# ANALYSIS OF SAFARI RETREATS JUDGEMENT

# GST-ITC FOR CONSTRUCTION OF BUILDINGS LEASED OUT AS MALLS, WAREHOUSES, ETC

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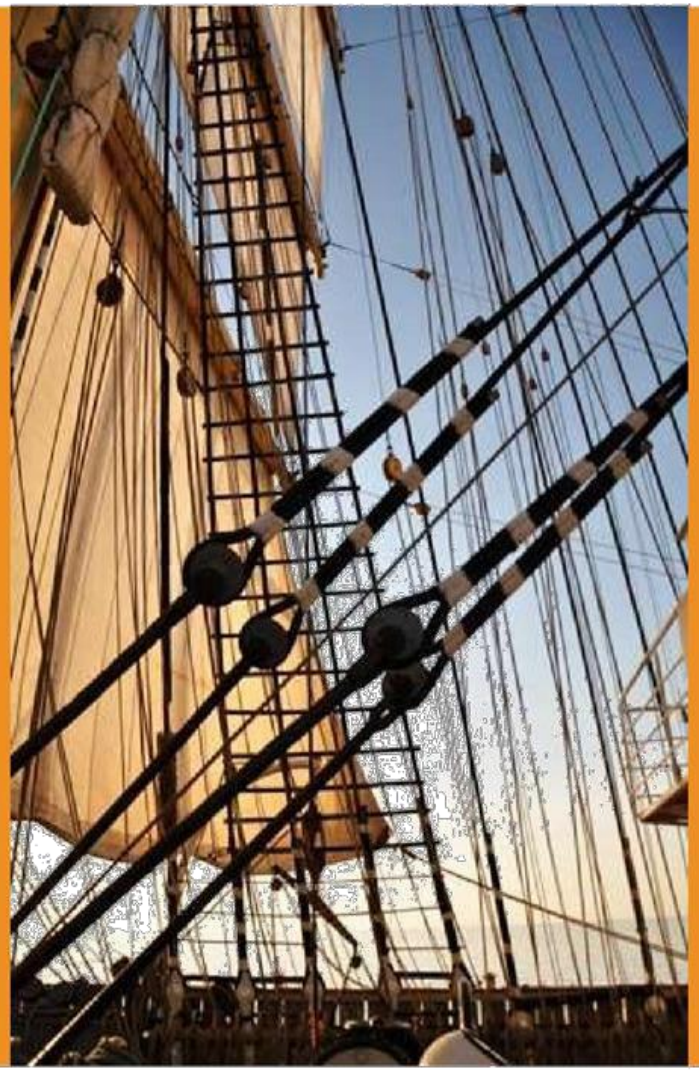

# Questions Answered by Hon'ble Apex Court



(i) Whether the definition of "plant and machinery" in the explanation appended to Section 17 of the CGST Act applies to the expression "plant or machinery" used in clause (d) of sub-section (5) of Section 17?

(ii) If it is held that the explanation does not apply to "plant or machinery", what is the meaning of the word "plant"? and

(iii) Whether clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act are unconstitutional?

# Exceptions to Blocking ITC u/s 17(5)(d)



There are two exceptions in Sec 17(5)(d) of CGST Act, to the exclusion from ITC provided in the first part of Clause (d) –

- The first exception is where goods or services or both are received by a taxable person to construct an immovable property consisting of a "plant **or** machinery".

- The second exception is where goods and services or both are received by a taxable person for the construction of an immovable property made not on his "**own account**".

Construction is said to be on a taxable person's "own account"when

(i) it is made for his personal use and not for service or

(ii) it is to be used by the person constructing as a setting in which business is carried out.

**However, construction cannot said to be on a taxable person's "own account" if it is intended to be sold or given on lease or license.**

# Difference between “plant or machinery” & “plant And machinery”,



17(5)(d) uses an expression of “plant **or** machinery”, which is not specifically defined.

- The decision in the case of ***Anand Theatres*** cannot be applied while considering the question of whether a mall or warehouse or a building, other than a hotel or a cinema theatre, can be said to be a “plant”.

- If it is found on facts that a building has been so planned and constructed as to serve an assessee’s special technical requirements, it will qualify to be treated as a plant for the purposes of investment allowance.

- **Explanation to Section 17 of The CGST Act for “plant and machinery”, cannot be applied to Section 17(5)(d)**

# Functionality Test



- The question whether a mall, warehouse or any building other than a hotel or a cinema theatre can be classified as a plant within the meaning of the expression “plant or machinery” used in Section 17(5)(d) is a factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business. If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5) to sub-section (1) of Section 16

- Functionality test will have to be applied to decide whether a building is a plant.

- Therefore, by using the functionality test, in each case, on facts, in the light of what we have held earlier, it will have to be decided whether the construction of an immovable property is a “plant” for the purposes of clause (d) of Section 17(5).

# Whether Section 17(5)(c) or (d) is ultra-vires



- Provision is ultra-vires in taxation statute, not only in-case it is discriminatory, but if it treats equals as un-equals or un-equals as equals

- Immovable property and immovable goods for the purpose of GST constitute a class by themselves. Clauses (c) and (d) of Section 17(5) apply only to this class of cases.

- Apex Court has ruled that 17(5)(c) or (d) is not ultra-vires

# THANK YOU

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