RAJASTHAN APPELLATE AUTHORITY FOR ADVANCE RULING
GOODS AND SERVICES TAX

NCR BUILDING, STATUE CIRCLE, C-SCHEME
JAIPUR – 302005 (RAJASTHAN)
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Proceedings under Section 101 of the Central GST Act, 2017 read with Rajasthan GST Act, 2017

Before the Bench of
1. Sh. Pramod Kumar Singh, Member (Central Tax)
2. Sh. Abhishek Bhagotia, Member (State Tax)

ORDER NO. RAJ/AAAR/05/2020-21 DATED 29.01.2021

Name and address of the Appellant	:	M/s Indag Rubber Limited, SP 86-88, Industrial Area Bhiwadi, Bhiwadi, Alwar, Rajasthan 301019
GSTIN of the appellant	:	08AAACI0868D1ZS
Issues under Appeal	:	Whether the Appellant is eligible to claim input tax credit of the GST charged by vendor at the time of supply of goods and services to it, which are used for carrying out the following activities for setting up for of MRO facility which will be rented out. a. Civil work b. External Development work
Date of Personal Hearing	:	19.01.2021
Present for the appellant	:	Sh. P. K. Sahu, Authorized Representative
Details of Appeal	:	Appeal No. RAJ/AAAR/APP/05/2020-21 against Advance Ruling No. RAJ/AAR/2019-20/23 dated 21.10.2019

(Proceedings under section 101 of the Central GST Act, 2017 read with section 101 of the Rajasthan GST Act, 2017)

At the outset, we would like to make it clear that the provisions of both the Central GST Act, 2017 and the Rajasthan GST Act, 2017 are same except for certain provisions. Therefore, unless a mention is specifically made to such dissimilar provisions, a reference to the Central GST Act, 2017 would also mean a reference to the same provisions under Rajasthan GST Act, 2017.

2. The present appeal has been filed under Section 100 of the Central GST Act, 2017 (**hereinafter also referred to as 'the CGST Act'**) read with Section 100 of the Rajasthan GST Act, 2017(**hereinafter also referred to as 'the RGST Act'**) by M/s Indag Rubber Limited, SP 86-88, Industrial Area Bhiwadi, Bhiwadi, Alwar, Rajasthan 301019 (**hereinafter also referred to as 'the Appellant'**) against the Advance Ruling No. RAJ/AAR/2019-20/23 dated 21.10.2019.

BRIEF FACTS OF THE CASE

3. M/s Indag Rubber Limited, SP 86-88, Industrial Area Bhiwadi, Bhiwadi, Alwar, Rajasthan 301019 is holder of GST Registration No. 08AAACI0868D1ZS (hereinafter refer as Appellant). The Appellant *inter-alia* manufactures precured tread rubber, un-vulcanized rubber strip gum, universal spray cement and tyre envelopes for the tyre retreading industry. M/s Elcom Systems Pvt. Ltd (hereinafter referred to as "Elcom") is a private limited company incorporated in India and is engaged in the business of repair, maintenance, overhaul, upgrade and modernization of Unmanned Aerial Vehicles (UAV). Elcom has approached Appellant for taking on lease a Maintenance Repair and Overhaul facility (hereinafter referred to as "MRO"). According to the agreement between the Appellant and Elcom, the Appellant will construct MRO facility at Bhiwadi as per the specifications given by Elcom. The said MRO facility will thereafter be given on lease to Elcom by the Appellant. Elcom will install its equipments in the MRO facility and will render MRO services to Israel Aerospace Industries (IAI in short).The said sub-lease for the MRO facility is for the period of 9 years and 6 months. In case of early termination of this sub-lease deed, Elcom shall ensure that IAI makes its best efforts for alternative arrangements to continue operations at the MRO Centre for remainder of the 9 years lock in period, so that the appellant shall not suffer loss. In such case, the Elcom shall continue to make monthly payment to the Appellant of the lease rentals and other costs and expenses which are payable by Elcom under this sub-lease deed, until the Appellant enters in a fresh deed with new tenant for the unexpired term. The scope of work of Appellant for setting up the MRO facilities would include the following:

i. Civil Work (Earth work, concrete work, brick work, steel work, wood work, aluminium/ metal work, waterproofing, flooring/ skirting, finishing)
ii. External Development Works(Area Grading, site developing and roads)
iii. Fire-fighting system(Fire pumps, internal hydrant, sprinkler system, fire extinguishers, external fire hydrant system, electrical works)
iv. Internal and External Plumbing and sanitary works (Sanitary fixtures and fittings, internal drainage, internal water supply, external sewage, external water supply, pumps, treatment station)
v. Heating, ventilation and Air Conditioning ('HVAC') in Hanger Building, warehouse building and paint shop (variable refrigerant flow system, air handling system, air distribution system, piping, insulation, ventilation system and electrical works)
vi. Electrical installations (11KV HT Panel, transformers, 11KV HT cable, bus duct, diesel generator, UPS, Battery charger cum DCDB, earthing, lighting protection, LT Cables, cable trays, wirings, distribution board, poles, fixtures & fans, civil and miscellaneous works, fire alarm and public-address system, CCTV, voice, video & data networking, LT Panels).

3.1 Appellant procures inputs and input services for undertaking work with respect to point no. iii. to vi. In respect of these inputs and input services, input tax credit is being availed by the Appellant.

3.2 The Appellant has entered into agreement with M/s Akanksha Contracts Pvt. Ltd. for supplying various goods and services for setting up the MRO facility on the Industrial Land. The Appellant issues purchase order on M/s Akanksha Contracts Pvt. Ltd for supplying the goods and services for setting up of MRO facility. The goods are procured by M/s Akanksha Contracts Pvt. Ltd on a bill to ship to basis. In the invoice issued by the supplier, the bill to party is M/s Akanksha Contracts Pvt. Ltd. and ship to party is the Appellant. Against the material receipts, the Appellant has paid Rs. 97.37 lacs amount in advance

for procuring of goods and services. Further, it has been agreed that M/s Akanksha Contracts Pvt. will raise a consolidate invoice for each month, which will include value of both goods and services so supplied along with adjustments regarding the advance so received. M/s Akanksha Contracts Pvt. Ltd is charging applicable rate of Goods and Services Tax (hereinafter referred to as "GST") on the goods and services being supplied to the Appellant. Further, when the Appellant will lease out the MRO facility to Elcom, it will be paying GST at applicable rate on the amount of rent received for leasing out of MRO facility.

4. The appellant has filed application for advance ruling before the Authority for Advance Ruling, Rajasthan whether the Appellant is eligible to claim credit of the GST charged by vendor at the time of supply of goods and services to it, which are used for carrying out the following activities for setting up of MRO facility which will be rented out

a. Civil work
b. External Development works

5. Authority for Advance Ruling, Rajasthan has observed that the provisions of Section 17(5)(d) of CGST Act, 2017 is clear that if the goods or services are used for the construction of an immovable property, the ITC shall not be available irrespective of use of the said property and issued Ruling that the applicant is not eligible to claim credit of the GST charged by vendor for supply of goods and services to it, which are used for carrying out the activities (Civil Work and External Developmental works for setting up of MRO facility.

6. Aggrieved by the Ruling above, the appellant has filed appeal before this forum at online portal on 30.11.2019 and in hard copy on 04.11.2020. The Appellant in its appeal has, inter-alia, mentioned the following grounds of appeal:

6.1 IMPUGNED RULING IS A NON-SPEAKING ORDER AND HAS BEEN PASSED IN GROSS VIOLATION OF THE PRINCIPLE OF NATURAL JUSTICE.

6.1.1. It is submitted that the ruling passed by the Authority neither records nor considers the complete written and oral submissions made by the Applicant. Thus, the same stands in violation of principle of natural justice.

6.1.2. It is pertinent to mention that one of the submissions of the Appellant was that it is covered by the judgment of *Safari Retreats* and thus, is eligible to take credit. Further, the Appellant made detailed additional submission regarding applicability of the principle of *stare decisis*. However, the Authority neither recorded nor considered submissions in this regard in the impugned ruling.

6.1.3. Further, the Appellant in order to substantiate its view, had relied on the advance ruling in the matter of **In Re: K.P.H. Dream Cricket Pvt. Ltd., 2018 (18) GSTL 278 (AAR-GST),** where the credit of input services was allowed to the applicant therein, for carrying out an output activity of supplying complimentary ticket as the same was taxable in nature. The Authority has not distinguished the principle laid down in this ruling.

6.1.4. It is submitted that being a quasi-judicial body deciding the rights and liabilities of the Appellant, the Authority is bound to follow the principles of natural justice. However, the Authority by not considering the submissions (oral as well as written) of the Appellant has violated the said principles (*audi alteram partem*).

6.1.5. Further, it is submitted that the Authority while passing the ruling has not given reasons and basis for such ruling. It is pertinent to mention that the Authority has merely recorded that the purposive dimension of the provision of Section 17 (5) (d) of the CGST Act is blocking of credit for construction of immovable property. However, the Authority has failed to substantiate this observation with any cogent reasoning.

6.1.6 It is submitted that it is a settled principle of law that non-speaking orders or the orders passed without recording the complete submissions and reasons for passing the final order are *non-est* in law. Thus, the impugned ruling being devoid of any reason/basis is non-speaking and thus, unsustainable in law. This further, establishes the fact that the impugned ruling is violative of principle of natural justice.

6.1.7. The Appellant submits that the principles of natural justice have been enshrined and regularly affirmed with the utmost favour by the Hon'ble Supreme Court and all other judicial flora. As per the settled judicial position, principles of natural justice are the minimum standards of fair decision-making imposed on persons or bodies acting in a judicial or quasi-judicial capacity, like the Authority for advance ruling. Where an Authority or body is required to determine questions of law or fact in circumstances where its decisions will have a direct impact on the rights or legitimate expectations of the assessee concerned, there exists an implied obligation to observe the principles of natural justice. One of the shades of the rules of natural justice is to consider the submissions made by an assessee. It is submitted that considering the submissions made by the assessee before passing an order leads to a fair opportunity to assessee and to present its own view point.

It is submitted that it is a settled law that a quasi-judicial authority is obligated to provide cogent reasons while passing any order. The same has been emphasized in the case of ***Kranti Associates Pvt. Ltd. and Anr. Vs Shri Masood Ahmed Khan and Ors.,*** reported at ***2010 9 SCC 496.***

6.1.8. In ***Union of India v. Mohan Lal Capoor and Others,*** reported at ***AIR 1974 SC 87***, the Hon'ble Supreme Court while dealing with the question of selection under Indian Administrative Service/Indian Police Service (Appointment by Promotion Regulation) held that the expression "reasons for the proposed supersession" should not be mere rubber stamp reasons. Such reasons must disclose how mind was applied to the subject matter for a decision regardless of the fact whether such a decision is purely administrative or quasi-judicial. The Hon'ble Court held that the reasons in such context would mean the link between materials which are considered and the conclusions which are reached. Reasons must reveal a rational nexus between the two.

6.1.9. In this regard, reliance is also placed on the decision of the Hon'ble High Court in the case of ***Anil Products Limited vs. CCE, Ahmedabad-II*** reported at ***2010 (257) E.L.T. 523 (Guj.),*** wherein the Hon'ble High Court has held that mere reproduction of submissions in the body of order is not enough but finding of deciding authority on these submissions is equally necessary. The Hon'ble High Court further held that the adjudicating / appellate authority must give its specific findings on various submissions made, judgments relied upon and the distinguishing features pointed out by assessee before them, in their final order. It is further submitted that in pursuance of directions given by Hon'ble CESTAT in the case of ***Commissioner of Customs (Import), Chennai vs. Do Best Infoway*** reported at***2016 (336) E.L.T. 156 (Tri. - Chennai)*** to CBEC to issue appropriate guidelines for the quasi- judicial authorities to discharge their duties keeping in view the spirit of the ratio laid down by Apex Court in the case of **Gordhandas**

Bhanji [1952 AIR 16 SC], the CBIC had issued guidelines vide ***Instruction F. No. 390/CESTAT/24/2016-JC, dated 13-4-2016***. In para 5(d) of the said Instructions, the CBIC has categorically mentioned that the quasi-judicial orders have to be necessarily be the speaking orders recording every fact and reason leading to the final decision in the matter. Non-speaking orders or the orders passed without recording the submissions and reasons for passing the final order is *nonest* in law. In view of the aforesaid legal position, it is submitted that the impugned ruling has been passed in gross violation of the principles of natural justice as it fails to consider the submissions made by the Appellant and is passed without providing any reasons.

6.2. THE APPELLANT IS ELIGIBLE TO AVAIL CREDIT FOR THE INPUTS AND THE INPUT SERVICES RECEIVED BY APPELLANT USED FOR MRO FACILITY WHICH IS RENTED BY IT.

6.2.1. It is submitted that in view of the Appellant, it is eligible to claim credit for the inputs and input services used for MRO facility which is rented to Elcom, as the same is an outward taxable supply. The impugned ruling denying the credit to the Appellant using a restricted reading of Section 17(5)(d) of the CGST Act is incorrect and is liable to be set aside.

6.2.2. It is submitted that Section 16 (1) of the CGST Act specifically provides that every registered person shall be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course or furtherance of his business. Such entitlement is subject to fulfillment of certain conditions such as possession of invoice, receipt of goods/service, payment of tax to Government etc.

6.2.3. It can be seen that one of the objective behind introduction of GST viz. seamless flow of credit is being fulfilled with Section 16(1) of the CGST Act. The major intent behind GST is that wherever, the supplier is engaged in providing taxable supply, it should be given credit of the inputs and input services used by it for providing the said supply.

6.2.4. It is further submitted that the eligibility of credit is subject to fulfillment of conditions under Section 16(2) of the CGST Act. The relevant portion of Section 16 of the CGST Act is extracted below:

> *"Section 16 - Eligibility and conditions for taking input tax credit.*
> *(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him 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.*
> *(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--*
> *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
> *(b) he has received the goods or services or both.*
> *Explanation.-For the purposes of this clause, it shall be deemed that the registered person has received the goods or, as the case may be, services--*

(i) where the goods are delivered by the supplier to a recipient or any other person on the direction of such registered person, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to goods or otherwise;

(ii) where the services are provided by the supplier to any person on the direction of and on account of such registered person.]

(c) subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply; and

(d) he has furnished the return under section 39:

Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon."

6.2.5. In the instant case, the Appellant before availing the credit will be fulfilling all the conditions such as receipt of tax invoice, receipt of goods/service, payment of tax to Government by supplier, furnishing of returns etc.

6.2.6. It is submitted that Section 17(5) of the CGST Act is a non-obstante clause to Section 16(1) of the CGST Act. Section 17(5) of the CGST Act provides certain cases in which credit is not available. Clause (d) of Section 17(5) provides that goods and services received by taxable person for construction of an immovable property (except plant and machinery) on his own account including when such goods or services or both are used in the course or furtherance of business. The relevant portion of Section 17 is extracted below for kind reference:

"Section 17 - Apportionment of credit and blocked credits.

(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business."

6.2.7. In the light of objective and provisions under GST, it can be said that Section 17(5)(d) deals with unavailability of credit of inputs/input services in case where the output is not taxable. Thus, in case where the outward activity undertaken by an assessee is not taxable, the provision of Section 17(5)(d) will apply and credit will not be available. In order to further explain the same, reference is made to

Entry No. 5 of Schedule III. Schedule III deals with activities which are to be treated neither as supply of goods nor supply of service.

6.2.8. Sale of building *interalia* is neither supply of service nor supply of goods by virtue of Entry no. 5 of Schedule III. Thus, on a combined reading of this provision alongwith the earlier paragraph, it can be said that in case if inputs/input services are used for construction of a building which is to be sold, restriction under Section 17(5) (d) will be applicable.

6.2.9. It is pertinent to mention that according to Entry No. 5 of Schedule II, renting of immovable property is a supply of service. Further, lease of building is also supply of service under Entry No. 2 of Schedule II. Accordingly, the Appellant at the time of renting the MRO facility will be liable to pay tax as the same is a taxable supply of service. Hence, the outward activity undertaken by the Appellant is a taxable supply.

6.2.10. In order to substantiate the understanding of the Appellant, reference is made to Circular No. 74/2018 dated 08.12.2018 which provides that credit will be available for construction materials, capital goods and input services used for construction of flats, houses, etc. where completion certificate has not been issued. It is pertinent to mention that on receipt of completion certificate, a building ceases to be goods and thus, GST is not applicable.

6.2.11. It can thus be concluded that the intent behind incorporating Section 17(5)(d) of the GST Act is to restrict the credit where the immovable property is being supplied after the completion certificate, as supply of immovable property does not attract levy of GST. However, for all other cases, such as renting/leasing of immovable property, as supply of service is being undertaken, credit of inputs and input services is available.

6.2.12. In the light of aforementioned, it is submitted that where the immovable property is constructed for the purpose of leasing out, the tax chain is not broken and accordingly, credit is available.

6.2.13. It is submitted that in the instant case, the Appellant is involved in setting up of MRO facility and further leasing it out to Elcom. Therefore, the Appellant is liable to pay GST on the outward supply, i.e. renting of MRO facility. Accordingly, the Appellant is eligible to claim credit of the tax charged by M/s Akanksha Contracts Pvt. while supplying the goods and services to the Appellant, on fulfillment of conditions enunciated under Section 16(2) of the CGST Act.

6.2.14. In this regard reliance is placed on the case of ***M/s Safari Retreats(Supra),*** wherein the credit has been allowed on goods and services procured for the construction of shopping malls and then letting out the same. Relevant portion of the judgment is extracted below for your kind reference:

> *"19. The very purpose of the Act is to make the uniform provision for levy collection of tax, intra state supply of goods and services both central or State and to prevent multi taxation. Therefore, the contention which has been raised by the learned counsel for the petitioners keeping in mind the provisions of Section 16 (1)(2) where restriction has been put-forward by the legislation for claiming eligibility for input credit has been described in Section 16(1) and the benefit of apportionment is subject to Section 17(1) and (2). While considering the provisions of Section 17(5)(d), the narrow construction of interpretation put-forward by the Department is frustrating the*

very objective of the Act, inasmuch as the petitioner in that case has to pay huge amount without any basis. Further, the petitioner would have paid GST if it disposed of the property after the completion certificate is granted and in case the property is sold prior to completion certificate, he would not be required to pay GST. But here he is retaining the property and is not using for his own purpose but he is letting out the property on which he is covered under the GST, but still he has to pay huge amount of GST, to which he is not liable.

20. In that view of the matter, in our considered opinion the provision of Section 17(5)(d) is to be read down and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in ***(1999) 2 SCC 361 (supra),the very purpose of the credit is to give benefit to the assessee. In that view of the matter, if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST, which is required to pay under Section 17(5)(d) of the CGST Act.***

21. In that view of the matter, prayer (a) is required to be granted. However, we are not inclined to hold it to be ultra vires. Prayer (b) is not accepted."

6.2.15. It is submitted that when the output is taxable, the inputs and input services used for undertaking the output supply are eligible for credit. In this regard, reliance is placed on the case of **Eicher Motors Ltd. v. Union of India(1999) 2 SCC 361**, wherein it has been observed that the credit of the tax paid on inputs shall be available, if the tax has been paid on such goods on the basis of the fact that these goods will be utilised as inputs in the manufacture of further products.

6.2.16.Similar view has been taken in the case of **Collector of Central Excise, Pune v. Dai Ichi Karkaria Ltd., (1999) 7 SCC 448** wherein it has been observed that the credit is an indefeasible right of the assessee.

6.2.17.Further reliance in this regard is required to be made to the ruling of Punjab Authority of Advance Ruling in the matter of **In Re: K.P.H. Dream Cricket Private Limited, 2018 (18) G.S.T.L. 278 (A.A.R. - GST),** credit of inputs and input services was allowed to the assessee for the act of providing complimentary tickets, as this act was taxable. It is pertinent to mention here that in this application, as the outward activity was taxable, credit was held to be available to the assessee/applicant.

6.2.18.On the basis of the aforementioned submissions, it is submitted that as the Appellant is engaged in the provision of renting of immovable property which is a taxable supply, the goods and services procured by it for making such supply are eligible for credit.

6.2.19.Further reliance in this regard is placed on the case of **Oxford University Press v. Commissioner of Income Tax, (2001) 3 SCC 359,** wherein purposeful interpretation of a statutory provision was validated.

6.2.20.Furthermore, in the case of **K.P. Varghese v. Income-Tax Officer, Ernakulam and another, Vol.131 (1981) ITR 597**, it has been observed that

literal construction in certain cases leads to an absurd interpretation of a statutory provision and such practice is required to be avoided.

6.2.21.In the light of aforementioned submissions, it is submitted that in the view of the Appellant, the restriction under Section 17(5) (d) of the CGST Act is not applicable in cases where the inputs and input services are used for making a taxable output supply.

Rebuttals to the findings of the impugned ruling

6.2.22.The Authority has observed that credit is not available for the construction of an immovable property even when such goods or services are used in the course or furtherance of business. However, no reasoning behind such observation is provided. The Authority has not provided any reason as to why the decision of *Safari Retreats*(**supra**) is not applicable.

6.2.23.The Authority has also observed that the interpretation of Section 17 (5) (d) of the CGST Act of the Appellant that it deals with unavailability of credit of inputs/ input services when output is not taxable, is implicit and one dimensional in nature and is not the intentional outcome of the said provision. In this regard, it is submitted that the decision of *Safari Retreats* (**supra**) and earlier advance ruling of *K.P.H. Dream* (**supra**) substantiates the view of the Appellant. The Authority also recorded that the purposive dimension of the said provision is blocking of credit for construction of immovable property. However, it is submitted that this observation of the Authority is without any reason and is against the principles laid down by the cases cited by the Appellant in its application.

6.2.24.It is submitted that the Authority observed that there are 2 phases in the instant transaction, i.e. construction of immovable property and leasing of the same for MRO purposes and the issue in the Application only relates to the 1st phase. The Authority concluded that the taxability of the output supply post construction is immaterial in determining the eligibility of credit. In this regard, it is submitted that the observation of the Authority is incorrect. The taxable event under GST is "supply". Thus, the question of availing credit will apply only when a supply take place. In this case, the inputs/input services are being supplied to the Appellant and being a recipient, it will be eligible to take credit on the same, on fulfillment of conditions mentioned under Section 16. In case if a subsequent transaction of the Appellant fall under the restriction under Section 17(5), requirement of reversal of credit (by way of addition in output tax liability) will arise. Since, the instant case does not fall under the restriction under Section 17(5), the Appellant is eligible to take credit.

6.2.25.Moreover, in this regard it is also submitted that the Authority failed to analyze the transaction as a whole. It is submitted that the MRO facility is not merely created with an intent for construction of immovable property. It has been created keeping in mind the specifications given by Elcom with the objective to be given on lease to it.

6.2.26.Therefore, it is submitted that the Authority failed to appreciate the transaction as a whole and only based its findings on the basis of one limb of the transaction, ignoring the fact that the other limb is equally important to determine the taxability.

6.2.27.It is submitted that the Authority further clarified that if goods or services are used for the construction of an immovable property, the credit shall not be

available, irrespective of the use of the said property, i.e. in accordance with Section 17 (5) (d) of the CGST Act. In this regard, it is submitted that the Authority failed to provide any reason behind the said interpretation, i.e. the use of the said property shall not be an issue while deciding the eligibility of credit and application of the provision of Section 17 (5) (d) of the CGST Act. Further, the findings of the Authority is not in conformity with the principle laid down in the cases relied by the Appellant in its application.

6.2.28. It is further submitted that Clause 9.2 of the sub-lease deed between the Appellant and Elcom provides that even if such sub-lease deed is terminated before the predetermined period, Elcom will make good the loss of the rentals till the Appellant finds a new tenant for the MRO facility. Therefore, it can be construed that the ultimate aim behind construction of MRO facility was only to rent it further and nothing else.

6.2.29. It has been observed by the Authority that the following case laws are not relevant in the present case as the facts are different from the facts referred in these cases:

- **Tara Exports v. Union of India, 2018 (9) TMI 1474;**
- **Eicher Motors Ltd. v. Union of India, (1999) 2 SCC 361;**
- **Collector of Central Excise, Pune v. Daiichi Karkaria Ltd., (1999) 7 SCC 448.**

6.2.30. In this regard, it is submitted that, the facts of the cases are although not similar to that of instant matter; however, the principle laid down in these cases is applicable in the instant case. Thus, the impugned ruling is liable to be set aside.

6.3. THE ACT OF NOT FOLLOWING THE ORISSA HIGH COURT JUDGMENT IN THE CASE OF SAFARI RETREATS IS A CASE OF JUDICIAL INDISCIPLINE.

6.3.1. It is submitted that the Appellant in the Application as well as during oral submissions has heavily relied on the judgment of Hon'ble Orissa High Court in the case of *Safari Retreats* **(Supra),** where in the facts and circumstances are similar to that of instant matter.

6.3.2. It is submitted that the said judgment has decided the similar issue which is in question in the instant Appeal. However, the Authority failed to record any findings on this judgment, even when additional written submissions were made by the Appellant regarding the applicability of the aforesaid judgment.

6.3.3. It is submitted that by not following the aforesaid judgment the Authority has violated the judicial discipline as no contrary judgment on this issue in GST regime has been passed by any other High Court or any other superior Court.

6.3.4. In this regard, reliance is placed on the case of **Commissioner of Income Tax, Vidarbha v. Godavaridevi Saraf, 1978 (2) ELT 624 (Bom.)** wherein it has been held that the Tribunal was required to respect the law laid down by a High Court, even if it is of a different State, so long as there is no contrary decision of any other High Court on that question.

6.3.5. Further, reliance in this regard is placed on the case of **The Commissioner of Central Excise v. Valson Dyeing Bleaching and Printing Works, 2010 (259) ELT 33 (Bom.)** wherein the Hon'ble High Court upheld the order of the Tribunal on the ground that it had merely followed a judgment of the Madras High Court as the same was binding on the Tribunal. It is submitted that further reliance

is also placed on the case of **Panipat Co-operative Sugar Mills Ltd. v. Commr. of Central Ex., Rohtak, 2013 (293) ELT 66 (Tri. – Del),** wherein the judgment of 3 different High Courts on the similar question of law has been adopted by the CESTAT, New Delhi. It is submitted that in the above-referred case, there was no decision of the jurisdictional High Court on the issue being dealt by the Tribunal. In this background, the reliance was placed on the decision of 3 different high courts which were not the jurisdictional high courts in that case. Applying similar analogy, it is submitted that in the instant case as well, though the judgment of Safari Retreats (supra) is not that of a jurisdictional High Court, same was required to be followed by the Authority as there is no contrary decision on this issue by any other High Court (including the jurisdictional i.e. Rajasthan High Court). It is submitted that Jurisdictional officer relying on the decision of Safari Retreats (Supra) submitted that credit is admissible.

6.3.6. It is submitted that reference is also required to be made to the judgment in the case of **Shalu Synthetics Pvt. Ltd. v. CCE & ST, Vapi, 2017 (346) ELT 413 (Tri. – Ahmd.)**, wherein it has been held that the High Court decisions (in this case other jurisdiction) are required to be preferred over the decision of the Larger bench of the Tribunal.

6.3.7. In view of the judgments relied above and the submissions made, it is submitted that the Authority has erred in not relying on the decision in the case of *Safari Retreats* (Supra), wherein the facts and circumstances are similar to that of the instant matter. It is submitted that since no contrary view taken by any other high court including Hon'ble Rajasthan HC, by application of principle of stare decisis, the said judgment is squarely applicable on the Appellant.

6.4. THE ORISSA HIGH COURT JUDGMENT IN CASE OF SAFARI RETREATS IS FINAL AND VALID.

6.4.1. It is submitted that the Department has challenged the judgment of Safari Retreats (supra) before the Hon'ble Supreme Court vide a special leave petition. The Hon'ble Supreme Court has issued notice in this petition vide order dated 08.11.2019.

6.4.2. It is pertinent to mention that neither any stay has been granted in this case nor the operation of the judgment in the case of Safari Retreats (Supra) has been suspended. Accordingly, the judgment of Safari Retreats (supra) is valid and thus, in operation.

6.4.3. It is submitted that reliance has been placed on the case of **Kunhayammed and others vs. State of Kerala and another, AIR 2000 SC 2587(1).** Relevant portion of the judgment is extracted below:

> *"..14...(4) In spite of a petition for special leave to appeal having been filed, the judgment, decree or order against which leave to appeal has been sought for, continues to be final, effective and binding as between the parties. Once leave to appeal has been granted, the finality of the judgment, decree or order appealed against is put in jeopardy though it continues to be binding and effective between the parties unless it is a nullity or unless the Court may pass a specific order staying or suspending the operation or execution of the judgment, decree or order under challenge."*

6.4.4. Further, reliance is placed on the judgment in case of **Sanyogita Rane v. Manoramabai Rauji Rane, 2013 (7) ALLMR 633 (Bombay High Court)**, wherein the judgment was held to be effective since it has not been stayed by the Apex Court in subsequent proceedings. In this case, reference was made to *Kunhayammed and others v/s. State of Kerala and another* **(supra).**

6.4.5. Further, reliance can also be placed on the case of **Tata Motors Ltd. v. The State of Jharkhand and Ors., 2008 (56) BLJR 2903 (Jharkhand High Court)**, wherein the Ld. Bench observed that mere pendency of Special Leave Petitions will not amount to stay the operation of the impugned judgment.

6.4.6. It is submitted that in the above case, the Tribunal followed the principle of judicial discipline and held that the judgments cited would squarely apply to the issue on hand as no stay order has been passed against them even if appealed before the Apex Court.

6.4.7. On the basis of the aforementioned judicial precedents, it is submitted that it is a settled principle of law that till an order is stayed or set aside by the higher court, the order is operative and thus, binding on other judicial/quasi-judicial authorities. It is reiterated that the judgment in the case of Safari Retreats (supra) has not been stayed or set aside by the Hon'ble SC and thus, the Hon'ble AAAR is bound to follow the same. Thus, the impugned ruling is liable to be set aside.

6.5. The appellant has also made additional submissions (supplementary facts and additional grounds of appeal) on 04.11.2020 as under:-

6.5.1. A teaming agreement was signed between Israel Aerospace Industries Ltd. (IAI) and Elcom Systems Pvt. Ltd. (ELCOM) on 15 Jan 2018 for providing maintenance, repair and overhaul (MRO) and training services for the RPVs (Remotely Piloted Vehicles), also known as drones. As per this agreement, MRO activities concerning current UAV(Unmanned Aerial Vehicle) systems and new UAV systems shall be performed by ELCOM as a sub-contractor to IAI. Services to be rendered by ELCOM as per this agreement are as under:

(a) Field Activities:
- Maintenance of:
  - i) Unmanned Air Vehicle (UAV)
  - ii) Ground Control Stations (GCS)
  - iii) Ground SATCOM
  - iv) "I" Level labs
  - v) GSTE Repair and Calibration
- Spare parts support
- Quality assurance
- Training and Certifications

(b) Maintenance Center Activities:
- Engine - repair, overhaul and investigation
- Structure and Composite- repair
- Paint- repair
- Wiring – repair
- UAV & AGCS – repair
- Communication- repair (future option)

6.5.2 On 27th March 2018, an agreement signed in Delhi with IAI wherein the detailed "Statement of Work (SOW)" was defined and agreed upon by two parties (IAI and ELCOM). As per the agreement, ELCOM shared the responsibility of setting up the Infrastructure for MRO, logistics and Training as per FRD(Facility Required

Documents). Detailed responsibility defined in Para 4 of the SOW is reproduced below.

4. <u>Infrastructure requirements</u>

ELCOM shall be responsible for setting up the requisite maintenance, logistics and training infrastructure as per specific in the FRD. The main considerations are enclosed as follows:

4.1 Offices for management and operation
4.2 Maintenance Hangar
4.3 Workshops
4.4 Repair laboratories
4.5 Logistics Warehouse
4.6 training Centre
4.7 Runway (In consultation with IAI/Malat)
4.8 Guide Simulator

6.5.3. In the month of April 2018 IAI team visited various sites for setting up MRO facility, including existing factory location of ELCOM in Mohali. Vacant portion of the appellant site at Bhiwadi was selected for construction of the MRO facility. IAI developed FRD (Facility Required Documents) as per the selected site, and the same was shared with ELCOM through email dated 13th June 2018 by Mr Rami Cohen of IAI.

6.5.4. IAI team visited ELCOM on 16-17 Jul 2018, to discuss FRD and other requirement of the MRO project. Subsequently ELCOM Team visited IAI, prepared a project report and submitted to RIICO for approval.

6.5.5. Post tie-up with the appellant for the construction, the following individual/ company was appointed to undertake the construction:

a) RSA Architects, Mr Swarandeep Singh – Owners Engineer
b) CPKA - Project Management Consultancy, Architecture Engineering & Design Consultancy

6.5.6. **MRO: Facilities Under Construction:** As per the contract with IAI following facilities are under construction at the appellant site at Bhiwadi:

a) Main Hangar Block- comprising of Hangar and Annex buildings (both side of hangar)
b) Engine Test Room
c) Paint Shop
d) Warehouse
e) Security Office Cum reception
f) Canteen, power house, and other utility buildings

6.5.7. **Hangar, Paint shop and Engine Test Room:**- A brief on hangar, engine test room and Paint shop has been submitted and concluded that Engine test bench is not complete without the supporting infrastructure, specially designed structure of the Hanger is integral part of the repair and test set up of UAV and the complete structure of the paint shop acts as a paint booth in the MRO facility.

6.5.8. **Annex Building:-** Two Annex buildings (both side of Hangar) are being constructed to house the repair, training and office facilities as per the requirements laid out by IAI. These are double story RCC buildings, facilities being constructed in these building are as under:

<u>Left Hand Side(LHS) Ground floor (Workshop/Labs)</u>	**<u>Right Hand Side(RHS) Ground floor (Workshop/Labs)</u>**

Structure Repair Shop	Measuring Room
Trimming Room	Battery Room
Textile Material Cut Room	Propeller Calibration Room
GSE Maintenance Shop	Carburetor Room
Electrical Maintenance Shop	Propeller Shop
Mechanical Maintenance Shop	Engine Shop
Store	Tool Room
Trimming Room	Crew Room
Inflammable Material Store	Server Room
	SAR Lab
	GCS Lab
	Wiring Shop
First Floor	**First Floor**
Training Area including Simulator facility for training	All administrative and technical offices including conference rooms

6.5.9. Hangar is mainly designed for repair/assembly/overhaul/ upgrade of RPA (Remotely Piloted Aircraft). Apart from RPAs, hangar space will be utilised for repair/ upgrade of Ground Control Station Shelters. Hangar is designed for parking four fully assembled RPAs. Workshops of various parts of RPA are located in the Ground floor of Annex buildings, both side of the Hangar. Details of workshops being constructed in the Annex buildings are as under:

- GSE Maintenance Shop
- Electrical Maintenance Shop
- Mechanical Maintenance Shop
- Structure and Composite Repair Shop
- General Store
- Trimming Room
- Inflammable Material Store
- Measuring Room
- Battery Room
- Propeller Calibration Room
- Carburetor Room
- Propeller Shop
- Engine Shop
- Tool Room
- Crew Room
- Server Room
- SAR Lab
- GCS Lab
- Wiring Shop

6.5.10. RPA will be brought to the MRO centre in a container (disassembled state) for repair/ overhaul/ upgrade. Various parts of the RPAs will be repaired/ tested in respective shops (as on required basis) and then the RPA will be assembled in the hangar for further repair/testing. Similarly, if painting is required, parts of RPA will be taken to the paint shop. In case any repair is carried out in the engine, it has to be tested and calibrated in the Engine Test Room. Annex is constructed alongside Hanger for ease of movement of repairable to and from various repair shops.

6.5.11. Warehouse is customized to house the spares and material required for Field Service as well as MRO. Apart from the general area of storage, there are rooms with required environmental control to house aircraft electronic components,

rubber parts, battery and inflammable stores. It also has a separate room with access control to store classified material (Locked end user room). Warehouse is customised for storage of spare parts of specific RPVs. Even the rack layout with weight capacity is specified by the OEM (IAI).

6.5.12 Training facility and Simulator rooms are built as per FRD of IAI. Every details of the training facility down to the location of electrical points have been specified by IAI for this facility. Building plays an important role in the simulator setup. Building infrastructure to include room layout, acoustic walls, one way glasses, electrical blind as essential part of the simulator. Only the simulator equipment will not complete the setup and it can't be housed in an ordinary building to complete its desired function.

6.5.13. **Customised MRO Infrastructure:-** Complete MRO Infrastructure is customised as per the requirement specified by IAI. FRDs provided by IAI remains the guiding factor for all architectural design by CPKA. Some of important points to establish these facts are as under:

a) The infrastructure is built for MRO of RPVs supplied by IAI to various defence forces.

b) Since the facility is equipment specific, floor space for each workshop, door opening, corridor space, turning radius etc are specifically mentioned by IAI.

c) Even location of electric points and type of sockets required in each point is specified by IAI.

d) Each drawing have been vetted and approved by IAI.

e) IAI team visited the site multiple time to supervise the construction.

6.6. The AAR has not applied the law relating to exclusion of credit in section 17(5)(d) of CGST Act. This provision does not block credit in respect of immovable property that satisfies the description of plant and machinery. The structures being constructed for the MRO facilities would be ultimately used as plant, on which input credit is not blocked under the GST law.

6.6.1. The appellant has decided to let Elcom Systems Pvt. Ltd. operate its MRO facility from its vacant land at an industrial plot allotted to the appellant by RSIDC Ltd. Under the arrangement, the appellant has agreed to construct buildings as per the specifications given by ELCOM. ELCOM will do the finishing by installing machinery and equipment to complete the setting up of the MRO facility. The appellant would charge a monthly lease rent from ELCOM for the vacant land plus the buildings it would erect. The lease rent would be taxable under the GST laws.

6.6.2. Section 16 of the CGST Act permits registered person to take input credit in the prescribed manner.

6.6.3. GST paid by the appellant on input goods and services used for construction of the buildings would be allowable as input credit in terms of section 16. But this provision is subject to section 17, which prescribes circumstances in which certain input credits are blocked for utilisation in paying output tax.

6.6.4. The AAR has reached abrupt conclusion after quoting the law sub-section (5) of Section 17 of GST Act, 2017.

Clearly, under section 17(5)(d), blocking of credit does not apply to plant or machinery. At the end of section 17, there is an explanation, quoted in the earlier paragraph above, which defines "plant and machinery". The AAR has not considered

this definition nor whether the structures being constructed by the appellant satisfy the definition of plant for the purpose of section 17(5)(d).

6.6.5. It should be noted that clauses (c) and (d) of section 17(5) excludes immovable properties for blocked credit and the parenthesis excludes from this exclusion "plant and machinery" in clause (c) and "plant or machinery" in clause (d). It is not clear why in one "and" is used and in the other, "or". Thus, input tax credit for construction of plant and machinery is not blocked. In the Explanation to section 17(5), "plant and machinery" has been defined as "apparatus, equipment, and machinery fixed to earth by foundation or structural support". That means all these three expressions are referring to immovable properties only. This Explanation excludes from the definition of "plant and machinery" buildings and civil structures.

6.6.6. In different laws, there are differential treatments for plant and building. It may so happen that a building may also be regarded as plant. A building is not a plant when it is used as a setting or shelter in which business is carried on. But if the building is used as a tool for carrying out the business operation, and not merely as a setting/shelter, it should be given the status of plant. In ***CIT vs. Dr. B. Venkata Rao, (2000) 111 Taxman 635 (SC)***, the Supreme Court explained that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, it amounted to a 'plant'; but where the structure played no part in the carrying on of these activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant.

6.6.7. The Supreme Court, ***Scientific Engg. House (P.) Ltd. v. CIT, (1986) 157 ITR 86 (SC)***, explained the meaning of plant, citing several rulings of India and UK:

> **11.** The counsel for the assessee urged that the expression 'plant' should be given a very wide meaning and reference was made to a number of decisions for the purpose of showing how quite a variety of articles, objects or things have been held to be 'plant'. But it is unnecessary to deal with all those cases and a reference to three or four decisions, in our view, would suffice. The classic definition of 'plant' was given by Lindly, LJ. in *Yarmouth* v. *France* [1817] 19 QBD 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 runs thus:
>
> > "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a businessman 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", (p. 658)
>
> 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, as for instance, in *Hinton* (*Inspector of Taxes*) v. *Maden & Ireland Ltd.* [1960] 39 ITR 357 (HL) knives and lasts having an average life of three years used in manufacturing shoes were held to be plant. In *Taj Mahal Hotel's* case (*supra*) 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 pipeline fittings installed fell within the definition of 'plant' given in section 10(5) of the Indian Income-tax Act, ('the 1922 Act') which was similar to the definition given in section 43(3) of the 1961 Act and this Court after approving the definition of plant given by Lindley LJ. in *Yarmouth's* case (*supra*) as expounded in *Jarroldv. John Good & Sons Ltd.* [1962] 40 TC 681 (CA) held that sanitary and pipeline fittings fall within the definition of plant.

12. In *IRC* v. *Barclay, Curie & Co. Ltd., (1970) 76 ITR 62,* the House of Lords held that a dry dock since it fulfilled the function of a plant must be held to be a plant. Lord Reid considered the part which a dry dock played in the assessee-company's operations and observed:

> "...It seems to me that every part of this dry dock plays an essential part.... The whole dock is I think, the means by which, or plant with which, the operation is performed." (p. 67)

Lord Guest indicated a functional test in these words:

> "...In order to decide whether a particular subject is an 'apparatus' it seems obvious that an enquiry has to be made as to what operation it performs. The functional test is, therefore, essential at any rate as a preliminary...." (p. 75)

In other words, the test would be: Does the article fulfill the function of a plant in the assessee's trading activity? Is it a tool of his trade with which he carries on his business? If the answer is in the affirmative it will be a plant.

[Emphasis added]

6.6.8. The Supreme Court, in ***CIT v. Dr. B. Venkata Rao, (2000) 243 ITR 81 (SC)***, considered a building, in which nursing home was run, as plant and observed,-

> "2. The assessee is a medical practitioner. He runs a nursing home. In respect of the building in which the nursing home is run, the assessee claimed, for the asst. yr. 1983-84, that it was a "plant". His contention was rejected by the ITO and by the CIT (A). The Tribunal found to the contrary. Applying the functional test, it held that the nursing home was a plant. The High Court affirmed that view. It said that a building used as a nursing home is not comparable with an ordinary building having regard to the number of persons using it, the manner of its use and the purpose for which it is used. The building was used not only to house patients and nurse them, but also to treat them, for which various kinds of equipment and instruments were installed.
>
> 3. The most apposite decision in this context is that delivered by the Allahabad High Court in *S.K. Tulsi & Sons* v. *CIT (1990) 90 CTR (All) 99: (1991) 187 ITR 685 (All): TC 29R.638.* Reference was made to an earlier judgment, where also the functional test approved by this Court in several decisions was applied. It was held that if it was found that the building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, it amounted to a "plant"; but where the structure played no part in the carrying on of these activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant."

6.6.9. In ***Asstt. CIT v. Victory Aqua Farm Ltd., (2015) 379 ITR 335 (SC)***, the Supreme Court accepted a pond used for fish farming as plant and explained the reasons:

> '4. It is not in dispute that if these ponds are 'plants', then they are eligible for depreciation at the rates applicable to plant and machinery and case would be covered by the provisions of Section 32 of the Act. It is not even necessary to deal with this aspect in detail with reference to

the various judgments, inasmuch as judgment of this Court in *Commissioner of Income Tax, Karnataka* v. *Karnataka Power Corporation [2002(9) SCC 571]* clinches the issue. Therein the Court has taken into consideration the earlier judgments on which some reliance was placed by the learned counsel for the Revenue and are suitably dealt with. The relevant portion of the said judgment reads as under:

"5. It was the case of the assessee that it was entitled to investment allowance as applicable to a plant in respect of its power generating station building. In a note filed before the Commissioner (Appeals) it stated that it had included for the purpose the value of its Potential Transformer Foundation. Cable Duct System, Outdoor Yard Structures and Tail Race Channel. It explained that the process of generation started from letting in water from the reservoir into the pen-stocks and ducts which were the water conductor system into the turbines. Once electricity had been produced by generation, it had to be conducted, as it was not possible to store the same, and the process of generation continued until the electricity was led to the transmission tower. The water that was used for rotation of the turbines had to be removed and this was done through the Tail Race Channel. For stepping up the electricity, transformers were used in the outdoor yard. The conduction of the electricity was through conductors held in ducts, called the Cable Duct System, which were specifically designed for the purpose. The case of the assessee, therefore, was that all these were part of the special engineering works that were an essential part of a generating plant and, therefore, it was entitled to have the same treated as a plant for the purposes of investment allowance. The Commissioner accepted the correctness of the assessee's case. He held that it was clear that the generating station buildings had to be treated as a plant for the purposes of investment allowance. These buildings could not be separated from the machinery and the machinery could not be worked without such special construction. He, therefore, allowed investment, allowance on the generating station, building, as claimed. The Tribunal affirmed this finding, as, as, indeed did the High Court.

6. We, therefore, have before us a finding of fact recorded by the fact finding authority that the generating station building is an integral part of the assessee's generating system.

7. Our attention has been drawn by learned Counsel for the Revenue to the judgment of this Court in *Commissioner of Income Tax* v. *Anand Theatres* 224 I.T.R. 192. He submits that, in that judgment, this Court has held that, except in exceptional cases, the building in which the plant is situated must be distinguished from the plant and that, therefore, the assessee's generating station building was not to be treated as a plant for the purposes of investment allowance.

8. It is difficult to read the judgment in the case of Anand Theatres so broadly. The question before the court was whether a building that was used as a hotel or a cinema theatre could be given depreciation on the basis that it was a "plant" and it was in relation to that question that the court considered a host of authorities of this country and England and came to the conclusion that a building which was used as a hotel or cinema theatre could not be given depreciation on the basis that it was a plant. We must add that the Court said, "To differentiate a building for grant of additional depreciation by holding it to be a plant in one case where a building is specially designed and constructed with some special features to attract the customers and the building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable." This observation is, in our view, limited to buildings that

are used for the purposes of hotels or cinema theatres and will not always apply otherwise. The question, 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.

9. In the instant case, there is a finding by the fact finding authority that the assessee's generating station building is so constructed as to be an integral part of its generating system. It must, therefore, be held that it is a "plant" and entitled to investment allowance accordingly. The third question is answered in the affirmative and in favour of the assessee."

6. We find that the judgment dated 14.10.2004 rightly rests this case on 'functional test' and since the ponds were specially designed for rearing/breeding of the prawns, they have to be treated as tools of the business of the assessee and the depreciation was admissible on these ponds. We, thus, decide the question in favour of the assessee and as a consequence, appeals of the Revenue are dismissed and that of the assessee are allowed.'

6.6.10. The appellant also placed reliance on ***Cachet Pharmaceuticals (P.) Ltd. vs. CIT, (2017) 82 taxmann.com 82 (Patna)***,
Schofield (H.M. Inspector of Taxes) vs. R. & H. Hall Ltd. (1965-1975) 49 TC 53,
Cooke v. Beach Station Caravans Ltd., Ch D 1974, [1974] STC 402; [1974] 1 WLR 1398; [1974] 3 All ER 159,

6.6.11. All the structures put up in the MRO facilities are designed for ELCOM's purposes and according to its specifications. the designs of the buildings are explained in Statement of Facts – *Annexure-I(2).* These buildings are not simple housing, where some business activity will be carried out. The shapes of the building are carefully constructed, keeping in mind the equipment that would be fitted, and the operations carried out.

6.6.12. **Engine Run-Up Test Bench**:- The Engine Run-up Test Bench structure includes two rooms: engines run-in room and control room. Specific test equipment will be installed in this facility to test ROTAX — 916, engines, post repair. However, test equipment alone is not sufficient for testing of the engine; the complete structure of the Engine Run-Up Test Bench is designed and constructed as integral part of this test set facility. A few specific provisions made in the building are as under:-

(a) **Inlet Air Opening:** An Inlet air opening (1 m x 7 m) on the roof of the building has been provided for drawing fresh air for running of the engine (refer to Figure 3, Page 21 of FRD).

(b) **Outlet Air Opening**: An outlet air opening with silencers,(dimensions: Height - 4.5 m, length- 3.5 m, complete rear wall area) has been provided (refer to Figure 3, Page 21 of FRD)

(c) **Ceiling Crane**: A ceiling mounted, XYZ Crane, with loading capacity of500 Kg, will be installed in the run-up room. Provision in the ceiling structure has been made to support the crane.

(d) **Acoustic Isolation**: Sound proofing of the building has been done to ensure reduction of noise level from 115 db to 70 db outside the room and to 63 db in the control room.

(e) **Window**: A shatter proof window has been built in the structure, between the control room and the engine run-in room (Dimensions: height from the floor - 1m, height - 1.5 m, width - 2.5m). The window has been designed to withstand any type of failure, burst, explosion within the Engine Run-In Room.

It would be evident from above that the civil infrastructure is integral to the functioning of Engine Test Facility. The Engine test bench is not complete without the supporting infrastructure.

6.6.13. **Hangar**: A hanger (dimensions: width — 50 m, length - 33m) is being constructed for the purpose of repair, assembly and calibration of RPVs (Remotely Piloted Vehicle). A few important features of the Hangar are as under:

(a) Span/ width of the hanger (50 m), unsupported, is designed to facilitate movement of assembled RPV to and from RPA.

(b) **Crane:** An underslung crane with loading capacity of 1.5 ton, being installed. Trusses of the hanger roof have been designed to take the load of the crane. Load of the carne further gets transferred to foundation from trusses through columns.

(c) **Utility of the Crane**: The underslung crane, apart from material shifting, works as a testing and calibration aid for the RPVs. Balancing of RPVs, a critical flying test requirement, is achieved by suspending the assembled RPV in air by the crane.

It would be evident from the above that the specially designed structure of the Hangar of MRO is integral part of the repair and test set up of UAV.

6.6.14. **Paint Shop**: An aviation standard painting facility is being set up in the MRO facility. Most of the general purpose paint shops used in the industries, are container based, where, the paint shop manufactures supply painting equipment mounted in a prefabricated the container. In the MRO facility, the paint is being built to the specific design of OEM as combination of concrete building and associated equipment. A few important features of the Paint Shop are as under:-

(a) Paint Shop, approx. area 415 sqm, consists of three shops, i.e. Painting Preparation Shop, Painting Shop and Drying area.

(b) Temperature and RH level in all shops are controlled as per the painting process requirements.

(c) Cut out in the roof have been provide for inlet air and exhaust fans are mounted on the wall.

(d) One wall of the Paint shop supports the Air Filter. Air from the paint shop is required to exhaust to the environment through these filters.

Conventional paint booth could not be utilised for the MRO, due the typical shape and size of the parts of RPV, which will require painting. The complete structure of the Paint shop acts as a paint booth in the MRO facility.

6.6.15. The appellant is to construct several specialised buildings. These are not normal structure wherein any type of business activity can be carried on. These have been designed keeping in mind equipment that would be installed and MRO operations to be carried out. In the hangar, overhead crane is to be installed that can move in three dimensions in the hangar space, which is crucial for taking out and reinstalling engines in the drones. The heavy crane and operational attachments will be hung from the roof. For this reason, the roof is angular shaped in order to take the load of the machinery. This way, the building takes part in the operation for repair of the drones. Similarly, the engine testing building is specially designed to allow draughts of air coming from the atmosphere and going back when the engine would be tested. From behind a glass partition an operator would switch on and run the engine to test its capability to function under different conditions. In the paint shop the walls would be lined with filters and the whole building would be designed to handle paint fumes.

6.6.16. The whole complex, for which the appellant is constructing the structures, is not just conglomeration of buildings, wherein business is to be conducted. To the structures, further additions would be made by ELCOM by installing machinery and equipment. All the structures together would constitute the MRO facility, like

structures in a factory. Every element of the complex would contribute to the repairing of drones. The structures are designed specifically keeping the technical requirements in mind. The buildings are peculiarly designed to complement the equipment and participate in the desired activities, not merely shelters in which the activities are conducted. The whole complex, including the structures and equipment is the MRO business that would come into existence. The appellant would play an initial role in constructing the structures to an extent. Once completed, the entire complex, including all the buildings should be treated as plant for the purpose of section 17(5)(c) and (d).

6.6.17. As explained earlier, a building or structure which is only a setting or shelter in which business is carried on is not plant, but where the building is so designed that it contributes to the operations of the business, it is a plant. In ***Dwarka Prasad v. Dwarka Das Saraf*, (1976) 1 SCC 128**, the Supreme Court was considering whether a cinema hall, built and adapted for screening films for application of rent control law. The entire building and cinema projector, accessories and the like were leased. Later, the landlord wanted to evict the lessee. The Court held that the protected category under the law was for "accommodation". A lease of an "accommodation" must essentially be of a building — not of a business or industry together with the building in which it is situated.

6.6.18. The Bombay High Court, in ***Purushottam Rambhao Khandwekar v. Gangadhar Mansingrao Wagh*, 1986 SCC On Line Bom 303: 1987 Mah LJ 41**, has decided a matter where the question was whether the lease was of the open land or of the land and the building which was constructed thereon for the use of the lessee. In that case, the lessee had agreed to construct a cinema theatre upon the site at the cost of Rs.50,000, the rent of which was fixed at Rs.6,000 per annum out of which Rs.1,200 was to be paid to the lessor and the balance to go towards payment of cost of construction of the theatre. After the lease period of 25 years, the lessee was to remove the machinery, equipment and furniture and hand over vacant possession of the premises to the lessor. The Court held that the lease was in respect of the open site only and the lessor was not a tenant in the building.

6.6.19. Courts have interpreted commercial arrangement not by the nomenclature given by the parties in the transaction document in appropriate circumstances. In ***Nai Bahu v. Lala Ramnarayan, (1978) 1 SCC 58***, the Supreme Court observed that, on the facts of that case, there was no intention to create a lease between the parties though the High Court thought there was. It ruled that it is the dominant intention of the document which must guide the construction of its content. Similarly, in ***Phatu Rochiram Mulchandani v. Karnataka Industrial Areas Development Board, (2015) 5 SCC 244***, it held that while construing an agreement it is not the nomenclature but the substance thereof that needs to be looked into. Therefore, mainly because the agreement in question is termed as "Lease Agreement" that by itself will not be the sole determinative factor.

6.6.20. In ***Sundaram Finance Ltd. v. State of Kerala, AIR 1966 SC 1178,*** the Supreme Court has held that the true effect of a transaction may be determined from the terms of the agreement considered in the light of the surrounding circumstances. In each case, the Court has power to go behind the documents and to determine the nature of the transaction, whatever may be the form of the documents. In this case, the Court ignored the sale letter and held that the transaction was one of loan transaction.

6.6.21. In ***Mangala Kunhimina Umma v. Puthiyaveettil Paru Amma, (1971) 1 SCC 562***, the Supreme Court has explained that the circumstances and

the conduct of the parties are always a very useful guide in ascertaining the true character and content of the transaction. It was to decide whether the transaction was lease or mortgage. The proportion between the amount advanced and the value of the property is one of the important tests to be taken into consideration in deciding the nature of the transaction. Where the amount advanced bears a substantial proportion to the value of the property it is an important element indicating that the intention was the creation of a mortgage and not a tenancy, it held on the facts of this case.

6.6.22. For convenience, ELCOM has required the appellant to construct the bare structures of the buildings before leasing and then ELCOM would complete the setting up of the MRO facility. On completion, the complex can be considered as a plant. Both the clauses (c) and (d) of sub-clause 5 of section 17 use the expression —

> "services ..... ***for*** construction of an immovable property (other than plant and machinery)

The expression "for" used before "construction of an immovable property" means that each service need not result in construction of an immovable property. In ***Indian Chamber of Commerce vs. CIT, (1976) 1 SCC 324***, the Supreme Court has explained that "for" used with the adaptive principle of a verb means "for the purpose of". It connotes the end with reference to which anything is done. The goods and services mentioned in section 17(5)(c)&(d) are those that help in the process of construction of an immovable property. In my view, the end result of construction is to be taken into account, and then decide whether the services provided to the appellant qualify or are blocked for input tax credit. From this prospective, all the activities that are undertaken to bringing into existence the entire MRO facility should be eligible for input tax credit. Accordingly, the appellant is entitled to take credit of GST paid by all the service providers involved in the process of setting up of the MRO facility.

6.7. The appellant is constructing the structures according to the specifications under the supervision of ELCOM. These are designed solely for the purpose of the operation of ELCOM. Since the appellant is not constructing the structures on its own account, the bar in section 17(5)(d) does not apply to such immovable property.

6.7.1. The appellant has lease-hold land from Rajasthan State Industrial Development & Investment Corporation Ltd. at Bhiwadi. Of this, vacant land of approximately 1,50,000 sq.ft. is lying unused for nearly 12 years. It has proposed to enter into a sub-lease agreement with ELCOM. ELCOM wants to run an MRO facility for drones. For this, it wants the appellant to construct hangar and other specialised buildings and then give it on lease at monthly rent of Rs.36 per sq.ft. The lease is for 9 years 6 months, with lock-in period for 9 years. The amount is to be increased by 12% compound rate after every 3 years. The appellant will spend about Rs.30 crore on construction of the structures and operation. Thus, the building structures are constructed keeping in mind the machinery and equipment that would be installed by ELCOM.

6.7.2. The arrangement militates against the deal being considered as a lease simpliciter. The Explanatory Statement to the shareholders for approval of the transaction states that the appellant will spend about Rs.30 crore on construction and external developments. It will receive Rs.54,00,000 per month. This will be increase by 12% after 3 years. Again, on the enhanced base it will be increased by 12% after 3 years and once more after 3 years. There is lock-in period of 9 years. This arrangement gives a return of more than 20% return on the initial outlay.

6.7.3. The construction is to be done as per the specification of ELCOM. ELCOM would do business with IAI. The design specifications of the buildings and facilities are given by ELCOM. Officers of both ELCOM and IAI regularly visit the site to see that the construction is going on as per their requirement. This shows that the appellant would work like a contractor for erecting structures primarily for the purpose of ELCOM's business operation.

6.7.4. The appellant would not bring into existence complete MRO facility ready to give service. ELCOM would do all finishing work and installation of machinery and equipment to make it ready for operation. Thus, the building structures are constructed keeping in mind the machinery and equipment that would be installed by ELCOM.

6.7.5. The appellant has no experience in MRO service business, nor has it any plan to embark on such activities after the present arrangement ends. To secure its interest, it has struck a bargain in such manner that it would get a decent return during the 9-year lock-in period. The rent per month is Rs.54,00,000 in the first 3 years, Rs.60,48,000 in the next 3 years and Rs.67,73,760 in the last three years of the lock-in period. This gives a decent return of 20% p.m. A business having a profit of 12-15%, after all expenses, will be regarded as successful venture.

6.7.6. Since the appellant is getting enough return on the construction cost and lease rent of the open space and the construction is done as per the requirement of ELCOM and under its periodical supervision, it can be said that the appellant is not considering the immovable property on his own account but on account of ELCOM, for the construction of the buildings and facilities.

6.7.7. The true intention of the parties needs to be unraveled. ELCOM wanted to conduct MRO business. Such facility is not available for hire. It does not have a plot of land. If only it can get a plot of land on lease, it can construct the building and facilities that suits the business plan. But that has to be long term plan, so that investment on construction can be recovered within the period of lease. ELCOM has found the appellant's land suitable and the latter is willing to give 9-year non-cancellable lease, long enough to make desired profit after meeting lease rent, cost of construction and operational expenses. But it does not have money to invest on construction upfront. It wants the appellant to have the basic structural construction and site development made as per ELCOM's requirement. ELCOM would pay a fixed sum per month which would include lease rent for the open space and installment for price of construction.

6.7.8. In the arrangement, the appellant would be able to use vacant space for getting rental income. ELCOM would pay lease rent and construction expenses out of its income from MRO service. The appellant is ready to receive the construction money over 9 years. The installments would cover lease of land, construction and development expenses, profit and inflation. Even though the bare buildings would remain standing on the plot after 9 years, the appellant is not interested in the value of the structures as it would have recovered the entire investment with acceptable profit during the lease period. Thus, the amount to of money receivable by the appellant from ELCOM is partly for lease rent of the land and partly for installment of remuneration for construction of the structures.

6.7.9. The appellant was really not constructing the structures on his own account. It was being used as a tool by ELCOM. The entire structure has been constructed as per the specifications given by ELCOM. The officers from ELCOM and IAI are visiting the site of construction from time to time to supervise the process. On several occasions, they have directed the appellant to make modifications to suit the

requirements of ELCOM. Actually, the appellant has been constructing the structures on account of ELCOM and not on its own account. ELCOM was participating right from the stage of preparation of the architecture, engineering and design of the management of the project. The appellant was merely funding the cost of the project and organising the construction activities.

6.7.10. Apart from the appellant undertaking the construction of the MRO infrastructure buildings, IAI (the Original Equipment Manufacturer of the Remotely Piloted Vehicle), ELCOM, RSA Associates (owner's engineers) and CPKA (architect and project management consultant) are involved in the construction project.

6.7.11. Throughout the planning of the project and its execution, ELCOM and its client, IAI, were involved in directing the appellant to undertake construction activities as per their requirements. A meeting was held between the appellant, CPKA and ELCOM at INDAG office on 20th Dec 2018, to formalise the contract with CPKA for Design, development and PMC of the MRO Project. Para 3 of the minutes specifies that the Project Report Submitted to RIICO is based on Facility Required Documents (FRD).It was clarified to CPKA that design and development of the MRO infrastructure has to be as per FRD. FRD is the document provided by IAI which lays down the complete infrastructure requirement for MRO of RPVs.

6.7.12. Email dated 12 Jan 2019 is from Mr Swarandeep Singh to Mr Rami Cohen, regarding submission of all drawings developed by CPKA to IAI for vetting. All construction drawings made by CPKA are as per FRD were approved by IAI with necessary amendments. Team of experts from IAI visited India on 14-15 Jan 2019 for necessary coordination with ELCOM, INDAG and CPKA. Email from Mr Swarandeep Singh regarding Predesign Submission of drawings to IAI is enclosed. This is further evidence about the involvement of IAI team in the development of MRO facility.

6.7.13. After meeting with IAI team and clarification received from them on the construction drawings (developed by CPKA), updated drawings were sent to IAI for further vetting. With email dated 12 Feb 2018 from Mr Swarandeep Singh, flowing updated drawing were sent to IAI for approval:

- Site Plan
- Hangar Phase 1 & 2
- Warehouse Phase 1
- Engine Room
- Paint Shop

6.7.14. Email from Mr Swarandeep Singh dated 22Jan would establish that even the door width required for hangar to annex buildings were customised to suite the requirement/ specification laid down by IAI. Email from Mr Rami Cohen dated 31st Jan 2019 giving specifications required for hangar flooring, Power requirement of CPA. Email from Mr Rami Cohen dated 13th Feb 2019 gives clarification on CPA, Layout Plan, and Paint shop. Email dated 14th Feb 2019 from Mr Swarandeep Singh establishes that even road width and turning radius required were specified by IAI. During the entire planning and execution phase, weekly conference calls were made between IAI and ELCOM team. CPKA team also joined the call on as required basis.

6.7.15. Email from Mr Rami Cohen dated 07 Mar 2019 has given detailed dimensions of the lifts required in the facility. This is proof of customisation of the MRO facility to suit the requirement of repair of RPVs. Lifts were designed as per the dimensions of the equipment which will have to be moved to training area. Email from Mr Rami Cohen dated 14 Mar 2019 has detailed requirement of

firefighting equipment as per the aviation standard and equipment requirement at various area. Email from Mr Rami Cohen dated 28 Mar 2019 contains detailed illumination required at various repair workshops. Complete requirement of lighting at various shops in the facility have been customised as per the requirement laid down by IAI.

6.7.16. With the e-mail dated 18 Apr 2019, Mr Rami Cohen has forwarded revised FRD of Engine Run-up test bench. As brought out earlier that the entire MRO facility was designed, developed and constructed based on the FRD provided by IAI (OEM) to suite the requirement of repair and overhaul of RPVs supplied by the OEM to Indian forces. FRD was revised during the course design and construction. IAI planned a new engine for the RPVs accordingly the Engine Run-up test bench design was changed by IAI and a revised FRD was issued.

6.7.17. Series of emails from Mr Rami Cohen in Dec 2019 and Jan 2020 towards vetting and approval of electrical drawing. Requirement of power connections sockets (including numbers and rating) were laid down by IAI. Complete details of data connections were also specified. This set of emails prove that electrical drawings of each rooms were vetted and approved by IAI. Email from Mr Rami Cohen dated 18 Feb 2020 gives the requirement of additional windows and revised specification of CPA.

6.7.18. Apart from the vetting and approval of the drawings and regular coordination through conference call, IAI team made multiple visits to India. Agenda of a few visits of IAI team to India for MRO project are enclosed for the following visits:

1. Agenda IAI team visit 14 – 15 Jan 2019
2. Agenda IAI team visit 30 Apr 2019
3. Agenda IAI team visit 05 – 06 Aug 2019
4. Agenda IAI team visit 04 – 05 Nov 2019
5. Agenda IAI team visit 03 – 05 Feb 2020

Agenda of various visits of IAI team to India for MRO project establishes involvement of Mr Rami Cohen and his team during the entire period of design, development and construction of MRO facility at Bhiwadi. IAI has guided the construction of the MRO facility which would be operated by ELCOM.

6.7.19. Section 17(5)(d) blocks credit for construction of immovable property, only when the same is undertaken by the taxable person "on his own account":

17. Apportionment of credit and blocked credits

.....

(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

.....

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) **on his own account** including when such goods or services or both are used in the course or furtherance of business.

Explanation.--For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or

repairs, to the extent of capitalisation, to the said immovable property;

From the above submissions, it is clear that the appellant is not constructing the structures on its own account, but on account of ELCOM. Therefore, the input credit on the goods and services used for construction of such immovable property would not be blocked in terms of section 17(5)(d) of CGST Act.

6.7.20. In order to reflect true nature of the transaction and relationship between the appellant and ELCOM, the parties have executed MRO Facility Agreement on 21.10.2020, which will take effect from 01.01.2021.

PERSONAL HEARING

7. A virtual hearing in the matter was held on 19.01.2021. Sh. P.K. Sahu, Authorized Representative of the appellant has attended hearing on 19.01.2021. He reiterated the submissions already made under grounds of appeal. He also submitted his submissions on 21.01.2021 on the query raised during hearing which is as under:-

7.1 During the hearing of the appeal fixed on 19.01.2021, the Hon'ble Authority, after perusing significantly higher number of documents or evidences filed along with the appeal, desired to know as to whether the evidences or documents submitted along with the appeal were placed before the original authority, it was informed by the counsel of the appellant that substantial number of such evidence/documents were not placed before the original authority. The members of the authority wanted to know from the learned counsel of the appellant as to whether substantial evidences can be adduced at the appellate stage, for which he had no immediate reply; but informed that the same would be submitted shortly. The learned counsel submitted the several case laws in support for adducing substantial evidences at the appellate stage; some of which are as under:

i. **North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das, 2012 (281) ELT 161 (SC)**

12. Though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general Rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and limitations as may be prescribed. These conditions are prescribed under order 41 Rule 27 C.P.C. Nevertheless, the additional evidence can be admitted only when the circumstances as stipulated in the said Rule are found to exist. The circumstances under which additional evidence can be adduced are:

(i) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, [clause (a) of sub-rule (1)], or

(ii) the party seeking to produce additional evidence, established that notwithstanding the exercise of due diligence, such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, [clause (aa), inserted by Act 104 of 1976], or

(iii) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce

Judgment, or for any other substantial cause. [clause (b) of sub-rule (1)].

ii. **[Hindustan Petroleum Corporation Ltd. vs. R.P. Agarwalla & Brothers (P) Ltd., AIR 1986 Cal 403, 413] [Ambuja vs. Apadurai, (1915) ILR 38 Mad 414; Muniyappa v. Rama Kr. AIR 1956 My 47; Wasawa v. Jagir, AIR 1965 Pu 494].**

iii. **[Radhamma v. Lakshmana K. murthy, 1996 AIHC 2921, 2924 (Kant)]**

iv. **[Krishan v. Narain Dass, AIR 1989 Punjab 267, 269]**

v. **CCE, B'lore vs. S.P. Flavours Pvt. Ltd., 2012 (283) ELT 3 (Kar.)**

vi. **Priya Dyers vs. CCE, Cus. & S.T., Rajkot, 2017 (346) ELT 393 (Tri. – Ahmd.)**

vii. **Orient Enterprises vs. Collector of Customs, 1986 (23) ELT 507 (Tribunal)**

Collector vs. Orient Enterprises, 1997 (92) ELT A69 (SC).

viii. **CCE, B'lore vs. S.P. Flavours Pvt. Ltd., 2014 (34) STR 462 (Kar.)**

7.2. It was contended that they had not argued anything new which was not in the application before the Hon'ble AAR. Our contentions all along are: (i) that we are not hit by section 17(5)(d), and (ii) that when our output service is taxable we are entitled to credit of the tax on input services, as has been held by Hon'ble Orissa High Court in ***M/s Safari Retreats Pvt. Ltd. and Anr. vs. Chief Commissioner of Central Goods & Service Tax & Ors., 2019 (25) G.S.T.L. 341 (Ori.).***

DISCUSSION AND FINDINGS:

8.1 We have carefully gone through the Appeal papers filed by the Appellant, the Ruling of the AAR, Rajasthan, written as well as oral submissions made by the authorized representative(s) of the Appellant, at the time of personal hearing held on 19.01.2021 and in his subsequent submission dated 21.01.2021. We also find that though the ruling of AAR, Rajasthan was given on 21.10.2019 and the appeal was filed online, all relevant documents, etc were given on 04.11.2020. As such, the appeal should be decided within 90 days from 04.11.2020 i.e 01.02.2021.

8.2 From the facts of the case, it would emerge that the appellant was approached by Elcom for taking MRO facility on lease. According to the agreement made between them, the appellant will construct MRO facility at Bhiwadi as per the specifications given by the later. The said MRO facility will thereafter be given on lease to Elcom by the appellant. Elcom will install its equipments in the MRO facility and will render MRO services to Israel Aerospace Industries. These facts clearly demonstrate that the appellant would continue to be the owner of the MRO facility and construction is carried out by them through the contractor selected by them, though specifications may have been given by a third entity.

8.3 In order to get the said facility constructed by the appellant on the industrial land, they have entered into agreement with M/s Akanksha Contracts Pvt Ltd for supply of various goods and services who, in turn, would raise a consolidate invoice for each month, which will include value of both goods and services so supplied along with applicable rate of GST on the goods and services being supplied to the appellant. Further, when the appellant will lease out the MRO facility to Elcom, it will be charging GST at applicable rate on the amount of rent received for leasing out of MRO facility.

8.4 The appellant had filed application for advance ruling before Authority for Advance Ruling, Rajasthan whether he is eligible to claim credit of the GST charged by vendor at the time of supply of goods and service to it, which are used for carrying out the following activities for setting up of MRO facility to be rented out-

a. Civil work
b. External Development works

8.5 Authority for Advance Ruling, Rajasthan has observed that the provisions of Section 17(5)(d) of the CGST Act, 2017 is clear that if the goods or services are used for the construction of an immovable property, the ITC shall not be available irrespective of use of the said property and issued Ruling that the applicant is not eligible to claim credit of the GST charged by vendor for supply of goods and services to it.

8.6.1 Aggrieved by the Ruling, the appellant came before us by way of an appeal filed at online portal on 30.11.2019 mainly on the following grounds-

i. Impugned ruling is a non-speaking order and has been passed in gross violation of the principle of natural justice.
ii. The appellant is eligible to avail credit for the inputs and the input services received by appellant used for MRO facility which is rented by it.
iii. The act of not following the Orissa High Court judgment in the case of Safari Retreats which is final and valid, is a case of judicial indiscipline.

8.6.2 Subsequently, on 04.11.2020, the appellant has submitted substantial documents and evidences in the form of copy of contracts, agreements, layout plans, etc. these evidences are listed as under

a. Copy of Statement of works	(pages 5, 34 to 38)
b. Copy of email dated 13.06.18	(page 39)
c. Copy of Minutes of meeting 16-17.07.2018	(pages 4, 40 to 43)
d. Copy of project report submitted to RIICO	(pages 10, 44 to 53)
e. Copy of site lay out plan	(page 54)
f. A brief on hanger, engine test room and p shop	(pages 2, 55 to 56)
g. Copy of lay out plans	(pages 27, 57 to 83)
h. Copy of FRD for MRO	(pages 72, 84-157)
i. Copy of Agreement dated 21.10.2020	(pages 18 186 to 203)
j. Copy of email, minutes and other	(pages 28, 158 to 185)

8.6.3 As we proceed further, it becomes incumbent on our part to bring out the legal position as exist on date regarding production of substantial additional documents at the appellate stage. The provisions of relevant Rule 112 of the CGST Rules 2017 is reproduced below-

"112. Production of additional evidence before the Appellate Authority or the Appellate Tribunal.-(1) The appellant shall not be allowed to produce before the Appellate Authority or the Appellate Tribunal any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority or, as the case may be, the Appellate Authority except in the following circumstances, namely:-

(a) where the adjudicating authority or, as the case may be, the Appellate Authority has refused to admit evidence which ought to have been admitted; or

(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by the adjudicating authority or, as the case may be, the Appellate Authority; or

(c) where the appellant was prevented by sufficient cause from producing before the adjudicating authority or, as the case may be, the Appellate Authority any evidence which is relevant to any ground of appeal; or

(d) where the adjudicating authority or, as the case may be, the Appellate Authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal."

8.6.4 From the records placed before the appellate authority, it would emerge that the appellant, nowhere in their appeal memo, could bring forth any evidence of availability of any such contingencies as enumerated above for producing substantial additional documents at the appellate stage. Given the fact that the appellate authority, like us, neither has been empowered to entertain these additional facts nor, in absence of an specific provision, have the right to remand the case back to the original authority, we find ourselves not able to take up these additional evidences despite of several case laws having been cited by the appellant in their favour which pertains to the earlier period. The appellant has placed reliance upon several case laws in support of his claim that additional substantial evidences can be produced at the appellate stage. We find from the case law relied upon by the appellant in the case of North Eastern Railway Administration, Gorakhpur vs. Bhagwan Das, 2012 (281) ELT 161 (SC), wherein it has been held by the apex court that though the general rule is that ordinarily the appellate court should not travel outside the record of the lower court and additional evidence, whether oral or documentary is not admitted but Section 107 C.P.C., which carves out an exception to the general Rule, enables an appellate court to take additional evidence or to require such evidence to be taken subject to such conditions and imitations as may be prescribed. From the facts of the case and the relevant provisions as contained in the rule 112 as referred to above, the additional substantial evidences cannot be allowed to be relied upon at the appellate stage.

8.7 Before we delve deep to decide the case, it would be proper in the fitment of justice to discuss the relevant provisions of the statute which are as under-

Section 16 (1) and (2) of the CGST Act

"Eligibility and conditions for taking input tax credit.

16.(1) Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him 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.

(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless,--

(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other taxpaying documents as may be prescribed;

(b) he has received the goods or services or both."

8.8 Thus, Section 16 (1) of the CGST Act specifically provides that every registered person shall be entitled to take credit of the input tax charged on any supply of goods or services or both made to him, which are used or intended to be used in the course or furtherance of his business. Such entitlement is subject to

fulfillment of certain conditions such as possession of invoice, receipt of goods/service, payment of tax to Government etc. as provided under Section 16(2) of the GST Act, 2017. However, the availability of credit is subject to the restrictions as stipulated under Section 17(5)(d) of the GST Act, 2017.

8.9 The relevant portion of sub-section 5 of Section 17 of CGST Act, 2017 in this regard is reproduced below:-

(5) Notwithstanding anything contained in sub-section (1) of section 16 and subsection (1) of section 18, input tax credit shall not be available in respect of the following, namely: -

(c) works contract services when supplied for construction of an immovable property (other than plant and machinery) except where it is an input service for further supply of works contract service;

(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant or machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

Explanation -For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immovable property;

(6) ------

Explanation. -- For the purposes of this Chapter and Chapter VI, the expression "plant and machinery" means 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 supports but excludes—

(i) land, building or any other civil structures;
(ii) telecommunication towers; and
(iii) pipelines laid outside the factory premises

8.10 Bare reading of the above provisions makes it clear that the restriction imposed herein is absolute in nature as it seeks to override Section 16(1) which entitles a registered taxpayer to avail credit on goods or services used or intended to be used in the course or furtherance of business. Irrespective of the fact that the goods or services are used for construction of immovable property which in turn will be used for conducting business, credit is not available; if the ownership of the property remains with the said person. The legislature, in his wisdom, think it proper to stop the flow of seamless credit once immovable property comes into existence and the ownership is fixed.

8.11 Let us put the issue in proper perspective. Generally, credit is available to the developers who are engaged in construction of immovable property because they are not engaged in construction on their own account but on behalf of others as the constructed portion / super-structure belongs to the buyer with whom agreement has been entered into. In such cases, the transaction completed before receipt of completion certificate and, therefore, tax on construction service is payable. In this case, credit on goods and services which went into such construction is admissible and can be utilized for payment of tax on construction service. If the developer constructs the immovable property on his own account, he would either use it for his own consumption where the same is going to be capitalized where depreciation is claimed or he would sell the immovable property out after obtaining completion certificate where the same is liable to stamp duty. In both the cases GST is not

applicable, therefore use of credit, does not arise and restriction on availment itself is quite justifiable.

8.12 It is admitted by the appellant that they are getting civil work and external development works from the contractor and that the ownership of the property shall remain with them. On perusal of fact submitted by the appellant, we find that the appellant has constructed hangar, paint shop, engine Run-up test bench, training room, warehouse, road and office building on the land of his factory for leasing the same to Elcom. All the civil construction undertaken by the appellant is certainly an immovable property in the first place in terms of Section 3(26) of the General Clauses Act, 1897 which reads as under-

> *"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."*

8.13 Secondly, the civil construction so undertaken can't be covered by the term 'plant & machinery'. The argument that has been put forth by the appellant is that, if not entirely covered under 'plant & machinery', these can be covered under the definition of 'Plant'. The appellant has cited several court ruling in this regard but we find all of them given in the context of some other statute like 'Income tax'. Here we want to make it clear that when the definition under this act is very much clear and unambiguous there is no need to take the meaning thereof from any another statute. The term 'plant', in any other statue, may include 'building', as per cited case laws but in view of specific exclusion of building **or any other civil structures** from the definition of 'plant' under the CGST Act, 2017, it is not possible to hold a civil structure or building as 'plant' for purpose of ITC in GST.

8.14 Moreover, the expression 'plant and machinery' is specifically defined in the explanation below Section 17(6) of the CGST Act, 2017. In the definition, after the term 'Plant and machinery' the word 'means' is used unlike in explanation below Section 17(5)(d), where the word 'includes' is used after the term "construction". As per the principle of interpretation of law laid down by the higher judiciary, the definition using the term **'means'** has to be strictly construed to mean only what is stated therein, nothing more, nothing less. Our above view finds support from the judgment of Kerala High Court in the case of *Kerala Public Service ... vs State Information Commission dated 9 March, 2011* wherein the Hon'ble High Court has observed as under---

> *"---.The Honorable Supreme Court stated in Hariprasad Shivshanker Shukla v. A.D. Divelkar [AIR 1957 SC 121], that "There is no doubt that when the Act itself provides a dictionary for the words used, we must look into that dictionary first for an interpretation of the words used in the statute. We are not concerned with any presumed intention of the legislature; our task is to get at the intention as expressed in the statute. When the statutory provision defining a particular term says that the said term shall mean what is stated in that definition clause, it shall mean only that; nothing more, nothing less; for the purpose of the statute which carries that definition. When a statute says that a word or phrase shall "mean" -- not merely that it shall "include" -- certain things or acts, the definition is a hard- and-fast one, and no other meaning can be assigned to the expression than the one put down in definition. A definition is an explicit* statement of the full connotation of a *term. - See Punjab Land Development and Reclamation Corpn. Ltd. v. Presiding Officer [(1990) 3 SCC 682] and P. Kasilingam v. P.S.G. College of Technology [1995 Supp (2) SCC 348] rendered relying on Gough v. Gough [(1891) 2 QB 665: 65 LT 110]. As noticed in S.N. College, the Legislature*

has the power to define a word even artificially. When a statute says that a word or phrase shall "mean" a particular thing, certain things or acts, that definition is a hard-and-fast one and no other meaning can be assigned to the expression than is put down in that definition. That definition is an explicit statement of the full connotation of a term."

8.15 Regarding contention of the appellant the term "plant and machinery" and not "plant" or "machinery" have been defined in the explanation below section 17 *of the CGST Act*, 2017. I find that the Appellate Authority for Advance Ruling, Karnataka had the occasion to discuss this issue in their ruling passed in respect of an appeal filed by *Tarun Realtors Pvt Ltd. = 2020 (3) TMI 981* - APPELLATE AUTHORITY FOR ADVANCE RULING, KARNATAKA. The same reads as under-

"15. It is the contention of the appellant that the definition of the expression "plant and machinery" as used in Chapter V and Chapter VI of the CGST Act cannot be applied to interpret the words "plant" or "machinery" used in clause (d) of Section 17(5) of the CGST Act. We find that in ordinary usage 'and' is conjunctive and 'or' disjunctive. From the well-known dictum of the Supreme Court that grammar is a good guide to meaning but is a bad master to dictate, it will appear that there is no hard and fast rule as to the meaning of the word 'or' and this word gets its proper meaning from the particular context from which it has been used. Justice G.P. Singh in the Principles of Statutory Interpretation (Thirteenth Edition) Chapter 7 page 485 has stated as follows:

"The word 'or' is normally disjunctive and 'and' is normally conjunctive but at times they are read as vice versa to give effect to the manifest intention of the Legislature as disclosed from the context. As stated by Scrutton L.J, "You do sometimes read 'or' as 'and' in a statute. But you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'. Further as pointed out by Lord Halsbury, the reading of 'or' as 'and' is not to be resorted to, "unless some other part of the same statute or the clear intention of it requires that to be done". Where provision is clear and unambiguous the word 'or' cannot be read as 'and' by applying the principle of reading down. But if the literal reading of the words produces an unintelligible or absurd result 'and' may be read for 'or' and 'or' for 'and' even though the result of so modifying the words is less favourable to the subject provided that the intention of the Legislature is otherwise quite clear. Conversely if reading of 'and' and 'or' produces grammatical distortion and makes no sense of the portion following 'and', 'or' cannot be read in place of 'and'. The alternatives joined by 'or' need not always be mutually exclusive."

As such the contention of the appellant is not sustainable.

8.16 After having been established the fact that the civil construction undertaken by the appellant is not a plant but an immovable property, we came to the another argument of the appellant where they claim that construction was under taken on account of Elcom and not on their own account and therefore the bar in section 17(5)(d) does not apply to such immovable property, we observe that at the time of construction, every structure is constructed with a special purpose in the supervision of his own or other. The fact remained that appellant is the owner of the said immovable property and it has not been sold to any other person. In future, it may be used for other than specific purpose related to his own and/or other without change of a brick. In future, the appellant's construction may also be used many other but quite different purposes by the appellant himself or by other with agreement of appellant. To determine the account of construction, it is necessary to determine in whose financial account the said expenditure will be shown. It is a fact that the Appellant has entered into agreement with M/s Akanksha Contracts Pvt. Ltd. for supplying various goods and services for setting

up the MRO facility on the Industrial Land of appellant. The Appellant issues purchase order on M/s Akanksha Contracts Pvt. Ltd for supplying the goods and services for setting up of MRO facility. The goods are procured by M/s Akanksha Contracts Pvt. Ltd on a bill to ship to basis. In the invoice issued by the supplier, the bill to party is M/s Akanksha Contracts Pvt. Ltd. and ship to party is the Appellant. Against the material receipts, the Appellant has paid the bill amount in advance for procuring of goods and services. Further, it has been agreed that M/s Akanksha Contracts Pvt. Ltd. will raise a consolidate invoice for each month, which will include value of both goods and services so supplied along with adjustments regarding the advance so received. We observed that as construction activity will be done on appellant's plot and payment for it is being made by appellant, consequently expenses and assets related to MRO facility will be shown in financial statements of appellant, therefore, mere construction of any civil structure with specific purpose under supervision of service receiver cannot be construed to be on other's account and that the ownership of the property is transferred to the other person. We find no force in the contention of appellant that the appellant is not constructing the structures on its own account, therefore, construction of MRO facility fully covered in exclusion clause as stipulated in section 17(5)(d) of the CGST Act, 2017.

8.17 As discussed above, in view of specific exclusion mentioned under Section 17(5) (c) & (d) of CGST Act, we conclude that ITC is not available for construction of an immovable property even when such goods or services or both are used in course or furtherance of business.

8.18 Lastly the appellant has stressed upon the judgment rendered by the Hon'ble High Court of Orissa in the case of "*M/s. Safari Retreats Pvt. Ltd., and Another* v. *Chief Commissioner of Central Goods & Service Tax & Others*". The appellant has further submitted that the act of not following the Orissa High Court Judgment is a case of judicial indiscipline and it is final and valid. In this regard the appellant placed reliance on several other judgements.

8.19 It can be seen that in the case of Safari Retreats, the prayers are (a) eligibility to credit of input tax paid on goods/services used for construction which is rented for commercial purposes, (b) to hold Section 17(5)(d) as *ultra vires*. While the Hon'ble High Court has granted the prayer at (a), has not accepted the prayer at (b) stating that they are not inclined to hold the provision *ultra vires*. On a case to case basis, the Hon'ble High Court has granted the credit. In as much as the said section is found to be valid by the Hon'ble High Court, we do not find any reason to go beyond the Statutory Provisions. However, since the appeal against the High Court order supra is pending before the Hon'ble Supreme Court and thus has not yet attained the finality, we refrain from commenting on the eligibility of the ITC in the cited case.

8.20.1 In this regard, we would like to refer to the judgment of Hon'ble Supreme Court in the case of *Union of India V. West Coast Paper Mills Ltd.,[2004(164)E.L.T. 375(S.C.)* wherein the Hon'ble Supreme Court has observed as under--

"Article 136 of the Constitution of India confers a special power upon this Court in terms whereof an appeal shall lie against any order passed by a Court or Tribunal. Once a Special Leave is granted and the appeal is admitted the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event the correctness of the judgment is in jeopardy.

Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the Court of Appeal."

8.20.2 The Hon'ble court further concluded as under----

"----once an appeal is filed before this Court and the same is entertained, the judgment of the High Court or the Tribunal is in jeopardy. The subject matter of the lis unless determined by the last Court, cannot be said to have attained finality. Grant of stay of operation of the judgment may not be of much relevance once this Court grants special leave and decides to hear the matter on merit."

ORDER

9. In view of the above discussion and findings, we hold that the appeal filed by the appellant has no merit and rejected accordingly.

(Pramod Kumar Singh) 29/01/2021
Member (Central Tax)

(Abhishek Bhagotia) 29/01/21
Member (State Tax)

SPEED POST

To
M/s Indag Rubber Limited,
SP 86-88, Industrial Area Bhiwadi
Bhiwadi, Distt. Alwar, Rajasthan-301019.

F. No. IV (16)AAAR/RAJ/05/2020-21/ 174 to 180 Date. 29-.01.2021

Copy to:-

1. The Chief Commissioner of CGST (Jaipur Zone), NCR Building, Statue Circle, Jaipur-302005.
2. The Chief Commissioner of SGST, Rajasthan, Kar Bhawan, Bhawani Singh Road, Ambedkar Circle, Jaipur-302005.
3. The Commissioner, CGST Commissionerate, Alwar
4. The Deputy Commissioner, State Tax (SGST) Special Circle-I, Kar Bhawan, UIT Sector-6, Bhiwadi-Distt. Alwar (Rajasthan)
5. The Member, Rajasthan Authority for Advance Ruling, Goods and Service Tax, Kar Bhawan, Bhawani Singh Road, Ambedkar Circle, Jaipur-302005
6. Guard File

29-1-21

(Shiv Kumar Gupta)
Superintendent