Deloitte.

Tax alert: Delhi High Court remands matter to adjudicating authority to reconsider ITC eligibility post SC judgement on Safari Retreats

25 August 2026

The Delhi High Court has reiterated that the Supreme Court judgement emphasized the functionality test and held that for a structure to be qualified as a "plant", it needs determination based on the facts of each case.

In a nutshell

Delhi High Court noted that the constitutional validity of sections 17(5)(c) and 17(5)(d) of the CGST Act has already been settled by the Supreme Court.

The High Court held that the CBEC Flyer No. 28 must be read and applied in accordance with the Supreme Court's decision, by the adjudicating authority considering the facts of the case.

Pragmatic approach to be adopted by the adjudicating authority in respect of application that may be filed by the taxpayer to seek benefits lapsed due to ongoing proceedings.

Scroll down to read the detailed alert

Background:

- Two petitions were filed before the Hon'ble Delhi High Court that sought to strike down clauses (c) and (d) of section 17(5) of the CGST Act, 2017 (impugned provisions), which restricted availment of ITC on inward supplies procured for construction of immovable property. They additionally challenged the validity of Circular/Flyer No. 28 dated 1 January 2018[1] (impugned flyer).
- The petitioners contended that –
  - The retrospective amendment[2] introduced by the Government does not affect certain Supreme Court's observations.
  - Benefits otherwise available to it will not be permitted due to delay in pursuing the present proceedings.

Delhi High Court Judgement[3]:

- The Delhi High Court noted that during the pendency of these proceedings, the constitutional validity of the impugned provisions had already been upheld by the Supreme Court[4]. However, the Supreme Court observed that whether a structure qualifies as a "plant", is a fact-specific determination requiring application of the functionality test on a case-to-case basis.
- Regarding the lapsing of eligible benefits, the Court referred to section 14 of the Limitation Act, 1963 that provides for exclusion of time spent in bona fide proceedings before a court. It granted the petitioner liberty to file an appropriate application before the adjudicating authority and directed that such application should be considered pragmatically in accordance with law.
- The Court held that the impugned flyer was issued prior to the Supreme Court's judgement (supra) and hence it must be read considering the said judgement, only by the adjudicating authority, after examination of the facts and circumstances of the case.
- Accordingly, both writ petitions were disposed of, granting liberty to the petitioners to approach the adjudicating authority for appropriate relief in accordance with law

Comments:

What can be construed from the Delhi High Court is that despite retrospective amendment in section 17(5)(d) by replacement of phrase 'plant or machinery' with 'plant and machinery', the Supreme Court's judgement (supra) still has relevance in the context of applicability of functionality test to determine whether a particular structure qualifies as a 'plant' or not.

To recap, the Hon'ble Supreme Court in the said judgement had held that construction cannot be on 'own account' if it is intended to be sold or given on lease or license. It had also held that construction is said to be on "own account" when:

(i) it is made for his personal use and not for service or

(ii) it is to be used by the person constructing as a setting in which business is carried out.

For taxpayers with legacy ITC disputes relating to construction, the decision offers a significant avenue for reconsideration considering the Safari Retreats judgement. The crucial issue remains whether the property, considering its functional role in the taxable business, falls within the statutory exception and fulfils the other prescribed conditions for availment of ITC.

---

[1] The flyer relates to Works Contract under GST

[2] Substitution of the phrase "plant or machinery" with "plant and machinery" w.e.f. 01.07.2017 in section 17(5)(d) of CGST Act, 2017

[3] Riveria Commercial Developers Limited Vs Union of India & Ors [TS-595-HC(DEL)-2026-GST]

[4]Chief Commissioner of Central Goods and Service Tax vs M/s Safari Retreats Private Limited [TS-622-SC-2024-GST]