this Contract.

7.0 The schedule for Taking Over/Time for Completion of the Facilities by the Employer upon successful completion of the +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala) and the Additional Time for Completion for all contractual purposes in line with the provisions of the Bidding Documents shall be as follows:

Sr. No	Completion (Taking Over) of:	Duration from the effective date of contract
Time for Completion		
1.	+320KV, two 1000MW Voltage Source Converter (VSC) based HVDC transmission system between Pugalur (Tamil Nadu) and	

	North Trichur (Kerala) a. Monopole 1 and associated Cable system b. Monopole 2 and associated Cable system	 38 months 38 months
	Additional Time for Completion#: 30 weeks	

#Additional Time for Completion shall be subject to levy of Liquidated Damages (LD) as per provisions of Bidding Documents'

* The Time for Completion (Taking Over) for the Replica along with Real Time Simulator and IPSRTS for real time studies included in the above Facilities will be 45 months.

8.0 This Notification of Award constitutes formation of the Contract and comes into force with effect from the date of issuance of this Notification of Award.

9.0 You shall enter into a Contract Agreement with us within twenty-eight (28) days from the date of this Notification of Award.

35. ***ii) Second contract - for On-Shore Services Contract-I***

Notification of Award for <u>On-Shore Services Contract</u>-I for + 320KV, 2 X 1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kerala) Specification No: CC-CS/698-SR2/HVDC-3249/7/G10/.R International Competitive Bidding.

Clauses--

2.0 AWARD OF CONTRACT AND ITS SCOPE--

We confirm having accepted the Bid of the JV of SIEMENS AG and SUMITOMO (referred to at para 1.4, 1.7 and 1.9 above) read in conjunct all the specifications, terms and conditions of the Bidding Documents including Record Notes of Clarification Meetings referred to at para 1.3, 1.5 and 1.6 above (hereinafter referred to as "Bidding Documents") and specific confirmations recorded in the Record Notes of Post Bid Discussions (referred to at para 1.10 above), and award on you, the ***<u>'On-Shore Services Contract-I' (also referred to as the 'Fifth Contract) for the subject package, for performance of all other activities inter-alia including port handling of the plant and Equipment including mandatory Spares (except +320kV HVDC Cable and some of its associated items) to be supplied</u>***

from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'First Contract' and 'Third Contract' and any other services specified in the Bidding Documents referred to hereinabove.

The scope of work under this Notification of Award (NOA) shall also include all such items which are not specifically mentioned in the Bidding Documents and/ or the JV's bid but are necessary for the successful completion of the scope under the Contract for S320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), unless otherwise specifically excluded in the Bidding Documents or in this NOA.

2.2 .As per para 1.4 above and as tied up in Clarification Meetings, we have also notified the following Notifications of Awards: **m**

(a) on the Lead Partner of JV i.e. SIEMENS AG on behalf of JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698 ***SR2/HVDC-3249/7/G10/R/NOA-1/7213 dated 22.03.2017*** *for award of 'Off-Shore Contract-I' (also referred to as the 'First Contract') for the subject package, covering inter-alia, all works to be performed in countries outside India including CIF supply of all equipment and trials including mandatory spares except +320kV HVDC Cable(including some of its associated items), to be supplied from abroad including corresponding type tests and training to be conducted abroad, required for the complete execution of the + 320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents.*

(b) on the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO, vide our Notification of Award Ref. No. ***CC-CS/698-SR/HVDC-3249/7/G10/R/NOA-11/7214*** *dated 22.03.2017 for award of 'Off-Shore Contract-II (also referred to as the 'Second Contract') for the subject package, for design, engineering, manufacture and CIF supply of +320kV HVDC Cable and some of its associated items including mandatory spares (if any), Type Testing and Training to be conducted outside India, required for the complete execution of the +320KV, 2X1000MW FSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western*

region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents;

(c) On the Associate of the JV i.e. M/s. Siemens Limited, India (SIEMENS-I), vide our Notification of Award Ref. No. CC-CS/698-SR2HVDC 3249/7/G10/R/NOA-II/7215 dated 22.03.20/7 for award of 'On- Shore Supply Contract-r (also referred to as the 'Third Contract') for the subject package, for supply of equipment and materials including mandatory spares except +320kV HVDC Cable (including some of its associated items) from within India and Type Testing (as applicable), required for the complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kerala), as set forth in the Bidding Documents;

(d) On the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698-SR2/HVDC-3249/7/G10/R/NOA-IV/7216 dated. 22.03.2017 for award of 'On-Shore Supply Contract-II' (also referred to as the 'Fourth Contract) for the subject package, for supply of some items including mandatory spares (if any) for +320kV HVDC Cable system from within India and Type Testing (as applicable), required for the complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala), as set forth in the Bidding Documents.

(e) On the Other Partner of the JV i.e. SUMITOMO on behalf of the JV of SIEMENS AG and SUMITOMO vide our Notification of Award Ref. No. CC-CS/698-SR2/HVDC-3249/7/G10/R/NOA-VI/7218 dated 22.03.2017 for award of 'On-Shore Services Contract-II' (also referred to as the 'Sixth Contract') for the subject package, for performance of all other activities inter-alia including port handling of the plant and Equipment including mandatory Spares for +320kV HVDC Cable and some of its associated items to be supplied from abroad, loading, inland transportation and insurance for delivery at site, insurance, unloading, storage and handling at site, installation including civil works, testing and commissioning including Performance Testing in respect of all Plant and Equipment supplied under both 'Second Contract' and 'Fourth Contract and any other services specified in the Bidding Documents.

Notwithstanding the award of work under six separate Contracts in the aforesaid manner, the JV shall be overall responsible to ensure the execution of all the six Contracts to achieve successful completion and Taking Over of the works covered under the package and Operational Acceptance by the Employer as per the requirements stipulated in the Bidding Documents. It is expressly

understood and agreed by the JV that any default or breach by the JV partners under the 'First Contract' and/or 'Second Contract and/ or the 'Fourth Contract' and/ or the 'Sixth Contract and/or breach by the Associate of JV-SIEMENS-1 under the 'Third Contract shall automatically be deemed as a default or breach of this 'Fifth Contract also and vice-versa, *and any such default or breach or occurrence giving us a right to terminate the First Contract' and/ or 'Second Contract and/or 'Third Contract and/or 'Fourth Contract and/or the 'Sixth Contract', either in full or in part, and/or recover damages under those contract(s), shall give us an absolute right to terminate this Contract at your risk, cost and responsibility, either in full or in part and/or recover damages under this Fifth Contract as well.*

However, such default or breach or occurrence in the First Contract' and/ or 'Second Contract and/or 'Third Contract and/or 'Fourth Contract' and/ or 'Sixth Contracts, shall not automatically relieve you any of your obligations under this 'Fifth Contract. It is also expressly understood and agreed by you that the equipment/materials supplied by you under the 'Third Contract, by SIEMENS AG on behalf of JV under the 'First Contract, by SUMITOMO on behalf of JV under the 'Second Contract and Fourth Contract', as per identified scope of works in respective Contracts, when erected, installed and commissioned by you under this 'Fifth Contract'/ by SUMITOMO under the 'Sixth Contract shall give satisfactory performance in accordance with the provisions of the Contract(s)..

3.0 CONTRACT PRICE -

3.1 The ***total Contract Price for the entire scope of work under this Contract*** *shall be INR 2,797,437,352 (Indian Rupees Two Billion Seven Hundred Ninety Seven Million Four Hundred Thirty Seven Thousand Three Hundred Fifty Two only) as per the following break-up:*

Sr. No.	Price Component	Amount
I	Local Transportation, Insurance and other Incidental Services (VSC Portion)	INR 623,073,872
Ii	Installation Charges (VSC Portion)	INR 2,174,363,480
iii	Training Charges Total for Fifth Contract (i+ii+iii)	Included INR 2,797,437,352

3.2 ***Notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire contract.***

4.0 You are required to furnish, at the earliest, the Performance Securities for an amount equal to 10% (Ten percent) of the Contract Price as detailed at **APPENDIX (NOA)-2**, in line with provisions of the Bidding Documents.

5.0 All the bank guarantees shall be furnished from eligible bank(s) as described in the Bidding Documents.

6.0 The schedule for Taking Over/Time for Completion of the Facilities by the Employer upon successful completion of the +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu- North Trichur, Kerala) and the Additional Time for Completion for all contractual purposes in line with the provisions of the Bidding Documents shall be as follows:

Sr. No	Completion (Taking Over) of:	Duration from the effective date of contract
Time for Completion		
1.	+320KV, two 1000MW Voltage Source Converter (VSC) based HVDC transmission system between Pugalur (Tamil Nadu) and North Trichur (Kerala) a. Monopole 1 and associated Cable system b. Monopole 2 and associated Cable system	 38 months 38 months
	Additional Time for Completion#: 30 weeks	

Additional Time for Completion shall be subject to levy of Liquidated Damages (LD) as per provisions of Bidding Documents

*The Time for Completion (Taking Over) for the Replica along with Real Time Simulator and IPSRTS for real time studies included in the above Facilities will be 45 months.

7.0 This Notification of Award constitutes formation of the Contract and comes into force with effect from the date of issuance of this Notification of Award.

36. Now in the light of above contracts and whole contract we shall discuss the issues raised in the grounds of appeal by the appellant.

1. **Exemption from payment of tax as per notification (Serial no. 18 in Notification No. 12/2017 – Central Tax (Rate) dated 29 June 2017), on the transportation charges is available to the Appellant or not on the ground that the appellant has entered into separate contracts for supply of goods and supply of services and the same does not constitute a composite supply**

Detail contention of the appellant is reproduced in the first part of the order under the heading grounds of appeal. The main line of arguments of appellant is as under;

Appellant has submitted that on a plain perusal of the Third and Fifth Contract, it is clearly seen that there are separate clauses, terms/conditions which are expressly outlined in the contract governing contract price, scope of work, lead partner, other partners, joint ventures, performance securities, bank guarantees, price components, pricing mechanism, raising of invoices, time period for completion of services, duration of the contract, etc. As exclusive clauses and conditions are clearly outlined in the Third and Fifth Contract respectively, the two contracts are separate and distinct in nature. The Third Contract contains terms governing supply of goods and the Fifth Contract contains terms governing supply of services.

Further, given that the transaction with the PGCIL is on ex-works basis where the ownership in the goods is transferred at the premises of the Appellant, it can be said that the Fifth Contract would commence only when the ownership in the goods is transferred to the PGCIL. Therefore, in light of the above, it is evident that each of the activities to be carried on by the Appellant under the aforementioned two contracts are independent and distinct. Accordingly, the two contracts cannot be regarded as one single contract.

Both the contracts have different scope of work, separate consideration and separate invoices. Therefore, in no circumstances, the two contracts can be said to form one composite contract and should be treated separately. The second contract of provision of services of transportation should be treated separately for levy of tax and appellant has submitted that he is purely providing the service of transportation of goods to the PGCIL and is not issuing any consignment note. Services provided by the Appellant are that of transportation of goods by road and not that of GTA. Accordingly, given that the conditions specified in the Exemption Notification are satisfied, the Appellant is eligible for exemption contained in Entry No. 18 of the Exemption Notification. No. 12/2017 – Central Tax (Rate) dated 29 June 2017. In support of this appellant has relied on no of judgments which are reproduced in grounds of appeal.

Whole line of arguments of the appellant regarding exemption on the transportation of service is in fact without considering the terms and obligations created under the both contracts of supply of goods and services and is based on the theory that the supply of service contract is in total isolation from the whole contract. Here appellant is isolating transportation services not only from other services envisaged under on-shore service contract (Fifth contract) but also isolating it from whole contract of supply of goods and services allotted to the JV in which appellant is an associate. Hence here most important questions is to verify whether the transportation services and other services provided by the appellant are altogether separate contract independent of any obligation cast on the appellant under the whole contract or not.

37. We have gone through the contention of appellant and also the terms of the both contracts. After going through the terms of contracts it is seen that though there are two contracts one for supply of goods and other for supply of services, in fact these two contracts are not separate or independent contracts as envisaged by the appellant but are parts of the one whole contract which are separated by the appellant for the reason known to him. Below are the some important paras from the contract which clearly throw light on the nature of the two contracts in relation to whole contract which is divided in six contracts and their interrelation with each other.

In the para 2.2 of the Fifth contract i.e. onshore service contract it is mentioned that,

Notwithstanding the award of work under six separate Contracts in the aforesaid manner, the JV shall be overall responsible to ensure the execution of all the six Contracts to achieve successful completion and Taking Over of the works covered under the package and Operational Acceptance by the Employer as per the requirements stipulated in the Bidding Documents. It is expressly understood and agreed by the JV that any default or breach by the JV partners under the 'First Contract' and/or 'Second Contract and/ or the 'Fourth Contract' and/ or the 'Sixth Contract and/or breach by the Associate of JV-SIEMENS-1 under the 'Third Contract shall automatically be deemed as a default or breach of this 'Fifth Contract also and vice-versa, and any such default or breach or occurrence giving us a right to terminate the First Contract' and/ or 'Second Contract and/or 'Third Contract and/or 'Fourth Contract and/or the 'Sixth Contract', either in full or in part, and/or recover damages under those contract(s), shall give us an absolute right to terminate this Contract at your risk, cost and responsibility, either in full or in part and/or recover damages under this Fifth Contract as well.

However, such default or breach or occurrence in the First Contract' and/ or 'Second Contract and/or 'Third Contract and/or 'Fourth Contract' and/ or 'Sixth Contracts, shall not automatically relieve you any of your obligations under this 'Fifth Contract. It is also expressly understood and agreed by you that the equipment/materials supplied by you under the 'Third Contract, by SIEMENS AG on behalf of JV under the 'First Contract, by SUMITOMO on behalf of JV under the 'Second Contract and Fourth Contract', as per identified scope of works in respective Contracts, when erected, installed and commissioned by you under this 'Fifth Contract'/ by SUMITOMO under the 'Sixth Contract shall give satisfactory performance in accordance with the provisions of the Contract(s)..

Regarding pricing of the contract, in clause 3.2 it is mentioned that,

"**Notwithstanding the break-up of contact price, the contract shall at all times be construed as a single source responsibility contract and any breach in any part of the contract shall be treated as breach of the entire contract.**"

Further in para 6.0 time period assigned for completion of contract is for whole contract of supply goods and services along with commissioning of the project and no separate time period is mentioned for supply of goods and supply of services.

38. It is seen that these paras are included in both of these contracts i.e. Third and Fifth contracts of supply of goods and supply of services resp. The contracts are awarded to the JV of SIEMENS AG and SUMITOMO in which the appellant is associate of JV.

39. We find that the Third Contract includes on shore ex works supply of all equipment's and materials. The Fifth contract includes on shore services i.e. all other activities like transportation, insurance and all incidental services, installation along with civil work, training required to be performed for complete execution of the VSC based HVDC Terminal and DC XLPE Cable package. It is apparent that the Third Contract cannot be executed independent of the Fifth Contract. It is clear from the contract that not only the third contract and fifth contract is interdependent but all six contracts are interrelated with each other. All the contracts are interdependent. Further the contracts are covered by the cross fall breach clause which means breach of one will be deemed as breach of other. The work of Taking Over/Time for Completion of the project and handing over to the Employer upon successful completion is to be completed within 38 months.

40. The Contractee is aware of such interdependence of the two contracts. Although there is breakup of contract price for supply of goods & supply of services and also awarded under two separate contract agreements, clauses under both of these contracts make it abundantly clear that notwithstanding the breakup of the Contract Price, the contract shall, at all times, be construed as a single source responsibility and the Applicant shall remain responsible to ensure execution of

both the contracts to achieve successful completion. Thus these two contracts for supply of goods & supply of services are naturally bundled under the whole contract. It is expressly understood and agreed by the appellant along with JV partners that while entering into Fifth contract of supply of services that any default or breach by the JV partners under the 'First Contract' and/or 'Second Contract and/ or the 'Fourth Contract' and/ or the 'Sixth Contract and/or breach by the Associate of JV-SIEMENS-1 under the 'Third Contract shall automatically be deemed as a default or breach of this 'Fifth Contract also and vice-versa, and any such default or breach or occurrence giving us a right to terminate the First Contract' and/ or 'Second Contract and/or 'Third Contract and/or 'Fourth Contract and/or the 'Sixth Contract', either in full or in part, and/or recover damages under those contract(s), shall give us an absolute right to terminate this Contract at your risk, cost and responsibility, either in full or in part and/or recover damages under this Fifth Contract as well. **Thus from the terms of the contract it is crystal clear that the transportation services provided by appellant which are the part of Fifth service contract is not only integrally connected with Third contract of supply of goods but it is also connected with the other contracts (First, Second, Fourth and Sixth contracts) which are performed by the JV partners other than the appellant.**

41. The 'cross fall breach clause', settles unambiguously that supply of goods, their transportation to the contractee's site delivery and related services of insurance, unloading and handling at site, installation including civil work, testing etc. are not separate contracts, but only form parts of an indivisible composite supply of goods and services with single source responsibility.

42. The two contracts for supply of the goods and allied services are not separately enforceable. The recipient has not contracted for ex-factory supply of materials, but for the composite supply. It is important that these two contracts if were separate and independent then inclusion of clause 2.1 as reproduced above was in fact not necessary. But by including the clause 2.1 the PGCIL has created interdependency between the two contracts so as to ensure the quality of the material and effective performance in execution of services related to contract.

It is seen from the agreement that though the parties have entered into distinct and separate contracts, one for the transfer of material and other for supply of services, this is in effect a single instrument embodying the intention of the parties. In turnkey projects more particularly of the kind involved in this impugned issue the same person has been entrusted with the responsibility of procuring the material and erection and installation of equipment and commissioning of project. Though as per the contention of the appellant, goods formed a predominant part of the contract, the obligation of the appellant under both the contract ceases only after

the turnkey project becomes operational and after the final payment is made both for supply of material and for erection of the system.

The appellant is entrusted with the work mainly for their expertise in erection and installation of the plant and the execution of turnkey project. *The function relating to the supply of material and the rendering of services of erection and installation are integrally connected and interdependent.* The terms of supply clearly show that the implementation schedule is not only for supply but also for erection, testing and commissioning of the project.

43. Thus, from the above it is seen that the supply of the goods and the supply of services are inextricably linked with each other. The contract awarded in substance and essence is a composite contract as defined in section 2(30) of the C.G.S.T. Act, 2017 for supply of goods and services.

The term 'composite supply' is given under clause 30 of Section 2 of the CGST Act.

"composite supply" means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Illustration.- Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

It is important to see the definition of 'principal supply' and goods along with the same.

"principal supply" means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

A reading of the definition of 'composite supply' shows that there should be

a.Two or more taxable supplies;

b. Of goods or services or both;

c. Or in combination thereof;

d. Which are naturally bundled and supplied in conjunction with each other;

e. In the ordinary course of business.

f. One of which is a principal supply.

44. The Contracts involve two supplies, one for the supply of goods and the other for the supply of services. The contracts fulfill the conditions of the 'composite

supply'. There is supply of goods and services. They are naturally bundled in the sense that both the goods and services may require to fulfill the intention of the buyer in giving the contract. The supply of goods and services are provided as a package and if one or more is removed, the nature of the supply would be affected. Thus, we hold that though there are two contracts made one for the supply of goods and the other for the supply of services, what can be easily gathered from the tenor of the agreements is that the buyer has given a contract which is a single indivisible contract which involves element of two supplies- one for the supply of goods and other for the supply of services. By making two separate agreements - one for the supply of goods and the other for the 'supply for services' what is purported to be done is an artificial division of contracts which though done, cannot take away the true and inherent nature of the contract.

It is important to note that in GST, under composite supply, whether the two taxable supplies are arising from one indivisible contract or from two separate contract is immaterial till these two supplies are naturally bundled and one supply being principal supply & other being ancillary supply to principal supply. Even if the considerations for two taxable supplies are separately quoted or there is single consideration for two supplies, both types of scenarios are covered under composite supply till the conditions as mentioned above for composite supply are fulfilled (i.e. naturally bundled supplies and one being principal supply and other ancillary supply to principal supply).

The entire transaction of providing the goods and the services is naturally bundled and hence this is clearly a case of composite supply of goods and supply of services.

45. The appellant on the issue of divisibility of contract has relied on judgments which are M/s. *Ishikawajma-Harima Heavy Indus. Ltd. Vs Dir. Of Income Tax, Mumbai 2007 (6) STR 3 (S.C.)*, M/s. *Linde Engineering Division v. Income Tax, (2014) 365 ITR 1, M/s. Siemens India Limited vs. State of Kerala 2003-(132)-STC-0418, M/s. Titanium Equipments and Anode Manufacturing Corporation, (1998) 110 STC 4.*

The sum and substance of these judgments is that when two separate contracts have been entered into by either parties, identifying two separate works viz. supply and service, then it is wrong in holding the same as indivisible contract.

It is to be noted that all judgments cited by the appellant are based on different terms of contract, scope of the contract and the provisions of law by which contract is governed i.e. Income Tax Act or other Acts. In the paras of judgments relied by the appellant nowhere the concept of overriding effect of one contract on other, cross fall clause in the contract are discussed. Further the judgments are under Income Tax Act or pre-GST Acts where concept of composite supply (as

explained aforesaid) as incorporated under GST was not present. Further in present case the indivisibility of contract or composite contract is not required to be decided by interpreting terms of contract but there is clear cut mention of the same in the terms of agreement that notwithstanding the award of work under six separate contracts, the JV shall be overall responsible to ensure the execution of all the six contracts to achieve successful completion and taking over of the works covered under the package and operational acceptance by the employer as per the requirements stipulated in the bidding documents and notwithstanding the break-up of the Contract Price, the Contract shall, at all times, be construed as a single source responsibility Contract and any breach in any part of the Contract shall be treated as a breach of the entire contract. Hence it is felt that the judgments relied by the appellant are not applicable to the present case before us.

46. Rather reference can be made to the Andhra High Court judgement in the case of M/s Larsen And Toubro Ltd (14 September, 2015 Nos. 22960 of 2007). **In this case, all the petitioners had executed turnkey projects for different PGCILs (same customer as in present case).** They claimed that the goods supplied by them, for being used in the turnkey projects, were subsequent sales exempt from tax under Section 6(2) of the CST Act, import sales under Section 5(2) of the CST Act, and the respondents lacked jurisdiction to subject these transactions to tax under the AP VAT Act treating them as intra-state sales. The assessing authority also examined the question whether there can be a sale in transit, or a sale in the course of import, in a transaction of works contract. He held that, from the nature of the contracts awarded, it could be seen that the petitioner was required to supply the goods as per the supply contract; they were also required to execute the works themselves; the intention of both the contractor and the contractee was completion of the works involving supply of goods as well as labor and therefore the transaction is a 'works contract. The Court observed- .. *"In turn-key projects, more particularly of the kind involved in this batch of Writ Petitions, the same person has been entrusted with the responsibility of procuring material, and of erection and installation of equipment. While in-built safeguards are provided in all the contracts to ensure quality of the material, and effective performance of the erection contract, the supply contracts, in substance, do not absolve the petitioners-contractors of their obligations of erection and installation of equipment after the goods are sold by them to the owner. The petitioners-contractors obligations, under both the supply and erection contracts, cease only after the turn-key project becomes operational, and after final payment is made both for supply of material and for erection installation of equipment. While a dual role is not impermissible in execution of turnkey projects, its relevance, in determining whether or not the subject contracts are indivisible works contracts, is insignificant."*

It further referred to a specific clause in the agreement as below-

.. "Appendix-H of the L & T Vemagiri supply agreement stipulates that 5% of the price shall be paid on successful test for the identified packages as per the pricing and technical specifications; 5% of the price on provisional acceptance; and 5% of the price on final acceptance. Provisional acceptance is defined under the supply agreement to mean the achievement of provisional acceptance as defined in the civil works and erection agreement, and in accordance with the terms thereof. It is evident, therefore, that 10% of the payment under the supply agreement is required to be made only after provisional and final acceptance as stipulated under the erection agreement'.

The Court concluded-

. "The goods supplied to the owner, under the supply contracts, are tailor made goods, and cannot be bought off the shelf. Such goods cannot, ordinarily, be sold to another except for its use in turnkey projects of a similar nature. The petitioners have been entrusted with the work mainly for their expertise in erection and installation of plants in the execution of turn-key projects. As they were entrusted with the work of erection and installation, the petitioners-contractors have also been entrusted with the task of procuring material therefor. The functions relating to the supply of material, and rendering services of erection and installation, are integrally connected and are interdependent".

The above observations of the Hon'ble High court are clearly applicable in the present case. The functions relating to the supply of goods and the installation thereof are clearly inter-dependent and though distinct agreements are made they are linked to each other and are indivisible.

47. Further appellant in support of his claim has cited some decisions related to how the agreement is to be read, which are; M/s VISA International Limited v. Continental Resources (USA) Limited, [2009 (2) SCC 55], Union of India v. Mahindra and Mahindra [1995 (76) E.L.T. 481 (S.C.)] and Mirah Exports Pvt. Ltd. vs. Collector of Customs [1998 (98) E.L.T. 3 (S.C.)] Rajasthan Spg. & Wvg. Mills ltd. vs. Commissioner of C. Ex., Jaipur [2001 (131) E.L.T.594 (Tri.-Del.)], S.S. Associates vs. Commissioner of C. Ex., Bangalore [2010 (19) S.T.R. 438 (Tri.-Bang.)]. The sum & substance of these decisions is that the Department cannot question the commercial wisdom of the parties entering into an agreement and must proceed on the basis that what is stated in the contract reflects the true nature of the intent and transaction and that it is therefore impermissible for the tax authorities to go behind the language of the contract or act contrary to it without producing evidences. In this respect we refer to the Supreme Court judgment in the case of Bhopal Sugar Industries Ltd vs. Sales Tax Officer, Bhopal on 14 April, 1977

(Equivalent citations: 1977 AIR 1275, 1977 SCR (3) 578). The Apex Court has observed the following-

"It is well settled that while interpreting the terms of the agreement, the Court has to look to the substance rather than the form of it. The mere fact that the word 'agent' or 'agency' is used or the words 'buyer' and 'seller' are used to describe the status of the parties concerned is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. Thus, the mere formal description of a person as an agent or buyer is not conclusive, unless the context shows that the parties clearly intended 'to treat a buyer as a buyer and not as an agent."

It is clear from the observations made by this Court that the true relationship of the parties in Such a case has to be gathered from the nature of the contract, its terms and conditions, and the terminology used by the parties is not decisive of the said relationship."

Thus, what the Supreme Court says above is that the form of the agreement is not important, it is rather the substance which has to be seen. The parties may use any words they like to suit their intention and it is therefore imperative that the agreement may not be taken as it is but its nature/substance has to be seen to arrive at the correct conclusions.

48. The appellant in support of his claim of exemption related to transportation services has relied on some judgments like **Bharathi Soap Works vs. CCE&C, Guntur [2008 (9) STR 80 (Tri-Bang)]; Essar Logistics Ltd. vs. CCE, Surat [2014 (33) STR 588 (Tri-Ahmd)] etc.** and **Commissioner of Cus. (Prv.), Amritsar Vs Malwa Industries Ltd [2009(235) E.L.T. 214 (S.C)]**. The judgments quoted by the appellants are with respect to the transactions of transportation contract which appellant has considered it as a separate contract and in isolation of other contract of supply of goods. Here the contract of transportation of goods is not be considered in the isolation but it has to be read along with the contract of supply of goods since performance of both of these contracts being interdependent and naturally bundled resulting into composite supply under GST. The decisions relied upon by the applicant in support of his claim are not applicable to the facts of the case considering the fact that the nature of supplies under contracts being composite supply under Goods and Services Tax Act, and the supply of transportation services cannot be considered in isolation in determining the levy of tax.

2. Another contention made by the appellant is that the Contracts entered into by the Appellant are not composite supply of services as work contract and Services provided by the Appellant are not in relation to immovable property

49. Before deciding the taxation of aforesaid composite supply as per section 8 of GST Act we have to see whether the contracts/agreement before us is a 'works contract' as defined in clause (119) of section 2 of the CGST Act or otherwise.

The definition of works contract is reproduced below.

(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;

Clause 6 of the Schedule II lists the two composite supplies which shall be treated as supply of services. Clause 6(a) of Schedule II of the CGST Act states that Works Contract as defined in Clause (119) of Section 2 of the CGST Act shall be treated as 'supply of services'.

50. From the definition it is clear that it defines only those supplies as works contract which are contracts for building, construction, fabrication etc. of any immovable property. Now here we have to verify whether the execution of the contract of the appellant with PGCIL i.e. Third contract and Fifth contract which are the part of the whole contract of on-shore and off-shore supply of goods and services for complete execution of +320KV, 2X 1000 MW, VSC Based HVDC Terminals and DC XLPE Cable System between Pugalur and North Trichur, results into immovable property or not.

Regarding this issue of immovability appellant in the grounds of appeal has contended that...

"The goods specified in the contracts are not such that would be attached to the earth and are not intended to be affixed permanently. Further, in the present case, specific goods supplied by the Appellant are installed only for the purpose of better functioning of the said goods and are capable of being removed and transferred from one place to another. Hence, the fact that the said goods are firmly but not permanently attached to the land, clearly means that the goods in question do not per se come under the ambit of immovable property."

It can be seen from the definition that works contract involves activities of 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. However, these activities should be in respect of immovable property. In order to decide whether the transaction is a works contract it is for us to decide

whether it is in respect of immovable property. The term 'immovable property' has not been defined under the GST Act.

51. Appellant has submitted the photographs of the project site, in support of his claim. The appellant has also submitted certain judgments in his favour in defining the term immovability which are M/s. Sirpur Paper Mills vs. CCE, Hyderabad [1998 (1) SCC 400], Commissioner of Central Excise v. Solid and Correct Engg. Works & Ors. [2010 (175) ECR 8 (SC)], M/s. Sri Velayuthaswamy Spinning Mills v. The Inspector General of Registration and the Sub Registrar [(2013 (2) CTC 551)], M/s. Perumal Naicker v. T. Ramaswami Kone and Anr. (AIR 1969 Mad 346). After going through same, we find that the following principles emerge:-

If a machine is attached for operational efficiency, it does not become immoveable property. The degree and nature of annexation is an important element for consideration; for where a chattel is so annexed that it cannot be removed without great damage to the land, it affords a strong ground for thinking that it was intended to be annexed in perpetuity to the land. The English law attaches greater importance to the object of annexation which is determined by the circumstances of each case. One of the important considerations is founded on the interest in the land wherein the person who causes the annexation possesses articles that may be removed without structural damage and even articles merely resting on their own weight are fixtures only if they are attached with the intention of permanently improving the premises. The Indian law has developed on similar lines and the mode of annexation and object of annexation have been applied as relevant test in this country also.

If the fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free then it cannot be called as 'Immoveable property'. .

If the setting up of the plant itself is not intended to be permanent at a given place and if the plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed, then also it cannot be termed as 'Immoveable property'.

52. So, what to be seen above is that in deciding whether a property is movable property or otherwise, we have to see what is the mode of necessary annexation and the object of annexation. If object is so annexed that it cannot be removed without causing damage to the land then it gives a reasonable ground for holding that it was intended to be annexed in perpetuity. Also whether the intention of the parties while erecting the system was that the plant has to be moved from place to place in the near future would also make a difference. We have to see by

relying upon the above principles i.e. 1) mode of object of annexation 2) mode of annexation whether the plant was installed merely to make it wobble free or it is affixed to the earth. Also, it needs to be seen whether *'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 project for which it is set up is completed."*

53. Now, that we have discussed the above judgments, we shall see whether the present issue i.e. composite supply of a goods and services would be termed as immovable property or not. In order to answer this question, we have to go through the nature of a contract as well as documents submitted by the appellant in relation to execution of the project.

It is seen from the nature of contract which envisages installation, which involves civil works to erect the structure for execution of the project in its entirety. It is an entire system comprising of a variety of different structures which are installed after a lot of prior work which involves detailed designing, ground work. Appellant has also submitted few photographs of the project which clearly shows that the structure is attached to the earth with the help of civil work. The photographs indicate the magnitude of the work done. Further foundations in cement concrete, cement concrete walls as well as cement concrete structures are constructed during the execution of the project. The mode of annexation shows that the groundwork, being the necessary foundation, is an important part of the project. The object of annexation, as said earlier, cannot be to make it movable from one place to the other. It simply cannot be equated to the Asphalt mix (the issue in Solid & Concrete Engg case) which was intended to be moved from one place to other. Hence considering the scope of the work and the facts revealed by the photographs, it can be very well said that completion of the installation, erection of the total project is resulting into immovable property. Hence the total project assigned to the appellant is nothing but composite supply of works contract as envisaged u/s 2 (119) of GST Act.

54. We shall refer to certain judgments in this regard. The first judgment is the Supreme Court judgment in the case of M/S. T.T.G. Industries Ltd., vs Collector Of Central Excise, ... on 7 May, 2004 Appeal (civil) 10911 of 1996. The contract here was for the design, supply, supervision of erection and commissioning of four sets of Hydraulic Mudguns and Tap Hole Drilling Machines required for blast furnace and the issue was whether the same is immoveable property. The Apex Court observed-

.. *"Keeping in view the principles laid down in the judgments noticed above, and having regard to the facts of this case, we have no doubt in our mind that the mudguns and the drilling machines erected at site by the appellant on a specially made concrete platform at a level of 25 feet above the ground on a base plate*

secured to the concrete platform, brought into existence not excisable goods but immovable property which could not be shifted without first dismantling it and then re-erecting it at another site. We have earlier noticed the processes involved and the manner in which the equipment were assembled and erected. We have also noticed the volume of the machines concerned and their weight. Taking all these facts into consideration and having regard to the nature of structure erected for basing these machines, we are satisfied that the judicial member of the CEGAT was right in reaching the conclusion that what ultimately emerged as a result of processes undertaken and erections done cannot be described as "goods" within the meaning of the Excise Act and exigible to excise duty."

In the above case, the Supreme Court took note of the fact that the various components of the Mudguns and the Drilling machines are mounted piece by piece on a metal frame, and the components are lifted by a crane and landed on a cast house floor 25 feet high. The volume and weight of these machines are such that there is nothing like assembling them at ground level and then lifting them to a height of 25 feet for taking to the case house floor and the to the platform over which it is mounted and erected. It observed that the machines cannot be lifted in an assembled condition and after taking note of these facts, it concluded that the same is immoveable property.

The Court further held that it cannot be disputed that such Drilling Machine and Mudguns are not equipment which are usually shifted one place to another nor it is practicable to shift them frequently.

55. The court also referred to its own judgments in the case of Quality Steel Tubes (P) Ltd. 75 ELT 17 (SC) and Mittal Engineering Works (P) Ltd. 1996 (88) ELT 622 (SC). In the case of Quality Steel Tubes (cited supra), the court held that goods which are attached to earth and thus become immovable did not satisfy the test of being goods within the meaning of the Act. It held that tube mill or welding head is immovable property. In the case of Mittal Engineering Works, the issue was whether mono vertical crystallizers is goods (in which case it would be excisable or immovable property). The mono vertical crystallizers is fixed on solid RCC Slab. It consists of bottom plates, tanks, coils, drive frames, supports etc. It is a tall structure rather like a tower with a platform. It was decided by the Court that the said product has to be assembled, erected and attached to the earth by a foundation and therefore not goods but immovable property.

56. We shall also refer to the Supreme Court decision in the case of Duncans Industries Ltd vs State Of U.P. & Ors on 3 December, 1999 where the SC had to decide whether the 'plant and machinery' in the fertilizer is 'goods' or 'immoveable property. The Apex Court held that the same is immoveable property and observed the following-

.. *"The question whether a machinery which is embedded in the earth is movable property or an immovable property, depends upon the facts and circumstances of each case. Primarily, the court will have to take into consideration the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent. A careful perusal of the agreement of sale and the conveyance deed along with the attendant circumstances and taking into consideration the nature of machineries involved clearly shows that the machineries which have been embedded in the earth to constitute a fertilizer plant in the instant case, are definitely embedded permanently with a view to utilize the same as a fertilizers plant. The description of the machines as seen in the Schedule attached to the deed of conveyance also shows without any doubt that they were set up permanently in the land in question with a view to operate a fertilizer plant and the same was not embedded to dismantle and remove the same for the purpose of sale as machinery at any point of time. The facts as could be found also show that the purpose for which these machines were embedded was to use the plant as a factory for the manufacture of fertilizer at various stages of its production. Hence, the contention that these machines should be treated as movables cannot be accepted."*

Thus, what can be seen from the above is that when machines are embedded with no visible intention to dismantle them and they are intended to be used for a fairly long period of time, they are 'immoveable property'.

The judgment relied by the appellant regarding immovability are not applicable as the facts in the present case and in the judgments cited are different. Rather ratios in judgments of M/S. T.T.G. Industries Ltd., vs Collector Of Central Excise; Mittal Engineering Works (P) Ltd. 1996 (88) ELT 622 (SC) and M/s. Dunkens Industries Ltd. are squarely applicable to the present case since the nature of contracts and its execution show without any doubt that the complete setup of the project in between Pugalur and North Trichur is permanent with a view to operate the project by PGCIL and not to dismantle and remove the same for any purpose at any point of time in future.

57. Further in additional submission the appellant has relied on the Order of Advance Ruling Authority in case of M/s. NR Energy Solutions India Pvt. Ltd. (GST-ARA-83/2018-19/B-03 dated 8.01.19) and submitted that-

"The Advance Ruling Authority had taken divergent view and held that supply of Relay & Protection Panels and Substation Automation System {SAS}, complete design, manufacture, packing, insurance, transport and delivery to sites, training, installation, testing and commissioning of protection panels with SAS compatible

to IEC 61850 protocol, to control and operate the 220 KV, 132 KV & 33 KV feeders, Power Transformers and equipment cannot be treated as works contract."

From the order of the Advance Ruling Authority in case of M/s. NR Energy Solutions India Pvt. Ltd. it can be seen that the terms of the contract are limited to supply and installation of *Relay & Protection Panels and Substation Automation System {SAS}* which is a small part of system compare to the whole contract awarded to appellant. The appellant cannot equate the contract of supply and installation of certain part of the system with the whole contract in the present case of on-shore and off-shore supply of goods and services for complete execution of +320KV, 2X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur. Hence ratio of advance ruling in case of M/s. NR Energy Solutions India Pvt. Ltd. is not applicable to present case before us.

Accordingly, we pass the following order:

ORDER

In view of the above discussions and findings and in terms of Section 101 (1) of the CGST Act 2017 and MGST Act 2017, we hold that-

58. From the conjoined and harmonious reading of various clauses of Third contract and Fifth contract awarded to the appellant and their interdependency under the whole contract comprising of six contracts, it can be safely concluded that the agreement for setting up for + 320KV, 2 X1000MW VSC based HVDC Terminals and DC XLPE Cable system between Pugalur and North Trichur associated with HVDC Bipole link between Western region (Raigarh, Chhattisgarh) and Southern region (Pugalur, Tamil Nadu-North Trichur, Kerala) is a composite works contract as defined u/s 2(119) of GST Act and taxable @ 18% and hence-

i. The transportation services provided by the appellant being part of the whole works contract will be taxable @ 18% as works contract services and will not be eligible for the exemption as provided in Serial no. 18 of the Notification No. 12/2017-Central Tax (Rate) dated the 28th June, 2017 and Notification No. 12/2017-State Tax (Rate) dated the 29th June, 2017.

ii. Order passed by the Maharashtra Advance Ruling Authority Order No. GST-ARA-69/2018-19/B-164, Mumbai dated December 19, 2018 is confirmed.

(RAJIV JALOTA)
MEMBER

(SUNGITA SHARMA)
MEMBER

Copy to- 1. The Appellant
2. The AAR, Maharashtra
3. The Pr. Chief Commissioner, CGST and C.Ex., Mumbai
4. The Commissioner of State Tax, Maharashtra
5. The Jurisdictional Officer
7. The Web Manager, WWW.GSTCOUNCIL.GOV.IN
8. Office copy.