Dis-Allowance of Input Tax Credit on Construction of Immoveable Property How Far Justiciable?

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Section 16 of CGST Act, 2017 (hereinafter called the Act) speaks of taking of Input Tax Credit (hereinafter called ITC) upon receipt of supply of either goods or services or both of them, which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person. In other words, the "Registered Person" shall be entitled to ITC of tax paid in respect of either "goods" or "services" but, however, the word "capital goods" is blissfully missing. No wonder, in future, the Department, in their quest for highly ingenuine interpretation, may come up with the argument that the registered person shall not be entitled to ITC on capital goods.

The present article discusses whether "building", "premises", "structure", "roads within the airport or factory", would squarely fall within the meaning of "plant and machinery" and hence, shall be entitled to "Input Tax Credit" notwithstanding the bar laid down in Clauses (c) and (d) of Sub-Section (5) of Section 17 CGST Act.

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Sub-Section (5) of Section 17 of the Act, inter-alia, prohibits the taking of ITC in respect of certain items:-

(a) .....
(b) .....
(c) works contract service when supplied for construction of an immoveable property (other than plant and machinery) except where it is an input service for further supply of works contract service;
(d) goods or service or both received by a taxable person for construction of an immoveable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

From the perusal of the above, a very interesting question arises as to whether during a construction of a building (which obviously is an immoveable property within the meaning of Transfer of Property Act), if an input or input services or capital goods, is used for further construction/erection/installation of building (an immoveable property which is used as a plant and machinery by the assessee), Input Tax Credit shall be allowable or not ?.

However, in my view, in case, the building or premises had been used as a plant or part of plant, then Input Tax Credit shall be allowable. In the event, the building or premises had been used in any other manner, (other than plant and machinery) no such Input Tax Credit shall be available to the assessee. Ordinarily, it is understood in the trade and industry circle plant and machinery only include " some structure of steel, aluminium, metal or similar items used/applied for fabrication/assembly/ installation of an "object" which is used for manufacture or production of goods".

Therefore, in subsequent paras, one need to understand the meaning, scope and intent of "words" "plant and machinery" and more particularly these words include within its sweep, the building/premises/structure/immoveable property within the meaning of "Transfer of Property Act".

In CIT v. Kanodia Warehousing Corporation MANU/UP/0711/19790: [1980]121ITR996(All) , the Division Bench of the Allahabad High Court has considered the meaning of "plant" and held that in order to find out if a building or

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structure or part thereof constitutes "plant", the functional test must be applied. It must be seen whether building or structure or part thereof, constitutes an apparatus or a tool of the taxpayer or whether it is merely a space where the taxpayer carries on his business. If the building or structure or part thereof is something by means of which the business activities are carried on, it would amount to a plant but where the structure plays no part in the carrying on of those activities but merely constitutes a place within which they are carried on, it cannot be regarded as a plant.

In R.C. Chemical Industries v. CIT MANU/DE/0141/1981 [1982]134ITR330(Delhi) , the Delhi High Court has considered the meaning of "plant" with reference to Section 43(3) of the Income Tax Act and laid down the following principles.

The definition of plant in Section 43(3) should be given a wide meaning as it is an inclusive definition. In order for a building or concrete structure to qualify for inclusion in the term 'plant', it must be established that it is impossible for the equipment to function without the particular type of structure.

The question whether the roads would include within the meaning of the word "buildings" was considered by various High Courts. The leading decision is of the Bombay High Court in C.I.T. v. Colour Chem Ltd. MANU/MH/0032/1974: [1977] 106 ITR 323. While negating the contention that roads are part of the plant, the Bombay High Court held that the roads within the factory premises are used for the purpose of carrying raw materials, finished products and workers. Therefore, it must be regarded as building or buildings within the meaning of sub-clause (iv) of section 10(2) of 1992 Act. It was also held that dictionary meaning of the word "building" cannot be confined to a structure or superstructure having walls and roof over it. The roads and roadways are adjuncts of the buildings lying within the factory area linking them together and are being used for carrying on its business by the assessee. Therefore, they must be regarded as forming part of the factory building.

The Supreme Court in the case of Scientific Engineering House Pvt. Ltd. Vs. Commissioner of Income Tax, 1986(157) ITR 0086 SC relied upon certain following foreign decisions while dealing with the explanation Plant and gave it a wide meaning under the provisions of Income Tax law in the following manner:

"The classic definition of 'plant' was given by Lindley, L.J. in Yarmouth v. France, [1887] 19 Q.B.D. 647, a case in which it was decided that a cart-horse was plant within the meaning of section 1(1) of Employers' Liability Act, 1880. The relevant passage occurring at page 658 of the Report runs thus:-
"There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, -not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

In other words, plant would include any article or object fixed or movable, live or dead, used by businessman for carrying on his business and it is not necessarily confined to an apparatus which is used for mechanical operations or processes or is employed in mechanical or industrial business. In order to qualify as plant the article must have some degree of durability. In C.I.T. Andhra Pradesh v. Taj Mahal Hotel, MANU/SC/0239/1971: 82 I.T.R. 44, the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipe-line fittings installed fell within the definition of "Plant" given in Sec. 10(5) of the 1922 Act which was similar to the definition given in Sec. 43(3) of the 1961 Act and this Court held that sanitary and pipe-line fittings fell within the definition of plant.

The Bombay High Court in the case of CIT v. Mazagaon Dock Ltd. MANU/MH/0278/1991u: (1991) 191 ITR 460(Bom) has held that dry dock and wet dock created for ships are to be treated as plant and not building.

The Apex Court in the case of CIT v. Dr. B. Venkata Rao MANU/SC/1284/1999: (2000) 243 ITR 81(SC) has held that in the case of an "Operation Theatre" in the hospital, it has been held to be a part of plant and not a part of building. The Court further held that the operation theatre in an hospital building is not simply a concrete structure but necessarily a part for running of the hospital

and the assessee is entitled to claim depreciation as applicable to plant and machinery.

In another decision reported in CIT v. Karnataka Power Corporation MANU/SC/0585/2000: [2001] 247 ITR 268 (SC), the Supreme Court held as follows (headnote):

The question whether a building can be treated as plant, basically, is a question of fact and where it is found as a fact 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. Held accordingly, that there was a finding by the fact-finding authority that the assessee's generating station building was so constructed as to be an integral part of its generating system. It was "plant" entitled to investment allowance.'

The ITAT, in an appeal ITA No.7111/Mum/2011, vide order dated 14.3.2014, made very interesting observations.
If we apply the above decisions to the facts of the case before us, we are of the considered view that taxiways and aprons, parking bays cannot be said to be merely concrete structures but are necessary tools for operating/using the Airport. Hence, the same are to be considered as part of plant and machinery. Therefore, we hold that assessee is entitled for depreciation at the rate as applicable on plant and machinery in respect of taxiways, aprons, parking bays etc.

The assessee claimed depreciation @ 25% on cold storage building by considering the same as plant which was allowed by the Learned Assessing Officer @ 10% by treating the same as building relying on the decision of Supreme Court in the case of Anand Theaters MANU/SC/0409/2000: 244 ITR 192. In appeal, the Learned Commissioner of Income Tax (Appeals) allowed the claim of the Assessed following the decision of the Calcutta High Court in the case of CIT v. Shree Gopikishan Industries (Cal) MANU/WB/0061/2003: 262 ITR 568 and the decision of the Allahabad High Court in the case of CIT v. Kanodia cold Storage MANU/UP/0175/1974: 100 ITR 155 by observing as under:

> "The classic definition of 'plant' was given by Lindley, L.J. in Yarmouth v. France, [1887] 19 Q.B.D. 647, a case in which it was decided that a cart-horse was plant within the meaning of section 1(1) of Employers' Liability Act, 1880.

The Appellant, during the course of appellate proceedings, has submitted that the cold storage is required to be constructed and maintained as to be damp proof, heat proof and protected against entry of or damage to the stored agriculture and other produce by pests, noxious insects, rats and other rodents. The same is to be provided with insulation of the floors, roofs and doors and insulation and water proofing treatment is to be done in a proper manner in accordance with cold temperature to be maintained below or above freezing point. The Appellant has therefore submitted that the storage or chamber itself is an apparatus and tool of the trade through which the business is carried on and the insulation without the building cannot produce the result and the building without the insulation also equally disastrous for the purpose. Therefore, it was contended that the cold storage plant is different from the other normal building because without the cold storage plant it is not possible to carry on the business of cold storage. In support of its contentions, the Appellant placed several court decisions, such as 100 1TR 155-C1T v. Kanodia Cold Storage (All); MANU/WB/0061/2003: 262ITR 568- CIT v. Shree Gopikishan Industries (Cal.) etc.

The Punjab and Haryana High Court in the case of CIT v. Yamuna Cold Storage MANU/PH/0244/1981: [1981] 129 ITR 728 (P&H), has held that the cold storage is a factory building entitled to 10 per cent.

The Supreme Court in CIT V. Dr. B. Venkata Rao MANU/SC/1284/1999: 243 ITR 81, dealt with a question as to whether a building of "Nursing Home" is plant and machinery. In that case, the ITAT has held that the nursing home to be a plant and the same was affirmed by the High Court. In the appeal, the Supreme Court held that since the nursing home is equipped to enable the sterilization of surgical instruments and bandages to be carried on and it was reasonable to assume that nursing home was equipped with operation theater and, therefore, held to be plant and machinery.

From the careful examination of the catena of judgments cited in the preceding paras, it could be said that the "building", "premises", "structure" "roads within the airport or factory", would squarely fall within the meaning of "plant and machinery" and hence, shall be entitled to "Input Tax Credit notwithstanding the bar laid down in Clause (c) and (d) of Sub-Section (5) of Section 17 CGST Act – of course, in various situations explained in the judgments cited above.