



Industry Sector specific impact of Supreme Court Judgment in the matter of Safari Retreat



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Brief Background

1. In the case of *M/s. Safari Retreats Pvt Ltd v Chief Commissioner of Central Goods and Service Tax*¹, the Petitioner was engaged in the construction of various shopping malls for the purpose of letting out premises in the malls to different tenants. Now, it was pointed out that the construction work involves procurement of various goods and services, however, the credit of input taxes paid on such inputs is barred in terms of **Section 17(5)(d) of the Central Goods and Services Tax Act, 2017 (“CGST Act”)**. The Petitioner filed a writ petition before the Orissa High Court to challenge the constitutional vires of **Section 17(5)(d)**.
2. The Orissa High Court upheld the constitutionality of **Section 17(5)(d) of the CGST Act**, but read down its restrictive interpretation to align with the law’s objective of providing input tax credit. It was held that the provision should be read down to allow ITC of taxes paid on the inputs for construction of malls as the same is being used for the purpose of making taxable supplies and therefore, the immovable property cannot be said to be constructed “on its own account”.
3. However, the Revenue sought a civil appeal before the Hon’ble Supreme Court against the abovesaid decision.

Safari Retreats: Supreme Court Decision

4. The Supreme Court, in its recent decision in the case of *Chief Commissioner of Central Goods and Services Tax & Ors v M/s. Safari Retreats Pvt Ltd & Ors*², primarily examined the following issues:

- (i.) Whether **clause (c) and (d) of Section 17(5) of the CGST Act** as well as **Section 16(4) of the CGST Act** are constitutionally valid?

¹ 2019-VIL-223-ORI.

² 2024-VIL-45-SC.

- (ii.) Whether the definition of “plant and machinery” under **Explanation to Section 17** would be applicable for construing the meaning of the words “plant or machinery” under **Section 17(5)(d)**. If no, then what would be the meaning of the word “plant”.

Issue (i)

5. The Supreme Court observed that the cases covered by **clauses (c) and (d) of Section 17(5)** are entirely distinct from the other cases. The same is done to ensure the object to not encroach upon the State’s legislative powers under Entry 49 of List II. Further, in this regard, it was emphasized that ITC is a statutory right, not an inherent one, and the legislature is within its power to create exceptions, especially in complex areas like tax law. Consequently, it was held that the provisions cannot be said to be neither arbitrary nor discriminatory based on the principle of reasonable classification enshrined under **Article 14 of the Constitution of India**.

Issue (ii)

Analysis of clause (c) and (d) of Section 17(5)

6. In this regard, it was noted that **Section 17(5)** carves out certain exceptions to the general rule that a registered person would be entitled to claim ITC after satisfying the conditions specified in **Section 16** and **Section 18**. **Section 17(5)(c)** bars entitlement to ITC on works contract services used in the construction of immovable property, subject to certain exceptions. Further, **Section 17(5)(d)** bars a registered person from claiming ITC of such goods and services which are used in the construction of immovable property on its own account. However, it was noted that the restriction envisaged under **Section 17(5)(d)** is subject to certain exceptions, which are as under:

- (i.) When goods and services are used for the purpose of construction of immovable property in the nature of “plant or machinery”; or
- (ii.) When goods and services are used for the purpose of construction of immovable property but not “on its own account”.

7. Now, in respect of the second exception, the Supreme Court made a specific observation as to the scope of the words “on its own account”. It was observed that in case where the

immovable property will be used for personal use and not for providing any services or will be used as a setting for carrying out its business activities, then it can be said that the construction is “on its own account”. However, in this regard, it was further observed that in case where the same is constructed for sale or for leasing/ licence purposes, then it cannot be said to be “on its own account”.

8. Although the above observations w.r.t second exception was the *ratio decidendi* in the Orissa High Court’s decision, it is not the case in this matter and at best, the same can qualify as the *obiter dicta* of the Supreme Court’s decision.

Meaning of the expression “plant or machinery” under Section 17(5)(d)

9. At the outset, the Supreme Court noted that the expression “plant and machinery” has been used for multiple times in Chapter V related to “Input Tax Credit”, however, the expression “plant or machinery” has been used at only once in **clause (d) of Section 17(5)**.
10. In this regard, it was further noted that under the Model GST law, the expression “plant and machinery” was used in **clauses (c) and (d) of Section 17(5)**. However, while enacting the GST law, the legislature has specifically used the expression “plant or machinery” in **clause (d) of Section 17(5)**. Moreover, the Orissa High Court decision was passed six years back, therefore, the legislature would have taken corrective measures to cure this error if the legislative intent would have been to use the expression “plant and machinery” in **clause (d) of Section 17(5)**.
11. In view of the above, it was noted that the usage of the expression “plant or machinery” in **Section 17(5)(d)** instead of the expression “plant and machinery”, appears to be a conscious decision of the legislature. The word “or” cannot be read as “and” since the same would defeat the legislative intent and it is not a function of judiciary to supplement the deficiencies, if any, in the law. Accordingly, it was held that the definition of the expression “plant and machinery” under **Explanation to Section 17** cannot be said to be applicable to construe the expression “plant or machinery”.

Meaning of the term “plant”

12. To ascertain the meaning of the word “plant”, the Supreme Court delved into its various decisions in the context of Income Tax law. Relying on these decisions, the Supreme Court held as under:

On hotels and cinema theatres:

- (i.) On the basis of its decision in the case of *Anand Theatres*³ and *Taj Mahal Hotel*⁴, hotels and cinema theatres cannot be said to fall under the purview of the term “plant”.
- (ii.) On the basis of its decision in the case of *CIT, Karnataka v Karnataka Power Corporation*⁵, the applicability of the decision in *Anand Theatres* and *Taj Mahal Hotel* is limited to the extent of hotel or cinema theatre. As such, said decisions cannot be applied to other cases involving immovable property such as malls, warehouses, etc.

On other cases:

- (iii.) For cases involving building other than a hotel or a cinema theatre, the Supreme Court highlighted that the same is a question of fact and would depend on the following conditions – (a) the same is constructed to suit the assessee’s special technical requirements; and (b) the same should be essential carrying out the activity of supplying services.

13. Herein, it is to be noted that the functionality test is to be applied to ascertain the nexus with the outward supplies. The Supreme Court relied on various cases wherein different immovable properties were held to be a “plant”. However, in the instant case, the Supreme Court has not commented on whether the malls constructed by the assessee would be a “plant” in terms of the said decisions or the functionality test. The matter has been reverted to the High Court to determine the same based on the facts of the case.

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³ (2000) 5 SCC 393.

⁴ (1971) 3 SCC 550.

⁵ (2002) 9 SCC 571.

14. In light of the above discussion, it can be seen that the determination of whether an immovable property would fall under the scope of a “plant”, would be subject to the application of functionality test on case-to-case basis. Thus, a factual exercise would be required to ascertain the same.

15. Let us now analyse the impact of above decision in some cases:

Availability of ITC on goods and services used in construction based on the judgment – Works contract services not covered !

- The construction of building generally involves civil works; procurement and installation of machinery items (such as HVAC’s, security system, communication equipment etc.) and procurement and installation of movable items (such as furniture etc.).
- There is no bar on availment of ITC on the machinery items and movable items under Section 17(5)(c) or Section 17(5)(d) of the CGST Act and the same should be available.
- Civil works may include receipt of works contract services. Further, goods (such as cement, RMC etc.) and services (only erection/construction services with no transfer of property in goods involved) used in civil works may be separately procured.
- The ITC on works contract services is barred under Section 17(5)(c) of the CGST Act. Section 17(5)(c) specifically uses the expression ‘plant and machinery’ and thus, the credit on works contract services used in construction of buildings cannot be claimed based on this judgment.
- It is to be noted that the Supreme Court in *Safari Retreats (supra)* has not read down **clause (c) of Section 17(5)** in any manner and as such, the definition of the expression “plant and machinery” under **Explanation to Section 17(5)** would be squarely applicable for the purposes of **clause (c) of Section 17(5)**. Accordingly, ITC of works contract services would still be restricted in cases involving construction of immovable property for leasing or renting purposes, except in cases where the said services are input services for further provision of works contract services.

- Therefore, the benefit accruing from the Supreme Court's decision in *Safari Retreats (supra)* would remain in the gray area for the past period considering that in the business involving leasing or renting of immovable property majorly involves works contract services as input services.
- This judgment will particularly be applicable only on the goods and services (other than works contract services) which are separately procured by the assessees that are used in civil works.

Applicability of the judgment on transaction on leasing/renting of commercial office spaces / malls etc

- The judgment will be applicable in cases where buildings such as shopping malls, commercial complexes and residential complexes are constructed for the purpose of letting out of the units. In terms of the Supreme Court judgment, in order to avail the ITC on goods and services used in construction, the assessees will have to factually satisfy the functionality test regarding the building in question, being a plant.
- Additionally, as per the finding made in Para 32 of the judgment, a building cannot be said to be constructed on assessee's 'own account' if it is given on lease or license.
- Reliance can be placed on the abovementioned findings to argue that the ITC on the goods and services used in construction of buildings which are meant to be given on rent should be available. **As per our understanding, the industry players will have a good case to argue that the credit of goods and services (other than works contract services) used in construction of immovable property will be available.**

Applicability of this judgment to warehouses, infrastructural facilities like co-working office spaces

- In such cases, the buildings so constructed are an essential requirement for provision of the services.
- In order to avail the credit on the goods and services (other than works contract services), these assessees will have to factually satisfy the functionality test regarding the building in question being a plant.

- The assesseees may consider availing ITC on such goods and services. Till some judgment (of High Court/Supreme Court) is pronounced on the aspect of functionality test in respect of such buildings, the assesseees may opt to not utilize such ITC in order to avoid interest liability in the future.

Applicability of this judgment to hotels and cinema theatres

- In Para 56 of the judgment, the Supreme Court has mentioned that the findings will be applicable for warehouses and other buildings, except hotels and cinema theatres.
- The said finding of the Supreme Court were mainly based on its earlier judgment of Anand Theatres wherein it was held that building used for running of a hotel or carrying on cinema business cannot be held to be a plant for the purpose of claim of depreciation under Section 32 of the Income Tax Act. Under Section 32 of the Income Tax Act, separate rates of depreciation were prescribed for plant and buildings. In the Anand Theatres judgment, the Court inter-alia relied upon the fact that ‘to differentiate a building for grant of additional depreciation by holding it to be a “plant” in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable’.
- As of now, the benefit of the judgment of Safari Retreats will not be available for hotels and cinema theatres till some judgment (of High Court/Supreme Court) is pronounced on the aspect of functionality test in respect of such buildings

Applicability of this judgment to factory buildings

- In the Safari Retreat judgment, there is no specific finding on the issue as to whether the factory buildings/manufacturing units can be regarded as plants or not.
- However, in the judgment, the Supreme Court relied upon its earlier judgment in the case of Karnataka Power Corporation wherein it was held that power-generating station buildings, which could not be separated from the machinery and the machinery could not be worked without such special construction, were held to be plant.

- Thus, in case of factory buildings as well, the functionality test will have to be applied to determine whether the building can be regarded as plant or not. The building has been so planned and constructed as to serve an assessee's special technical requirements. Accordingly, the ITC eligibility has to be determined on case to case basis. Further, the structuring of transaction by way of construction of factory building by one entity/registration and giving on rent to manufacturing entity may be explored.

Conclusion

- During the pendency of the Safari Retreat matter before the Supreme Court, many companies opted to avail the ITC on goods and services used in construction of buildings and simultaneously reverse the same. Considering the applicability of the functionality test, these companies may now consider to reavail the credit on such goods and services (other than works contract services). In our considered view, it is possible to argue that the time limit for availment of credit under Section 16(4) of the CGST Act is not applicable at the time of reavailment of the ITC. However, the said position is prone to dispute by the Department. In case the ITC was not availed earlier for the past period, the time limit under Section 16(4) of the CGST Act will be applicable and the ITC cannot be availed at this stage.
- Considering that the ITC on works contract service is not covered under the judgment of Safari Retreat, the assesseees may consider restructuring their agreements in the future to optimize the availability of ITC in case of construction of buildings.

Summary Table

Type of Work	Renting of Commercial office space / shops	Storage warehousing / Co Working Space	Hotel and Cinema Theatre	Factory Building
Civil Work (Works contract Services)	Difficult to avail ITC basis Safari Judgment unless there is some	Difficult to avail ITC basis Safari Judgment unless there is some	Not Available	Difficult to avail ITC basis Safari Judgment unless there is some

	favourable judgment from High Court in future	favourable judgment from High Court in future		favourable judgment from High Court in future
Civil Work (goods and services procured separately)	ITC available subject to satisfaction of functionality test (Good Case to argue). Further, can be argued building not on own account.	ITC available subject to satisfaction of functionality test (Better avail ITC and not utilize)	Not Available	Difficult to avail unless building has been so planned and constructed as to serve an assessee's special technical requirements
Plant and Machinery	Input Tax credit Available	Input Tax credit Available	Input Tax credit Available	Input Tax credit Available
Movable Items	Input Tax credit Available	Input Tax credit Available	Input Tax credit Available	Input Tax credit Available



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