

DRAFT

Quick Insight on GST-Infrastructure & construction industry

Introduction

The Government of India has identified infrastructure and construction as the key drivers for economic growth of the country and major investment is planned in this sector under the current plan.

Airports, roads, ports and railways including metro/mono play pivotal role in improving the infrastructure of the nation. Similarly, trade/ convention centers, stadiums, residential complexes are being constructed across the country. Thus, construction sector provides major employment opportunities to the citizens of the country.

The changes in the GST Act and Rules will substantially increase the ease of doing the business in the country. It is pertinent to note that GST amendments reduces the cascading effect of tax by allowing seamless credit. Also it will increase compliance across the value chain very effectively. It is important that GST Act/Rules are modified suitably so that it facilitates the business and reduces legal hassles. This will enable the business houses focus on productive future.

This proposal will help the infrastructure /construction industry and make compliance easier for the industry.

1. Withdrawal of concessions/exemptions to solar power projects

Power is one of the key requirements for infrastructure development. The Government of India through Ministry of New and Renewable Energy (MNRE) is playing a proactive role in promoting the adoption of renewable energy resources by offering various incentives such as generation-based incentives (GBIs), capital and interest subsidies, viability gap funding (VGF), concessional finance, fiscal incentives etc.

The National Solar Mission aims to promote the development and use of solar energy for power generation and other uses, with the ultimate objective of making solar energy compete with fossil-based energy options.

In pre- GST regime exemption was accorded from payment of excise duty for all equipment, instruments etc. required for initial setting up of Solar Power Project or facility as per CE Notification No.15/2010 dated 27.02.2010 – Central Excise. Under GST there is a levy of tax ranging between 5% to 18% on different equipment and instruments as detailed below:

- a. GST rate for solar energy system falling under Chapter 85.41 – 5%
- b. Other than the above GST rate is 18% e.g., inverters, cables etc.,

Predominantly, goods required for Solar projects attract GST levy @ 5%.

For development of solar renewable energy project, generally the solar system can be installed in civil foundation. Since the system is installed in civil works, the field formation may treat it as works contract service in relation to immovable property and levy GST at 18%. This leads to increase in cost for the project

Relevant GST Law:

As per schedule II composite supply of works contract is deemed as service and the applicable rate of GST is 18% as per 11/2017 dated 25th June, 2017.

Suggestion:

As multiple interpretations are possible, the intention of the notification may not be

viewed in its substance and may hamper business. Hence it is suggested that the GST rate for works contract services relating to solar projects shall need to be fixed @ 5% to clear the obstacle presently faced by this sector.

2. Benefit of zero rating to the sub-contractors of contractors supplying to SEZ

Benefit of zero rated supply is not available to sub- contractors supplying goods/services to a contractor providing supply of goods or services to SEZ unit or developer. This leads to blockage of working capital for the contractor.

Relevant Law:

As per Section 16 of the IGST Act, supply of goods or services or both to a Special Economic Zone Developer or a Unit are zero rated. However these provisions are silent about the sub-contractor supplying goods or services or both to the contractor

Suggestion:

It is suggested for inclusion of adequate provisions in the IGST Act so that the benefit of zero rated supply shall also be extended to sub-contractors providing supply of goods/services to contractors of SEZ Units/ Developers.

This will be in line with Rule 10 of SEZ Rules updated up to 2010 which states that: Provided further that exemptions, drawbacks and concessions on the goods and services allowed to a Developer or Co-developer, as the case may be, shall also be available to the contractors including subcontractors appointed by such Developer or Co-developer, and all the documents in such cases shall bear the name of the Developer or Co-developer along with the contractor or sub-contractor and these shall be filed jointly in the name of the Developer or Co-developer and the contractor or sub-contractor, as the case may be.

3. Deemed exports benefit for goods portion in works contract

Supply of specified goods to notified Power Projects have been considered as 'deemed exports' in Chapter 7 of the Foreign Trade Policy 2015-20 and benefits in the nature of advance authorization, duty drawback, and terminal duty refund were extended to such supplies. The intention was to support the Power Sector which is considered critical for development of the economy.

The pre-GST exemptions on account of excise duty/CVD & SAD for eventual supply to these projects are not available in the GST regime.

In GST regime suppliers/ importers of such goods are liable to pay IGST/ CGST+SGST from 18% to 28% which increases cost to the power producers. The cost of power projects will therefore increase significantly which may have ramifications not only for the power producers but also for EPC contractors.

Relevant GST Law:

Extract of section 147 of GST Act, 2017 is as under:

147. The Government may, on the recommendations of the Council, notify certain supplies of goods as deemed exports, where goods supplied do not leave India, and payment for such supplies is received either in Indian rupees or in convertible foreign exchange, if such goods are manufactured in India

Suggestion:

As per the above section supply of goods alone can be considered as deemed exports by the government whereas works contract has been deemed as supply of service under GST. Hence it is suggested to amend section 147, to extend the benefit of deemed exports for the goods portion in works contract.

Under the above section notification stating that Mega Power projects and Nuclear Power projects are deemed exports shall be issued.

4. Export of services between related parties

As per export of services definition under IGST act, supplier of service and recipient of service shall not be merely establishments of a distinct person. This leads to denial of legitimate benefit in spite of fulfilling all other conditions of export of services

Relevant GST Law:

As per section 2(6) “export of services” means the supply of any service when,—

- (i) the supplier of service is located in India;
- (ii) the recipient of service is located outside India;
- (iii) the place of supply of service is outside India;
- (iv) the payment for such service has been received by the supplier of service in convertible foreign exchange; and
- (v) the supplier of service and the recipient of service are not merely establishments of a distinct person in accordance with Explanation 1 in section 8;**

Explanation 1 in section 8 of IGST Act is as under:

For the purposes of this Act, where a person has,—

- i) an establishment in India and any other establishment outside India;
- ii) an establishment in a State or Union territory and any other establishment outside that State or Union territory; or
- iii) an establishment in a State or Union territory and any other establishment being a business vertical registered within that State or Union territory,

then such establishments shall be treated as establishments of distinct persons

Suggestion:

Clause (v) to section 2(6) shall be deleted so that the benefit of exports can be made available uniformly to everyone.

5. ITC restriction to be removed

Section 16 specifies that ITC shall be eligible on all inputs/ input services which are incurred in the course or furtherance of business.

However, section 17(5) inserts certain restrictions which leads to cascading effect and disputes

Relevant Law:

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**

17 (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:—

(a) motor vehicles and other conveyances except when they are used—

(i)

.....

(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and

(i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

Suggestion:

All credits on input/input services are to be allowed if it is in the course or furtherance of business

6. Refund due to inverted duty structure – Related to services

Refund of accumulated input tax credit where rate of tax on input services is higher than rate of tax on output supply (inverted duty structure)

Section 54(3) (ii) of GST act, 2017 is not clear about the refund of ITC accumulated on account of rate of tax on input services being higher than rate of tax on outward supply.

If the intention of the Government is not to allow refund in subject case it shall lead to working capital blockage/increase in cost.

Relevant GST Law:

Section 54 (3) (ii) of CGST Act, 2017 allows refund of unutilized input tax credit in case of (i) zero rated supply and (ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies

Suggestion:

Section 54 shall be amended to provide for refund of ITC accumulated on account of rate of tax on input services being higher than the rate of tax on outward supply

7. GST on movement of construction equipment between distinct persons

In EPC contracts, interstate movement of construction equipment, spares and enabling items from one project to another is imperative to maintain continuous, uninterrupted flow of work process and to optimize the asset utilization. These equipments are moved on principal to principal basis and there is no consideration or value addition. Spares and enabling items are mostly charged off to expenses account at the point of purchase itself, thereby posing valuation difficulties.

Such transfer of equipments was not chargeable to tax under pre-GST regime also.

Even if such movements constitute as supply and liable to levy of GST the recipient is entitled to a full ITC which means it is Revenue Neutral transaction for the Government exchequer but the same leads to the following issues in every movement:

- Valuation to be done for such movement
- Additional compliance requirement
- Unwarranted delay
- Blockage of working capital and adverse cash flows

Relevant GST Law:

As per section 25(4) of GST Act, 2017 different registrations of a same person shall in respect of each such registration be treated as distinct person and Schedule I provides that the transaction between distinct persons shall be deemed as a supply even if there is no consideration

Rule 28 of GST Rules, 2017 provides for the valuation mechanism for supplies between distinct persons. Proviso to this rule says that the value declared in the invoice shall be deemed to be the open market value if the recipient is eligible for full ITC

Suggestion:

Interstate movement of equipment/spares between distinct persons should be exempted from levy of GST.

8. Inclusion of Interest, Late Fee and Penalty in Transaction Value

As per valuation provisions interest, late fee and penalty for delayed payment of consideration shall be added to the transaction value for payment of tax. It is pertinent to note that the transaction value is the price actually paid or payable for supply of goods and or services. Whereas Interest, late free or penalty may arise due to contractual provisions or due to an issue between seller and buyer. Hence it is incorrect to include interest, late fee or penalty for delayed payment of consideration in arriving at the transaction value

Relevant GST Law:

As per section 15 (1) of GST Act,2017 value of supply shall be the transaction value which is the price actually paid or payable for the supply of goods or services and as per section 15(2)(d) of GST Act,2017 value of supply shall include interest or late fee or penalty for delayed payment of consideration for any supply

Suggestion:

It is suggested to delete the entry (d) in Section 15 (1) of GST Act, 2017 for the issues stated above.

9. Inter State Sharing of expenses/Allocation of cost

Allocation of cost/sharing of expenses incurred on common utilities between Divisions/ sites/branches etc. within a company is a common business practice and involves mere accounting entries.

Journal Vouchers/debit notes representing such sharing of expenses/allocation of cost on principal to principal basis without any consideration or value addition. In real sense it do not satisfy the definition of supply but attract GST

Relevant Law:

As per entry 2 of Schedule I to GST Act, 2017 is as under:

Supply of goods or services or both between related persons or distinct persons as specified in section 25 , when made in the course or furtherance of business shall be treated as supply even if made without consideration

Suggestion:

Clarification required that in the absence of any consideration or value addition such journal vouchers/debit notes would not attract GST.

10.Free Issues

There is no enough clarity as to whether free issue material value shall be considered for valuation by the works contractor for discharge of GST

Relevant GST Law:

Section 15 of GST Act, 2017 says that:

15. (1) The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or

services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply

(2) The value of supply shall include

(a)

(b) any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both

As per above it can be understood that free issue materials shall be added to the transaction value if supplier is liable to pay for that materials. How to decide the liability as per contract or as per regular course business???

Suggestion:

Clarification that free issue material not to be considered by contractor for valuation to discharge GST should be issued.

Free issues shall not form part of valuation because client is not eligible for ITC on the materials which has been issued on free of cost basis as per section 17(5)(d). If GST is charged by the contractor on the same material again which is not eligible for GST as per section 17(5)(c) it will amount to cascading effect which may not be the intention of the legislature

11. Deferment of ITC eligibility of GST paid on advances

ITC of the taxes paid on advances has been deferred through conditions mentioned under section 16 which leads to working capital blockage for the business

In case of advances there will not be any supply of goods or services or both by the supplier to the recipient but as per time of supply provisions receipt of payment has also been made as a taxable event and obligation to pay tax has been fixed on the business. In nutshell in case of advances there will not be any real supply.

Relevant GST Law:

Section 16(2) of GST Act, 2017 provides for the following four mandatory conditions for availment of ITC:

1. Possession of tax invoice or debit note
2. Receipt of goods or services
3. Payment of tax either by supplier or recipient as the case may be
4. Filing of return

But in case of advances receipt of goods or services happens much later and invoice for the same will be available on receipt of goods or services only

Suggestion:

Proviso to section 16(2) of GST Act, 2017 shall be inserted stating that the condition number one and two will not apply in case of availment of ITC of taxes paid on advances to provide relief to business from unnecessary working capital blockage. This is similar to the erstwhile Service tax law

12. ITC eligibility on construction equipment registered under Motor Vehicles Act.

Eg. Cranes, Dumpers, Grader, Tipper, Excavator etc

Section 17(5) (a) of GST Act, 2017 restricts eligibility of ITC on motor vehicles except in few situations.

Equipment like Grader, Cranes, Dumpers, Tippers etc. are construction equipments but require registration under the Motor Vehicles Act because they are motor driven and capable of traveling on the road. However, these equipments are solely used for construction work such as earthwork, leveling, movement of goods from one place to another, excavation, etc.

But as per section 17(5) ITC is not available on motor vehicles. These equipments since registered under Motor Vehicles Act could also be construed as motor vehicle and the ITC on such equipments could be questioned.

Relevant GST Law:

Extract of Section 17(5) (a) of GST act is as under:

(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:—

(a) motor vehicles and other conveyances except when they are used—

(i) for making the following taxable supplies, namely:—

(A) further supply of such vehicles or conveyances ; or

(B) transportation of passengers; or

(C) imparting training on driving, flying, navigating such vehicles or conveyances;

(ii) for transportation of goods;

As per the section 17(5)(a)(ii) ITC on motor vehicles is eligible provided they are used for transportation of goods. However the equipments mentioned above are used for other purposes namely earthwork, leveling etc.

Suggestion:

To remove unnecessary doubt and unwarranted disputes by the Revenue over availment of ITC on these equipments, it is suggested that after the entry of (ii) for Transportation of goods” the following entry to be incorporated:
(iii) Construction equipment falling under any Chapter of HSN.

For your information, in the questions and answers published by CBEC relating to Mining Sector, for

Question 21: (Will GST charged on purchase of all earth moving machinery including JCB, tippers, dumpers by a mining company be allowed as input credit)?

CBE&C answer is as under:

Answer: The provision of Sec. 17(5) (a) of the CGST Act, 2017 restricts credit on motor vehicle for specified purposes listed therein. Further, in terms of the provision of Section 2(76) of the CGST Act, 2017 the expression ‘motor vehicle’ shall have the same meaning as assigned to it in Clause (28) of Section 2 of the Motor Vehicle Act, 1988, which does not include the mining equipment, viz., tippers, dumpers. Thus, as per present provisions, the GST charged on purchase of earth moving machinery including tippers, dumpers used for transportation of goods by a mining company will be allowed as input credit.

Applying the same analogy, ITC is to be clearly allowed on Construction equipments used by the Companies in Construction Sector for construction work

13. ITC on works contract services to be allowed for all registered persons

As per section 17 of GST Act, 2017, ITC on works contract services is allowed only to works contractors. This provision is to be widened to allow the ITC to all registered persons making further taxable supplies.

Relevant GST Law:

Section 17(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

Suggestion:

ITC on works contract services should be widened to all registered persons making further taxable supply.

14. Loss of ITC because of Noncompliance of vendors and sub-contractors

As per section 42 of GST Act, 2017 ITC availed on provisional basis under section 16 shall be matched with the returns of the vendors. However, if the same is not matching, the ITC is required to be reversed with interest by the recipient.

Relevant GST Law:

Section 42(3) & (5) is as under:

(3) Where the input tax credit claimed by a recipient in respect of an inward supply is in excess of the tax declared by the supplier for the same supply or the outward supply is not declared by the supplier in his valid returns, the discrepancy shall be communicated to both such persons in such manner as may be prescribed

(5) The amount in respect of which any discrepancy is communicated under subsection (3) and which is not rectified by the supplier in his valid return for the month in which discrepancy is communicated shall be added to the output tax liability of the recipient, in such manner as may be prescribed, in his return for the month succeeding the month in which the discrepancy is communicated

Suggestion:

Hardship to be removed. ITC to be allowed to be taken based on the strength of the original tax invoices.

15.Amendment to section 49(4) relating to ITC utilization

Restriction on utilization of ITC for interest, fee, penalty or any other amount payment under GST

Relevant GST Law:

Extract of section 49(4) of GST Act, 2017 is as under:

The amount available in the electronic credit ledger may be used for making any payment towards output tax under this Act or under the Integrated Goods and Services Tax Act in such manner and subject to such conditions and within such time as may be prescribed.

Suggestion:

Tax payer to be allowed to utilize the ITC for payment of interest, fee, penalty or any other amount including Pre deposit for appeal by amending the above section

16. Statutory variation to be mandated

It is observed that Project owners are taking time to amend/renegotiate the existing contracts due to change in cost and till then invoices are kept under hold. Due to non-settlement of claims, the working capital position of all the Construction Companies is severely affected.

Various Government, Local authority, Governmental authority/ Government Undertakings/ private clients are expressing their inability to settle claims on account of GST differential, for the reason that they do not have any direction in GST Act

Suggestion:

Similar to anti-profiteering provision under section 171, a deeming provision for statutory variation on account of GST should be mandated in the GST Act.

17. Revision of TRAN -1

Due to technical glitches of GSTN portal, dealers were not able to file the revised TRAN -1 in some of the states. This lead to loss of eligible credits

Relevant Law:

Extract of rule 120A is as under:

[Revision of declaration in FORM GST TRAN-1] 69Every registered person who has submitted a declaration electronically in FORM GST TRAN-1 within the time period specified in rule 117, rule 118, rule 119 and rule 120 may revise such declaration once and submit the revised declaration in FORM GST TRAN-1electronically on the common portal within the time period specified in the said rules or such further period as may be extended by the Commissioner in this behalf.]

Suggestion:

Revised TRAN-1 to be allowed in the respective states

18. Clarity on principal/predominant supply

No clarity on determining the principal supply/Predominant supply which is necessary for deciding the tax rate in case of composite supply

Relevant GST Law:

As per section 2(30) “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply

As per section 2(88) Principal Supply means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary;

As per section 8 the tax liability on a composite shall be determined in the following manner, namely:—

(a) a composite supply comprising two or more supplies, one of which is a principal supply, shall be treated as a supply of such principal supply

From the above it can be understood that the rate applicable in case of composite supply is the rate applicable for principal supply

Suggestion:

Yardsticks for determination of the principal supply is required

19. GST payment via ISD registration

ISD registration should have the facility of making GST liability payment from the portal especially in the case of RCM transactions. The same shall facilitate in distributing the RCM payments through portal itself.

Relevant GST Law:

As per section 2(61) of GST Act, 2017 “Input Service Distributor” means an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit of central tax, State tax, integrated tax or Union territory tax paid on the said services to a supplier of taxable goods or services or both having the same Permanent Account Number as that of the said office;

Suggestion:

Payment for RCM should be enabled for ISD registration.

20.Reversal of ITC if vendor is not paid within 180 days:

As per second proviso to section 16(2) of GST Act, 2017 if vendor is not paid towards value of supply along with the tax payable thereon within a period of 180 days from the date of invoice ITC availed shall be added to the output liability of the vendor along with interest. That ITC can be reclaimed on payment to vendor but interest will be a cost. This leads to following issues:

1. The above restriction is forcing the business to make payment to the vendor within 180 days even if the credit period agreed between supplier and recipient as per commercial terms is more than 180 days.
2. On making payment to vendor, the credit alone can be reclaimed and the interest will be a cost

Relevant Law:

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.

Suggestion:

Amendment to section is required in such a way that, wherever the credit period as per contractual terms is more than 180 days, time limit for reversing the credit as per the above section shall be in line with the credit period

21. Clarity on interstate works contract

In order to determine if a supply is made on inter-state basis or intra state basis, location of the supplier and the place of supply are to be analysed.

In case of works contract services, place of supply is the location of the immovable property (i.e the place where the project is executed).

In certain cases, a works contractor may not have registration/ fixed establishment in the state of execution of the project. In such case, whether the contractor can make inter-state supply of works contract and raise IGST invoice on the recipient from the state where he has GST registration.

Suggestion:

Appropriate circular need to be issued to remove the ambiguity

22. Supply erection – contract divisibility

Two contracts, one for supply and another for erection which are inter-connected with cross fall breach clause. The issue arises whether to treat it as works contract (composite supply) or can be treated as two separate supplies.

Relevant Law:

Section 2 (30) defines “composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply;

Suggestion:

Option to be provided for treating it as works contract or two separate supplies.

23. Liquidity damages

Liquidated damages are levied for delay in the contractual completion. GST is levied on the premise that liquidate damage is a consideration for tolerating an act.

Normally, waiver of liquidated damages is negotiated between the parties to the contract and it may take even few years to conclude. In majority of the situations it may be waived fully or partially.

It has to be treated similar to discount.

Relevant Law:

Under Schedule II, The following shall be treated as supply of services, namely:—
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act; and

Suggestion:

Liquidated damages is a contractual recovery and hence it should not be under purview of GST.

