

**N.A.SHAH ASSOCIATES LLP**  
Chartered Accountants

## JUDGEMENTS UNDER INDIRECT TAXES

We are pleased to draw your attention to following important decisions which might be useful for you to take call on tax position.

### EXECUTIVE SUMMARY

CASE & CITATION	ISSUE INVOLVED	DECISION
INDIRECT TAX		
<a href="#">M/s. Achampet Solar Private Limited</a> <a href="#">[TSAAR Order No. 07/2022-TELANGANA]</a>	Whether liquidated damages recovered from contractor qualify as 'supply' under GST law and thereby liable to tax?  If yes, what will be the time of supply?	Liquidated Damages recovered will be treated as consideration for tolerating an act or a situation arising out of the contractual obligation and therefore, qualify as supply under GST.  Time of supply will be the date on which liquidated damages is determined as per the terms of the contract.
<a href="#">M/S. Vijayneha Polymers Private Limited</a> <a href="#">[TSAAR Order No. 29/2021- TELANGANA]</a>	Whether applicant is eligible to claim ITC of GST charged by works contractors for construction of factory building?	Applicant is eligible to claim ITC only to the extent of foundation constructed for Plant and Machinery.

The brief analysis of above referred decisions and rulings are given below.

**INDIRECT TAX**

**CASE 1 – M/S. ACHAMPET SOLAR PRIVATE LIMITED [TSAAR ORDER NO. 07/2022-TELANGANA]**

<b>Facts in brief &amp; Issue Involved</b>	<ul style="list-style-type: none"> <li>• Applicant is engaged in the production and distribution of electricity obtained from solar energy and entered into an agreement with a company for construction of a solar power project.</li> <li>• The agreement contains a clause for recovery of liquidated damages on delay in commissioning of the project and postponement in the taking over date beyond the milestones fixed for completion of project.</li> <li>• Applicant is desirous of ascertaining exigibility of liquidated damages to GST on account of delay in commissioning and its time of supply.</li> </ul>
<b>Observations &amp; Decision of AAR</b>	<ul style="list-style-type: none"> <li>• Liquidated damages are imposed for covering the loss of revenue of the company and costs borne by a project due to delay according to a formula.</li> <li>• Liquidated damages are claimed by the applicant from the contractor is due to the delay in commissioning of the project and the taking over date by the contractor beyond the milestones fixed for completion of project.</li> <li>• These damages shall be treated as a consideration for tolerating an act or a situation arising out of the contractual obligation and the same is specifically classified as a service under entry no. 5 (e) of the Schedule II.</li> <li>• AAR ruled that the Consideration received for such forbearance is taxable at @18% GST under the chapter head 9997.</li> <li>• The date on which the liquidated damage is payable as per the method prescribed in the contract is the time of supply of service by the applicant.</li> </ul>
<b>NASA Comments</b>	<ul style="list-style-type: none"> <li>• The similar ruling was also been made by the Maharashtra Authority for Advance Ruling in case of M/s. Maharashtra State Power Generation Co. Ltd (AAR Maharashtra) No. GST-ARA- 15/2017-18/B-30; dt. 08/05/2018.</li> <li>• There are another school of thought which are in the opinion that the liquidated damages do not satisfy the essentials of supply or</li> </ul>



	<p>service as the purpose of agreeing to payment of liquidated damages between the parties is only to ensure performance and not for tolerating of an act. The provisions of law as mentioned above cannot be applied to consideration to situations where the contract does not want delay in performance whereas time is the essence of the contract. Therefore, Government should clarify what to be included in tolerance of an act.</p> <ul style="list-style-type: none"> <li>• The issue circling around charging of tax in cases of 'Liquidated Damages' under GST law has been an issue from the beginning of GST law and even in the earlier regime under Service tax the issue had cropped many times.</li> <li>• As ruling of AAR does not have binding precedence, one has to take a considered call looking at the facts of the case, agreement with suppliers and the relevant provisions.</li> </ul>
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**CASE 2 – M/S. VIJAYNEHA POLYMERS PRIVATE LIMITED [TSAAR ORDER NO. 29/2021- TELANGANA]**

<b>Facts in brief &amp; Issue Involved</b>	<ul style="list-style-type: none"> <li>• Applicant have hired works contractor for construction of factory building, foundation of machinery, rooms for chillers, boilers, generators, transformers, erecting of electrical poles, laying of internal roads, factory building, internal drainage, laboratory etc.</li> <li>• Applicant has sought advance ruling on eligibility of ITC for aforesaid construction or works contract services.</li> </ul>
<b>Observations &amp; Decision of AAR</b>	<ul style="list-style-type: none"> <li>• As per section 17(5), ITC is blocked on following supplies: <ul style="list-style-type: none"> <li>○ Works contract services when supplied for construction of an immovable property (other than plant and machinery);</li> <li>○ Goods or services or both received for construction of an immovable property (other than plant or machinery) on his own account.</li> </ul> </li> <li>• Explanation to Section 17 defines "plant &amp; machinery" as follows: "Apparatus, equipment, and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods or services or both and includes such foundation and structural support but excludes:</li> </ul>

	<p>(i) Land, building or any other civil structures;</p> <p>(ii) Telecommunication towers; and</p> <p>(iii) Pipelines laid outside the factory premises.</p> <ul style="list-style-type: none"> <li>Based on above provisions, authority drew following conclusions: <ul style="list-style-type: none"> <li>ITC cannot be availed on works contract services for construction of an immovable property except for erection of plant &amp; machinery.</li> <li>ITC can be claimed only on the plant &amp; machinery and machine foundation.</li> <li>Plant &amp; machinery will not include building or other civil structures and pipelines laid outside factory premises.</li> <li>ITC cannot be availed on goods or services or both received by a tax payer for construction of immovable property on his own account.</li> </ul> </li> <li>Hence, applicant is eligible for ITC to the extent of machine foundation only.</li> </ul>
<b>NASA Comments</b>	<ul style="list-style-type: none"> <li>The eligibility of ITC depends on accounting treatment for addition to assets. ITC is disallowable only on assets capitalized to the immovable property.</li> <li>ITC in respect of plant and machinery, furniture and fixtures, office equipment, etc. is allowable.</li> <li>One must take a conscious call while capitalising the expense as it will impact ITC eligibility.</li> <li>As ruling of AAR does not have binding precedence, one has to take a considered call looking at the facts of the case and relevant provisions.</li> </ul>

We will be glad to provide any elaboration or elucidation you may need in this regard.

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