Handbook on Blocked Credit under GST

GST & Indirect Taxes Committee
The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Basic draft of this publication was prepared by CA Shubham Khaitan.

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Foreword

The GST & Indirect Taxes Committee of ICAI has always been proactive in providing the needed support to the members and honing their skills by organising courses, conferences and programmes, live webcasts, e-learning etc. on GST. Further, it has been regularly bringing out useful technical publications on various aspects of GST.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has come out with another useful publication titled, *"Handbook on Blocked Credit under GST"*. The readers may refer to this handbook to understand the various circumstances where input tax credit on procurements will not be available to the registered person i.e., where credit will be blocked under GST law.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Umesh Sharma, Vice-Chairman, and other members of GST & Indirect Taxes Committee for this initiative and all those who have contributed towards bringing out this publication for the benefit of the members and other stakeholders at large.

I am confident that the members would find this publication very useful in their professional assignments.

CA. (Dr.) Debashis Mitra

President, ICAI

Place : New Delhi
Date : 28.01.2023

Preface

With the introduction of Goods and Services Tax (GST), India has witnessed historic and impactful economic reforms. GST is a comprehensive, multi-stage, destination-based indirect tax that is levied on every stage of value addition across the country. GST law was also introduced with the main purpose of one nation and one tax and seamless flow of input tax credit. GST law provides seamless flow of input tax credit however, at some places it also restricts the registered persons from availing input tax credit.

ICAI being a 'partner in nation building' and the GST & Indirect Taxes Committee being entrusted with the responsibility of 'GST Knowledge Dissemination', we try our best in providing unstinted support to the Government in implementing the GST law in the best possible manner. The Committee spares no effort in developing various knowledge resources on GST like technical publications, e-learning, newsletter, updates etc. from time to time to make the members as well as other stakeholders more able and proficient in GST. The handbooks on various provisions of GST released by the Committee are one of the ongoing initiatives of the Committee towards the objective of GST knowledge dissemination. Augmenting this initiative, the Committee has developed another handbook titled 'Handbook on Blocked Credit'.

The Handbook aims to explain the complex law relating to blocked credit in simple and lucid language. The publication provides useful value-added analysis of such provisions. The relevant statutory provisions, notifications, circulars, case laws etc. have also been discussed in the Handbook for a holistic view.

We sincerely thank CA. (Dr.) Debashis Mitra, President, ICAI and CA. Aniket S Talati, Vice-President, ICAI for the encouragement and support extended by them to the various initiatives of the GST & Indirect Taxes Committee. We express our profound gratitude for the untiring efforts of CA. Shubham Khaitan in diligently preparing this Handbook. We are also grateful to CA. Vinod Awtani in meticulously reviewing this Handbook. We would also like to thank the members of our Committee who have always been a significant part of all our endeavours. Last, but not the least, we

commend the efforts made by the Secretariat of the Committee in providing the requisite technical and administrative assistance for successfully releasing this publication. We are sure that this Handbook will be of practical use to all the members of the Institute and other stakeholders.

Though all efforts have been taken to provide correct information in this Handbook, there can be different views/opinions on the various issues addressed to in this Handbook. We request the readers to bring to our notice any inadvertent errors or mistakes that may have crept in during the development of this Handbook.

We will be glad to receive your valuable feedback at gst@icai.in. We also request you to visit our website https://idtc.icai.org and share your suggestions and inputs, if any, on indirect taxes.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Umesh Sharma
Vice- Chairman
GST & Indirect Taxes Committee

Place: New Delhi
Date: 28.01.2023

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Contents

Readers may make note of the following while reading the publication:

Unless otherwise specified, the section numbers and rules referred to in this publication pertain to Central Goods and Services Tax Act, 2017 and Central Goods and Services Tax Rules, 2017.

Chapter 1
Meaning of Input Tax Credit

MEANING OF INPUT TAX CREDIT

The GST regime came into force from 01/07/2017. Under the GST regime, credit of tax paid at the time of inward supply is allowed to be set-off against the outward liability of a taxpayer.

Chapter V of the Central Goods and Services Act, 2017 (hereinafter referred to as 'the CGST Act') deals with input tax credit (hereinafter referred to as "ITC" or "input tax credit"). The said Chapter places certain restrictions on the availment of ITC. In this Handbook, we shall be discussing in detail the provisions contained in section 17(5) of the CGST Act which deals with blocked credit. Before we proceed to examine the provisions of section 17(5), let us first understand some basic concepts in relation to input tax credit.

The terms 'input tax credit' and 'input tax' have been defined by sections 2(63) and 2(62) of the CGST Act respectively as under:

2(63): "Input tax credit" means the credit of input tax.

2(62): "Input tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—

a. *the integrated goods and services tax charged on import of goods;*
b. *the tax payable under the provisions of sub-sections (3) and (4) of section 9;*
c. *the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act;*
d. *the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or*
e. *the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act,*

but does not include the tax paid under the composition levy.

Input tax has also been defined under section 2(g) of the Goods and Services Tax (Compensation to States) Act, 2017 as under:

"Input tax" in relation to a taxable person, means,—

(i) cess charged on any supply of goods or services or both made to him;

(ii) cess charged on import of goods and includes the cess payable on reverse charge basis;

In the light of the above narration, ITC can be availed on following types of taxes:

a) Tax charged by the supplier on goods or services under forward charge mechanism;

b) Tax paid by the recipient under reverse charge mechanism;

c) Tax paid on import of services would also stand included in reverse charge;

d) Tax charged on the import of goods at the time of filing the bill of entry.

At the same time, it has been categorically stated that the composition dealer is not eligible to claim ITC. In fact, the supplier is also not allowed to charge taxes separately from the recipient under the composition scheme.

As per the above, it can be observed that the definition of input tax credit is provided in brief. Unlike the Cenvat Credit Rules, it does not contain the inclusions and exclusions of available credit within the definition of input tax credit itself. Under the GST regime, ITC for business related expenses would be considered to be fully allowable unless specifically blocked under section 17(5) of the CGST Act. Therefore, the importance of blocked credit under section 17(5) is paramount.

INPUT, INPUT SERVICES AND CAPITAL GOODS

The goods or services on which tax has been paid can be in the nature of inputs, input services or capital goods.

The terms 'goods' and 'services' have been defined by sections 2(52) and 2(102) of the CGST Act respectively as under:

2(52): "Goods" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply.

2(102): "Services" means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash

or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged.

[1][Explanation: For the removal of doubts, it is hereby clarified that the expression "services" includes facilitating or arranging transactions in securities;]

To summarize the above, goods mean every kind of movable property. Services means anything other than goods. However, both goods and services would exclude money and securities. One may also refer Schedule II of the CGST Act to determine whether supply of certain activities or transactions constitutes supply of goods or services.

Once, something is identified to be classified as goods, one needs to understand whether the same would be classifiable as inputs or capital goods. The terms 'capital goods' and 'input' have been defined by sections 2(19) and 2(59) of the CGST Act respectively as under:

2(19): "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;

2(59): "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

The delineation between inputs and capital goods is whether the same has been capitalized in the books of the accounts. If the goods have been capitalized in the books of accounts, these would be considered as capital goods. If the goods have not been capitalized, they would be classifiable as inputs. Of course, the same should be used or intended to be used in the course or furtherance of business.

Further to the above, once any supply is identified to be a service, then the same would be classifiable only as input services from the perspective of the recipient even if the cost of such input service is capitalized. Section 2(60) of the CGST Act defines input services as under:

2(60): "Input Service" means any service used or intended to be used by a supplier in the course or furtherance of business.

[1] Inserted by the Central Goods and Services Tax (Amendment) Act, 2018, dated 30-08-2018, w.e.f. 1-2-2019 vide Notification No. 02/2019-Central Tax, dated 29-01-2019.

NEED FOR INPUT TAX CREDIT IN GST

There was a burden of tax on tax under the earlier regime of excise duty of Central Government and sales tax of the State Governments.

The introduction of Central VAT (CENVAT) had removed the cascading burden of tax on tax to a great extent by providing a mechanism of set off of tax paid on inputs and services upto the stage of production and has resulted in an improvement over the pre-existing regime of indirect taxes.

Similarly, the introduction of VAT in the States had removed the cascading effect by providing a set-off for tax paid on inputs and has again been an improvement over the previous sales tax regime.

But both CENVAT and State VAT had certain drawbacks or deficiencies. CENVAT did not extend to include the chain of value addition in the distributive trade below the stage of production. It also did not allow cross-utilisation of various indirect tax levies under the overall framework of CENVAT and thus kept the benefits of comprehensive input tax and service tax set-off out of the reach of manufacturers/ dealers.

Similarly, in the State-level VAT scheme, CENVAT load on the goods had not been removed and the cascading effect of that part of tax burden had remained unrelieved. Moreover, there were several taxes in the States, such as, luxury tax, entertainment tax etc. which were not subsumed in VAT. Further, there was no integration of VAT on goods with tax on services at the State level with the removal of the cascading effect of service tax.

With the introduction of GST, major Central and State taxes got subsumed into a single tax. The input tax credit paid on purchase of goods or services under GST can now be set off against the outward taxes leviable under GST. Therefore, this significantly reduces the burden of cascading effect of taxes. Thus, the GST law allows for continuous chain of set-off from the original producer's / service provider's point up to the retailer's level. Also, ITC can now be set off between both goods and services.

The concept of ITC introduced under GST is also in line with the guidelines of OECD that the burden of taxes in any value added tax system should not be borne by the businesses but by the ultimate consumer.

ITC – RIGHT VS CONCESSION

1. In the case of *M/s TVS Motor Company Ltd vs. The State of Tamil Nadu and others [2018-TIOL-386-SC-VAT]* the Supreme Court held that *"ITC*

is a form of concession which is provided by the Act; it cannot be claimed as a matter of right but only in terms of the provisions of the statute; therefore, the conditions mentioned in the aforesaid section had to be fulfilled." Similar conclusion was drawn in the case of *ALD Automotive Pvt. Ltd. vs. The Commercial Tax Officer & Ors. [2018-TIOL-385-SC-VAT].*

2. If Input tax credit has been lawfully availed after fulfilling the conditions laid down in the Act, does it become a taxpayer vested right? In the case of *Eicher Motors Ltd vs Union of India [1999 (106) E.L.T. 3 (S.C.)]* the assesses demanded quashing of the newly introduced rule 57F which provided for lapsing of MODVAT credit which was lying unutilised as on 16/03/1995. The assesses argued that MODVAT credit represented a vested right which was rightfully acquired by them under the earlier law. The Hon'ble Supreme Court held that the right to credit had rightfully accrued to the assessee. Section 37 of the Central Excise Act, 1944 [Power of Central Government to make rules] does not have the power to insert a rule that could take away such credit which had already accrued to them. Similar conclusion was drawn in the case of *Collector of Central Excise v. Dai Ichi Karkaria Ltd. [1999] 7 SCC 448.*

3. Reference can also be made to the Hon'ble Supreme Court's judgement in the case of *Jayam & Co vs. Assistant Commissioner [2018 (19) GSTL 3 (SC)]* wherein it was held that when a concession is given by a statute, the Legislature has the power to make the provision stating the form and manner in which such concession is to be allowed. Sub-section (20) seeks to achieve that. There was no right, inherent or otherwise, vested with dealers to claim the benefit of ITC but for section 19 of the VAT Act. That apart, there were valid and cogent reasons for inserting section 19(20). The main purport was to protect the Revenue against clandestine transactions resulting in evasion of tax.

From the above, one can draw an inference that CENVAT Credit / ITC is a concession or a benefit and is available only when all the conditions laid down by the law are satisfied. However, once all the conditions are satisfied and credit is availed, it becomes a vested right. In such cases, the right to claim ITC cannot be taken away once it has accrued in terms of law.

Chapter 2
Conditions and Eligibility for Taking ITC

Section 16 of the CGST Act pertains to eligibility and conditions for taking input tax credit. Once a registered person fulfills the basic conditions prescribed in section 16 then he becomes eligible to claim input tax Credit. Once the conditions of section 16 have been satisfied, the registered person also needs to check the provisions contained in section 17(5), which further restricts the availability of input tax credit.

STATUTORY PROVISIONS

Section 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.

BRIEF ANALYSIS OF SECTION 16(1)

1. Under the GST regime, the liability to pay tax is cast upon a taxable person including a person who is liable to be registered even though not actually registered. However, input tax credit can be availed only by a registered person i.e., a person registered under GST.
2. The conditions and restrictions for availing input tax credit have been prescribed under rule 36 of the Central Goods and Services Tax Rules, 2017 (hereinafter referred to as "the CGST Rules").
3. The phrase "in the course or furtherance" has not been defined anywhere in the Act. However, the same can be used in the context of input tax credit having nexus/ connection with the registered person's business.
4. The word 'business' is defined by section 2(17) of the CGST Act as under –

   "business" includes—

   (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;

(d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

(e) provision by a club, association, society, or any such body (for a subscription or any other consideration of the facilities or benefits to its members;

(f) admission, for a consideration, of persons to any premises;

(g) services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;

(h) [2]activities of a race club including by way of totalisator or a license to book maker or activities of a licensed book maker in such club; and

(i) *any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities*

Thus, business covers any transaction with *commercial motive*, whether or not there is profit motive in it and whether or not it is with or without any frequency. Also, the definition of business is wide enough to cover any activities which has any ancillary nexus with the business. Thus, the connection with the registered person's business is an essential criterion for the availment of ITC.

Section 16(1) talks only that ITC on any inward supplies which are either actually used or intended to be used in the course or furtherance of business or commerce. Hence, ITC would also be eligible for any expense which may be incurred for any future business transaction.

[2] Substituted by the Central Goods and Services Tax (Amendment) Act, 2018 (31 of 2018), dated 30-08-2018, w.e.f. 1-2-2019. Prior to its substitution, sub-clause (h) read as under:
"(h) services provided by a race club by way of totalisator or a licence to book maker in such club; and"

STATUTORY PROVISIONS

Section 16(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;*

aa. [3]*the details of the invoice or debit note referred to in clause (a) has been furnished by the supplier in the statement of outward supplies and such details have been communicated to the recipient of such invoice or debit note in the manner specified under section 37;*

b. *he has received the goods or services or both.*

[4][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.]

ba. [5]*the details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted.*

c. *subject to the provisions of section 41 ~~or section 43A~~ [6], 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:*

3 Inserted by the Finance Act, 2021, w.e.f. 1-1-2022 vide Notification No.: 39/2021 -CT dated 21-12-2021
4 Substituted by the Central Goods and Services Tax (Amendment) Act, 2018, dated 30-08-2018, w.e.f. 1-2-2019 vide Notification No. 39/2021 -CT dated 21-12-2021
5 Inserted by the Finance Act, 2022, vide Notification No. 18/2022 -CT w.e.f. 01-10-2022
6 Words "or section 43A" omitted by the Finance Act, 2022, vide Notification No. 18/2022 -CT w.e.f. 01-10-2022.

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.

Rule 36. Documentary requirements and conditions for claiming input tax credit-

(1) The input tax credit shall be availed by a registered person, including the Input Service Distributor, on the basis of any of the following documents, namely,-

(a) an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31 ;

(b) an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31 , subject to the payment of tax;

(c) a debit note issued by a supplier in accordance with the provisions of section 34 ;

(d) a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;

(e) an Input Service Distributor invoice or Input Service Distributor credit note or any document issued by an Input Service Distributor in accordance with the provisions of sub-rule (1) of rule 54.

(2) Input tax credit shall be availed by a registered person only if all the

applicable particulars as specified in the provisions of Chapter VI are contained in the said document [7][****]:

*[8][**Provided** that if the said document does not contain all the specified particulars but contains the details of the amount of tax charged, description of goods or services, total value of supply of goods or services or both, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, input tax credit may be availed by such registered person.]*

(3) No input tax credit shall be availed by a registered person in respect of any tax that has been paid in pursuance of any order where any demand has been confirmed on account of any fraud, willful misstatement or suppression of facts.

[9][(4) No input tax credit shall be availed by a registered person in respect of invoices or debit notes the details of which are required to be furnished under subsection (1) of section 37 unless,-

*(a) the details of such invoices or debit notes have been furnished by the supplier in the statement of outward supplies in **FORM GSTR-1** or using the invoice furnishing facility; and*

*(b) the details of [10][input tax credit in respect of] such invoices or debit notes have been communicated to the registered person in **FORM GSTR-2B** under sub-rule (7) of rule 60 .]*

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7 Omitted (w.e.f. 01.10.2022) vide Notification No. 19/2022 - CT dated 28.09.2022

8 Inserted vide Notification No.39/2018 -CT dated 04.09.2018

9 Substituted (w.e.f. 01.01.2022) vide Notification No. 40/2021 - CT dated 29.12.2021 for "(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been furnished by the suppliers under sub-section (1) of section 37, in FORM GSTR-1 or using the invoice furnishing facility shall not exceed 5 per cent. of the eligible credit available in respect of invoices or debit notes the details of which have been furnished by the suppliers under sub-section (1) of section 37 in FORM GSTR-1 or using the invoice furnishing facility.
Provided that the said condition shall apply cumulatively for the period February, March, April, May, June, July and August, 2020 and the return in FORM GSTR-3B for the tax period September, 2020 shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above.
Provided further that such condition shall apply cumulatively for the period April, May and June, 2021 and the return in FORM GSTR-3B for the tax period June, 2021 or quarter ending June, 2021, as the case may be, shall be furnished with the cumulative adjustment of input tax credit for the said months in accordance with the condition above."

10 Inserted (w.e.f. 01.10.2022) vide Notification No. 19/2022 - CT dated 28.09.2022.

BRIEF ANALYSIS OF SECTION 16(2) AND ITS RELATED RULES

1. Documentary evidence required for the availment of input tax credit has been prescribed under rule 36(1) of the CGST Rules.
2. Rule 36(1) prescribes the following documentary evidence on the basis of which ITC can be availed:
    a. an invoice issued by the supplier of goods or services or both in accordance with the provisions of section 31;
    b. an invoice (self-invoice) where the supply is received from an unregistered person and the tax is payable under reverse charge, subject to the payment of tax;
    c. a debit note issued by a supplier in accordance with the provisions of section 34;
    d. a bill of entry or any similar document prescribed under the Customs Act, 1962 or rules made thereunder for the assessment of integrated tax on imports;
    e. an input service distributor invoice or input service distributor credit note or any document issued by an input service distributor in accordance with the provisions of sub-rule (1) of rule 54
3. Proviso to rule 36(2) provides that if the document does not contain all the particulars as specified in law but contains the following particulars, then also ITC may be availed by the registered person:
    a. Details of the amount of tax charged
    b. Description of goods or services
    c. Total value of supply of goods or services or both
    d. GSTIN of the supplier and recipient
    e. Place of supply in case of inter-state supply received.
4. Section 16(2)(aa) of the CGST Act was inserted by Finance Act, 2021 and made effective only from 01/01/2022. This clause is to be read along with rule 36(4) of the CGST Rules. The said rule from 01/01/2022 provides for the availment of only that input tax credit whose details have been reflected in a registered person's GSTR-2B. Obviously, this would be applicable only on forward charge and not on ITC availed under reverse charge, import of goods, import of services, ISD credits etc.

Before 01/01/2022, even though there was no provision in section 16 of the CGST Act which restricted credit to those invoices/ debit notes getting reflected in GSTR-2B. Rule 36(4) of the CGST Rules was inserted by Notification No. 49/2019-Central Tax dated 09/10/2019 which initially allowed availment of input tax credit upto 120 percent of the input tax credit getting reflected in GSTR-2A. This, limit was later reduced to 110 percent of the input tax credit getting reflected in GSTR-2A vide Notification No. 75/2019-Central Tax dated 26/12/2019 and made applicable w.e.f 01-01-2020.There was a further reduction of the said limit to 105 percent of the input tax credit getting reflected in GSTR-2A/2B vide Notification No. 94/2020-Central Tax dated 22/12/2020 and was applicable w.e.f 01-01-2021. Currently the Act as well as the Rule provide for 100 percent matching with effect from 01/01/2022.

Hence for the period prior to 01-01-2022, a registered person can take a plea that without any statutory backing, the rule cannot place restrictions on availment of input tax credit. It is a settled principle that a subordinate legislation cannot override the statue.

There can be a question in a person's mind that section 16(1) of the CGST Act entitles a person to take credit subject to conditions and restrictions as may be prescribed. Therefore rule 36(4) always had a statutory backing. Whether the statutory right as provided in section 16(1) is enough to give such wide powers to the authorities is yet to be tested in the courts of law.

5. Since, rule 36(4) requiring the matching of ITC between GSTR 2A /2B and 3B has been inserted with effect from 9th October 2019, one can take a stand that the matching principles were not required for the period from 1st July 2017 till this date.

   Reliance can also be placed on *Union of India v. Bharti Airtel Ltd. [2021] 131 taxmann.com 319 (SC*). In the said case, the registered person had failed to fully avail his input tax credit which had accrued to him during the period July'17 to Sep'17. The reason that was given for the same was non availability of Form GSTR-2A till September 2018.

   The Hon'ble Supreme Court held that input tax credit is to be self-assessed by the registered person. Reliance is to be placed by him on primary sources such as invoices/challans, receipt of goods and services. While availing input tax credit, a registered person is not solely

dependent on GSTR-2A. The assessee is required to submit returns on the basis of self-assessment in Form GSTR-3B manually on electronic platform. Form GSTR-2A is only a facilitator for taking an informed decision while doing such self-assessment.

The judgment of Hon'ble Delhi High Court in favour of the assessee was reversed by the Hon'ble Supreme Court by holding that if there is no provision regarding refund of surplus or excess ITC in the electronic credit ledger, the assessee who discharged output tax liability (OTL) by paying cash (which he was free to pay in cash in spite of the surplus or excess electronic credit ledger account), could later on ask for swapping of the entries, so as to show the corresponding OTL amount in the electronic cash ledger from where he could claim a refund.

The court held that the GST law permits rectification of errors and omissions only at the initial stages but in the specified manner.

6. Section 16(2)(ba) was inserted by Finance Act, 2022 and made effective by Notification No. 18/ 2022-Central Tax dated 28-09-2022 with effect from 01-10-2022. The said section makes reference to section 38 as substituted by the Finance Act, 2022 vide notification no. 18/2022-Central tax dated 28-09-2022. A registered person shall be able to avail input tax credit only in respect of those invoices/debit notes which have not been restricted as per the provisions of section 38. The details of such restricted credit will be auto populated in a registered person's GSTR-2B. Section 38 is reproduced hereunder for ready reference:-

Section 38: Communication of details of inward supplies and input tax credit

(1) The details of outward supplies furnished by the registered persons under sub-section (1) of section 37 and of such other supplies as may be prescribed, and an auto-generated statement containing the details of input tax credit shall be made available electronically to the recipients of such supplies in such form and manner, within such time, and subject to such conditions and restrictions as may be prescribed.

(2) The auto-generated statement under sub-section (1) shall consist of—

a) details of inward supplies in respect of which credit of input tax may be available to the recipient; and

b) details of supplies in respect of which such credit cannot be

availed, whether wholly or partly, by the recipient, on account of the details of the said supplies being furnished under sub-section (1) of section 37,-

i. by any registered person within such period of taking registration as may be prescribed; or

ii. by any registered person, who has defaulted in payment of tax and where such default has continued for such period as may be prescribed; or

iii. by any registered person, the output tax payable by whom in accordance with the statement of outward supplies furnished by him under the said sub-section during such period, as may be prescribed, exceeds the output tax paid by him during the said period by such limit as may be prescribed; or

iv. by any registered person who, during such period as may be prescribed, has availed credit of input tax of an amount that exceeds the credit that can be availed by him in accordance with clause (a), by such limit as may be prescribed; or

v. by any registered person, who has defaulted in discharging his tax liability in accordance with the provisions of sub-section (12) of section 49 subject to such conditions and restrictions as may be prescribed; or

vi. by such other class of persons as may be prescribed

From the above, it can be summarized that ITC would be restricted under section 38 in the following cases:

a. where supply is received from a registered person within such period of taking registration as may be prescribed;

b. where supply is received from a registered person, who has defaulted in payment of tax and where such default has continued for such period as may be prescribed; or

c. where value of supply in the supplier's GSTR-1 exceeds the value disclosed in GSTR-3B by the prescribed limit

d. where the input tax credit in the supplier's GSTR-3B exceeds the value disclosed in GSTR-2B by the prescribed limit

e. where the supplier has paid higher proportion of tax through electronic credit ledger in GSTR-3B than that allowed as per law

f. by such other class of persons as may be prescribed

7. Section 16(2)(c) of the CGST Act imposes a condition which is almost impossible for a registered person to verify. It allows a registered person to avail ITC only on those invoices, whose tax amount has been deposited by the supplier with the Government. Here, one needs to note that GSTR-2B/2A only shows to the recipient the tax invoices which have been uploaded by the supplier in their Form GSTR-1. Therefore, a question arises as to whether the payment of the same which has been done by the supplier through Form GSTR-3B against those invoices, can be verified.

   In the case of *DY Beathel Enterprises v. State Tax Officer (Data Cell) (Investigation Wing), Tirunelveli [2021-TIOL-890-HC-MAD-GST],* the assessee purchased goods from registered dealer. Credit was availed by the assessee based on returns filed by the seller. Most of the payments inclusive of tax that were made by the assessee were through banking channels. However, the seller had failed to deposit any tax with the Government. The Department initiated recovery proceedings against the buyer, without initiating any action against the seller. The court quashed the impugned order as the Department took no steps to initiate proceedings first against the seller. The matter was remanded back with the instruction to initiate recovery of taxes from the supplier at first.

   However, the Hon'ble Court in the said case did not dwell on the issue of liability of ITC reversal in cases where the supplier does not pay tax and the Department fails to recover the same.

   In the case of *LGW Industries Ltd. vs. Union of India [(2022) 134 taxmann.com 42 (Calcutta-HC)],* the taxpayers were asked to reverse input tax credit along with interest and penalty, as the supplier from whom purchases were made, were found to be non-existing (so there was no tax deposit with the exchequer). Further, the registration of such supplier was also cancelled from retrospective date. The court remanded the case back to the concerned authority with the direction to check:

   i. the genuineness of the documents on the basis of which credit was availed by the taxpayer

   ii. whether payments on purchases along with GST were actually paid or not to the supplier

   iii. whether verification was done by the taxpayer to check the genuineness of the supplier

iv. whether the transactions and purchases were made before or after the cancellation of registration of the suppliers

v. compliance of statutory obligation by the petitioners in verification of identity of the suppliers (RTP)

If it is found, upon considering the relevant documents, that all the purchases and transactions in question are genuine and supported by valid documents and transactions in question were made before the cancellation of registration of those suppliers and after taking into consideration the judgments of the Supreme Court and various High Courts which have been referred in this order and in that event the petitioners shall be given the benefit of input tax credit in question.

8. The second and third provisos to section 16(2) of the CGST Act are applicable only in case of input tax credit availed under forward charge mechanism. The said provisions are not applicable in respect of the following cases:

i. Supplies made under Schedule I of the CGST Act as such supplies are made without consideration

ii. Value of supplies added in accordance with the provisions of clause (b) of sub-section (2) of section 15 of the CGST Act, i.e amount on which supplier is liable to pay tax 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.

The second proviso to section 16(2) provides for the reversal of input tax credit on account of non-payment of the amount [value of supply along with tax payable thereon] to the supplier within a period of 180 days. Interest is also leviable as per section 50 on account of non-payment to the supplier, if the said ITC stands both availed and utilized. However, it is to be noted here that as per *Circular No 170/02/2022-GST dated 06th July 2022*, which provides for reporting requirements in Form GSTR-3B, the reversal of ITC on account of non-payment is to be shown in Table 4(B)(2) of Form GSTR-3B.

There is a requirement to reverse input tax credit on account of failure to pay to the supplier within 180 days. A plain reading of the rule shows that, the said reversal is applicable irrespective of the terms of contract

between the seller and the recipient. There are certain industries where the terms of credit are long or there is a practice of holding back of certain amount till the completion of work (e.g. retention payments). One needs to note that there is no specific exclusion or relief is given under the said proviso even where there is no default in payment by the purchaser to the seller as per the terms of the contract.

However, it must be noted that the second proviso to section 16 (2) uses the term "fails to pay". A person can be said to have failed to pay an amount only when he is liable to pay the same. The proviso inherently links the liability to reversal of ITC only in those cases where the supplier was contractually bound to pay the same to the recipient. However, one will have to wait for the meaning to be given by the Courts to the phrase "fails to pay" for determining the liability to reverse ITC for invoices involving retention payments.

9. Section 16(3) of the CGST Act clearly provides that one can either claim depreciation on the component of tax paid on inward supply of capital goods and plant and machinery or claim ITC on the same. This option is available to the taxpayer. Where it is possible to utilize the entire ITC for payment of output taxes, then one may opt for availing the benefit of such ITC. This results in a lower output tax liability to be paid in cash.

   Where ITC may not be available or utilizable, then one may claim depreciation on the tax component. Upon claiming higher depreciation, the quantum of income tax on the said component comes down.

   Section 16(3) of the CGST Act reads thus:

> *Where the registered person has claimed depreciation on the tax component of the cost of capital goods and plant and machinery under the provisions of the Income-tax Act, 1961 (43 of 1961), the input tax credit on the said tax component shall not be allowed.*

10. Section 16(4) of the CGST Act provides the last date for the availment of input tax credit. The earlier due date for availment of ITC was the due date of September month's return of the subsequent financial year or filing of annual return for the said period, whichever is earlier. However, the said provision has been amended by the Finance Act, 2022 to provide for the availment of input tax credit by 30th of November following the end of the financial year to which invoice pertains or filing of annual return for the said period, whichever is earlier. The said provisions have been made effective from 1st October 2022 vide

Notification No. 18/ 2022 dated 28th September 2022. The new time limit is applicable for the invoice or debit note pertaining to FY 2021-22.

The amended provisions of section 16(4) read thus:

> *A registered person shall not be entitled to take input tax credit in respect of any invoice or debit note for supply of goods or services or both after the [11] thirtieth day of November following the end of financial year to which such invoice or [12]debit note pertains or furnishing of the relevant annual return, whichever is earlier*
>
> *Provided that the registered person shall be entitled to take input tax credit after the due date of furnishing of the return under section 39 for the month of September, 2018 till the due date of furnishing of the return under the said section for the month of March, 2019 in respect of any invoice or invoice relating to such debit note for supply of goods or services or both made during the financial year 2017-18, the details of which have been uploaded by the supplier under sub-section (1) of section 37 till the due date for furnishing the details under sub-section (1) of said section for the month of March, 2019*

11. It is important to note here that the time limit [due date of September month's return (before amendment)/ 30th November of the next financial year (after amendment)] provided as per law is an absolute date. On a plain reading of the said provisions, it is clear that in case there is a delay in filing of return for availing ITC beyond the dates specified, input tax credit under section 16(4) of the CGST Act shall not be available in relation to invoices/debit notes pertaining to the previous financial year.

12. One of the conditions for availing input tax credit is that the invoice or debit note should have been furnished by the supplier in their GSTR-1, which will then be reflected in the recipient's GSTR-2B. Thus, a conjoint reading of section 16(4) with section 16(2)(aa) of the CGST Act indicates that before availing ITC in Form GSTR-3B within the time limit specified in section 16(4), the relevant invoice or debit note must be reflected in GSTR-2B.

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[11] Substituted for "due date of furnishing of the return under section 39 for the month of September" by the Finance Act, 2022, Notified by Notification No. 18/2022 -CT w.e.f. 01-10-2022.

[12] The words "invoice relating to such" omitted by the Finance Act, 2020, w.e.f. 1-1-2021 vide Notification No. 92/2020-C.T. , dated 22nd December, 2020

13. Can the Act place restrictions on conditions for the availment of input tax credit under section 16(4) of the CGST Act, even though section 16(2) of the CGST Act starts with a non-obstante clause? One can take a view that all the sections contained in the CGST Act in relation to conditions for the availment of input tax credit, are to be read in isolation and hence, all conditions should be complied to avail the ITC. If no effect is given to the conditions laid under section 16(2), it would lead to redundancy of the said provision. In the case of *Kailash Chandra and Anr vs Mukundi Lal and Ors, (2002) 2 SSC 678* it was held that a provision in the statute is not to be read in isolation. It has to be read with other related provisions in the Act itself, more particularly, when the subject matter dealt with in different sections or parts of the same statute is the same or similar in a nature.

Chapter 3
Overview of Provisions of Apportionment of Credit and Blocked Credit

Section 17 of the CGST Act can be divided into two parts. Sub-sections (1) to (4) of section 17 deal with apportionment of input tax credit and sub-section (5) of section 17 deals with blocked credit.

STATUTORY PROVISIONS

Section 17 (1) Where the goods or services or both are used by the registered person partly for the purpose of any business and partly for other purposes, the amount of credit shall be restricted to so much of the input tax as is attributable to the purposes of his business.

(2) Where the goods or services or both are used by the registered person partly for effecting taxable supplies including zero-rated supplies under this Act or under the Integrated Goods and Services Tax Act and partly for effecting exempt supplies under the said Acts, the amount of credit shall be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.

(3) The value of exempt supply under sub-section (2) shall be such as may be prescribed and shall include supplies on which the recipient is liable to pay tax on reverse charge basis, transactions in securities, sale of land and, subject to clause (b) of paragraph 5 of Schedule II, sale of building.

[13]Explanation—For the purposes of this sub-section, the expression "value of exempt supply" shall not include the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.

(4) A banking company or a financial institution including a non-banking financial company, engaged in supplying services by way of accepting deposits, extending loans or advances shall have the option to either comply

[13] Inserted by the Central Goods and Services Tax (Amendment) Act, 2018, w.e.f. 1-2-2019.

with the provisions of sub-section (2), or avail of, every month, an amount equal to fifty percent of the eligible input tax credit on inputs, capital goods and input services in that month and the rest shall lapse:

Provided that the option once exercised shall not be withdrawn during the remaining part of the financial year:

Provided further that the restriction of fifty percent shall not apply to the tax paid on supplies made by one registered person to another registered person having the same Permanent Account Number.

BRIEF ANALYSIS

1. Where the inward supplies are used by the registered person partly for the purposes of business and partly for other purposes, the amount of credit would be restricted to so much of the input tax as is attributable to the purposes of his business. Therefore, no credit is available on inward supplies used for non-business purposes.
2. Where the inward supplies are used by the registered person partly for effecting taxable supplies, including zero-rated supplies [exports/ supplies done to SEZ for authorised operations], and partly for effecting exempt supplies, the amount of credit would be restricted to so much of the input tax as is attributable to the said taxable supplies including zero-rated supplies.
3. 'Exempt supply' refers to supplies which attract "NIL" rate of tax, wholly exempt from tax and includes non-taxable supplies. Further, the value of exempt supply for the purpose of apportionment of the input tax credit would include the following supplies in such manner:
    a. supplies on which the recipient is liable to pay tax on reverse charge basis [from the point of view of the supplier];
    b. transactions in securities and the value of security would be taken as 1 percent of the sale value of such security [Explanation to rule 45 of the CGST Rules];
    c. sale of land and subject to clause (b) of paragraph 5 of Schedule II, sale of building and the value of land and building would be taken as the same as adopted for the purpose of paying stamp duty.

The value of exempt supply would not include the following:

a) the value of zero-rated supplies of exempted goods or services.

b) the value of activities or transactions specified in Schedule III, except those specified in paragraph 5 of the said Schedule.

4. In case a registered person is utilizing his inputs or input services partly for business and partly for other purposes or he is making outward supplies both taxable including zero-rated and exempt in his business, then the input tax credit of inputs and input services would be eligible in terms of the procedure laid down under rule 42 of the CGST Rules.

5. In case a registered person is utilizing his capital goods partly for business and partly for other purposes or he is using capital goods for making outward supplies both taxable including zero-rated and exempt in his business, then his input tax credit on inward supply of such capital goods would be eligible in terms of the procedure laid down under rule 43 of the CGST Rules.

STATUTORY PROVISIONS

Section 17(5): "Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

[14][(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

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

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

[14] Substituted by CGST (Amendment) Act, 2018, w.e.f 01-02-2019

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa)

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.]

(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 capitalisation, to the said immovable property;

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

(g) goods or services or both used for personal consumption;

(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.

(6) The Government may prescribe the manner in which the credit referred to in sub-sections (1) and (2) may be attributed.

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.

BRIEF ANALYSIS OF SECTION 17(5)

Non-Obstante Clause- *Meaning of 'notwithstanding'*

1. Section 17(5) of the CGST Act is a non obstante provision. The sub section has an overriding effect on sections 16(1) and 18(1) of the CGST Act, both of which are in relation to availment of input tax credit. The word 'notwithstanding' as per the Black's Law Dictionary means "Despite; in spite

of". Thus, the sub section will be effective in spite of what is contained in sections 16(1) and 18(1).

2. The term 'notwithstanding' was explained by the Apex Court in the case of *Chandavarkar Sita Ratna Rao vs Ashalata S. Guram [1987 AIR 117, 1986 SCR (3) 866]* as follows-

"*A clause beginning with the expression 'notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force, or in any contract' is more often than not appended to a section in the beginning with a view to give the enacting part of the section, in case of conflict, an overriding effect over the provision of the Act or the contract mentioned in the non-obstante clause. It is equivalent to saying that in spite of the provision of the Act or any other Act mentioned in the non-obstante clause or any contract or document mentioned the enactment, following it will have its full operation or that the provisions embraced in the non-obstante clause would not be an impediment for an operation of the enactment."*

Thus, any input tax credit falling under the provisions of sub section (5) of section 17 of the CSGT Act shall be disallowed irrespective of the fact that it is allowable under section 16 or section 18 of the CGST Act. In a way, Section 17 (5) blocks ITC benefit of tax paid on legitimate inward supplies which otherwise would have been allowable in the course of business.

Meaning of 'In respect of'

3. 'In respect of', as per the Cambridge Dictionary means "in connection with something". However, in the Indian courts it has been interpreted in different ways. One interpretation is that it is having a wider meaning indicating nexus or connection with something[15]. Another interpretation is that the word "in respect of" should be given a narrow meaning. It should be interpreted as "on"[16]. In the context of section 17(5) of the CGST Act, it is extremely important to understand whether "in respect of" should be given a wider meaning or a restricted meaning, as blocking of credit would depend on the same.

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[15] *The State of Tripura v. Province of East Bengal 1951 SCR 1; Tolaram Relumal and Anr. V State of Bombay 1955 SCR 439; S.S. Light Railway Co. Ltd v. Upper Doab Sugar Mills Ltd. & Anr. [09.02.1960].*
16 State of Madras vs. M/s Swastik Tobacco Factory 1966 taxmann.com 5 (SC) [14-12-1965].

4. In the case of *P.V Narasimha Rao vs State (CBI/SPE) [Appeal (CRL.) 1207 of 1997],* Justice G.N. Ray had noted as under:-

"The correct interpretation of the expression "in respect of" cannot be made under any rigid formula but must be appreciated with references to the context in which it has been used and the purpose to be achieved under the provision in question.". Now, to interpret whether the term "in respect of" in section 17(5) of the CGST Act shall be given a narrow or broad interpretation, we can take reference to the antecedent or precedent words used. The word "in respect of" is followed by the word 'namely'. As per the Black's Law Dictionary the word 'namely' means *"By name or particular mention" "The term indicates what is to be included by name. By contrast, 'including' implies a partial list and indicates that something in not listed*".

5. In the case of *Chairman Sebi vs Roofit Industries Ltd [Civil Appeal No. 1364-1365 of 2005]* it was held as under:

"The use of the word 'namely' indicates that these factors alone are to be considered by the Adjudicating Officer. Black's Law Dictionary defines 'namely' as by name or particular mention. The term indicates what is to be included by name. By contrast, including implies a partial list and indicates something that is not listed. In this context, we find no reason to read 'namely' as including, as learned Senior Counsel for the respondent would have us do." Similar inference was drawn by the Supreme Court in the case of *Siddharth Chaturvedi vs Securities and Exchange Board India [Civil Appeal No. 14730 of 2015]***.**

6. One can apply the rule of 'noscitur a socii' to infer that since the word "in respect of" is followed by the word "namely", a narrow interpretation should be given to the word "in respect of". Thereby, *one cannot expand the coverage of the specific clauses which contains the list of blocked ITC.*

Bundles of credits blocked in GST under section 17(5)

One may bifurcate the blockage of credits broadly into the following bundles:

First bundle

This includes goods or services or both related to transport, food beverage, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, life insurance, health insurance when used for personal consumption. There is a possibility of such services be construed in the nature of personal benefit. It may be quite difficult to identify the inward

supplies which are for personal use and used in direct nexus with business. Hence, ITC is allowed only when a direct and identifiable link can be established.

Second Bundle

This includes blockage of credit on works contract services, goods or services or both when used for construction of immovable property (except plant and machinery). The idea is to block all such credits when used on his own account. However, in case of work contract services, if there is a further supply of works contract service, ITC has been fully allowed.

Third Bundle

Where the goods are lost, stolen, destroyed, written off or disposed of by way of gift or free samples. ITC has been blocked where any goods have alternate disposal mechanism other than being supplied to another person.

Fourth Bundle

This includes any tax paid in accordance with the provisions of sections 74, 129 and 130. Whenever any supplier or recipient pays taxes after having the intent to evade the same, the recipient does not become eligible for the said ITC. This is for discouraging the practice of evasion of taxes.

Chapter 4
Motor Vehicles, Vessels and Aircraft and their Renting

STATUTORY PROVISIONS

Clauses (a) and (b) of Section 17(5) of the CGST Act read as under:

Before 1st Feb 2019

Notwithstanding anything contained in sub-section (1) of section 16 and sub- section (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

(b) the following supply of goods or services or both —

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness center;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an

outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession;"

From 1st Feb 2019

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

(a) motor vehicles for transportation of persons having approved seating capacity of not more than thirteen persons (including the driver), except when they are used for making the following taxable supplies, namely:—

(A) further supply of such motor vehicles; or

(B) transportation of passengers; or

(C) imparting training on driving such motor vehicles;

(aa) vessels and aircraft except when they are used—

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

(A) further supply of such vessels or aircraft; or

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

(ii) for transportation of goods;

(ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa):

Provided that the input tax credit in respect of such services shall be available—

(i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;

(ii) where received by a taxable person engaged—

(I) in the manufacture of such motor vehicles, vessels or aircraft; or

(II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

(b) the following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

Brief Analysis

Clauses (a) and (b) of section 17(5) of the CGST Act, got substituted by clauses (a), (aa), (ab) and (b) through Central Goods and Services Tax (Amendment) Act, 2018, effective from 01/02/2019 vide Notification No. 02/2019-Central Tax dated 29th January 2019.

Will there be any retrospective applicability of the earlier provisions?

The amendment was not clarificatory in nature. The said amendment at certain places expanded the scope of blocked credit and at certain places restricted the scope of blocked credit. As stated earlier, the provisions of section 17(5) are to be read strictly. Further, the amendment was not made applicable retrospectively. Thus, for the period from 01/07/2017 to

31/01/2019 provisions which stood prior to CGST (Amendment) Act, 2018 shall be applicable and for the period after 01/02/2019, the amended provisions shall be made applicable.

TYPES OF CONVEYANCES

Motor vehicle

The term motor vehicle has been defined under section 2(76) of the CGST Act thus:

> *"Motor vehicle" shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988)*

Section 2(28) of the Motor Vehicles Act, 1988 defined 'motor vehicle' as under:

> *"motor vehicle" or "vehicle" means any mechanically propelled vehicle adapted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty-five cubic centimetres.*

Thus, a motor vehicle

i. consists only of vehicles which are made for use on roads

ii. excludes from its ambit vehicles running on fixed rails eg. train, tram, metro etc.

iii. excludes from its ambit a vehicle that is used only in factory or closed premises

iv. excludes from its ambit a vehicle having less than 4 wheels and engine capacity not exceeding 25 cubic centimeters. Thus, for any two-wheeler or three-wheeler vehicle like auto rickshaws, scooter, bike one needs to check the engine capacity. If the engine capacity is more than 25CC, the said vehicle will be considered as motor vehicle.

v. The term which has been used in the aforementioned definition is "mechanically propelled vehicle". Thus, the term would exclude cycles, cycle rickshaws and vehicles pulled by animals or humans;

Other conveyances

Before the amendment dated 1st February 2019, it was stated that the ITC would be blocked on motor vehicles and other conveyance. The term 'conveyance' has been defined under section 2(34) of the CGST Act as under:

"conveyance" includes a vessel, an aircraft and a vehicle;

The above definition is inclusive and hence even though it explicitly mentions that the same would cover motor vehicles, aircrafts and vessels, any other conveyance would also be covered.

However, after the amendment, the provisions of blocked credit have been specifically made applicable only with respect to motor vehicles, aircraft and vessels. ITC would be restricted only on motor vehicles, vessels and aircraft.

Aircraft

The term aircraft has not been defined under the CSGT Act. Thus, one can take reference from other laws.

Section 2(1) of the Aircraft Act, 1934 defines aircraft as under:

"aircraft" means any machine which can derive support in the atmosphere from reactions of the air, [other than reactions of the air against the earth's surface] and includes balloons whether fixed or free, airships, kites, gliders and flying machines;

An aircraft must be a machine driven airborne craft.eg. Airplane, Helicopter, Motor Kite, hot air balloons, gliders etc.

Vessel

The term vessel has not been defined in the CGST Act. Thus, one can take reference from other laws.

Section 3(55) of the Merchant Shipping Act, 1958 defines vessel as under:

"vessel" includes any ship, boat, sailing vessel, or other description of vessel used in navigation;

Section 48 of the Indian penal Code defines vessel as under:

"vessel" denotes anything made for the conveyance by water of human beings or of property;

Thus, going by the bare reading, a vessel can be either mechanically or non-mechanically propelled. It would cover any kind of vessel like ship, boat, sailing vessel, houseboat etc. The condition is that it should be used for the purpose of navigation in waters. The navigation can either be for human beings or goods.

BLOCKAGE OF ITC ON PURCHASE OF MOTOR VEHICLES

ITC is blocked on certain types of motor vehicles even though they may be used in the course or furtherance of business. This would be so irrespective of the fact that the same is used for daily commutation to and from the place of business by the owner or employee of the company.

Further to the above, there are certain exceptions based on the purpose of usage and the nature of business of the registered person. The following table summarises the eligibility of ITC for the various periods:

	From 01-07-2017 to 31-01-2019	**Post 1-02-2019**	**Remarks**
1	Motor vehicles made and used for transportation of goods	Motor vehicles made and used for transportation of goods	No change in the eligibility of ITC even after amendment.
2	Motor vehicle for transportation of passengers was allowed when used for • Further supply of such vehicle or conveyance • For transportation of passengers • For imparting training on driving	Motor vehicle for transportation of passengers having approved seating capacity of more than 13 persons	ITC is allowed. After 1-02-2019, there is no condition for use of such vehicle for specific purposes.
3		Motor Vehicles for transportation of passengers having approved seating capacity upto 13 persons is allowed only when used for: • Further supply of such motor	W.e.f. 1-02-2019 blocking of ITC is only with respect to motor vehicles for transportation of passengers having approved seating capacity upto 13 persons subject to

		vehicles • For transportation of passengers • For imparting training on driving such motor vehicles.	exceptions.

Transportation of goods

Before the amendment of 1st February 2019, a separate exception had been there in the law in respect of motor vehicles used for transportation of goods. This means that ITC had been allowed specifically for motor vehicles if the primary purpose was for transportation of goods.

After 1st February 2019, the blockage of ITC is on motor vehicles for transportation of persons. Blockage of ITC is like a negative list wherein ITC is allowed except that which is blocked by section 17(5). Since, the blockage of ITC is not for motor vehicles made for transportation of goods in the first place, the same stands fully allowed as per law.

It may be noted that the actual usage of the motor vehicles is not relevant. What is relevant is that the purpose for which such motor vehicles have been designed or approved. If a motor vehicle designed to carry passengers is used for transportation of goods, the ITC would continue to be blocked.

Approved Seating Capacity of more than 13 persons

ITC would be blocked only on motor vehicles where the approved seating capacity is upto 13 persons including the driver of the vehicle as well. Where the said capacity is more than 13 persons, ITC would be allowable irrespective of the number of the persons or the use of such vehicle.

In case of seating capacity restriction, one needs to check the approved seating capacity by the Regional Transport Authority. Here one needs to note that the availability of input tax credit is dependent on the approved seating capacity irrespective of the actual number of persons sitting.

Therefore, ITC would be allowable on buses used for transportation of employees to and from the place of business to their residence. However, ITC would be blocked if the transportation is being done through a car.

Transportation of passenger

Input tax credit will be allowed on motor vehicle which is used for providing the service of transportation of passengers. The statutory provisions have employed the phrase "used for making taxable supplies of transportation of passenger". The term "for" as per the Cambridge Dictionary means "intended to be given to". This means that the vehicle must be registered as a passenger transport vehicle with the State Transport Department. Where any vehicle is temporarily used for passenger transport and is not registered as a passenger transport vehicle, ITC would not be allowed on it. It must be noted that the ITC would be allowed only where the income is earned by way of passenger fare.

However, the final eligibility of ITC would also depend on the entry in the rate notification.

Used for providing training on driving of vehicles

ITC would be allowed where the purchase of motor vehicles is used for providing training on driving of motor vehicles. This means that the purpose of purchase should be to provide such training. If any vehicle is purchased for any other purpose and is registered as such, ITC would not be allowable simply because later it is converted into a motor vehicle for training. Therefore, the intent of its usage should be present at the time of purchase.

Further supply of motor vehicle

Section 17(5) of the CGST Act allows input tax credit on purchase of motor vehicles, vessels and aircraft if there is further supply of such motor vehicle, vessel or aircraft as the case may be. Here it is important to note that the word used is "supply" not "sales". The word 'supply' has been defined under section 7 of the CGST Act. The said definition is a wide one which includes within itself sale, lease, rental etc.

Therefore, the motor vehicle purchased and used for renting / sale of such vehicles would also be covered. Hence, the ITC would be allowable both to an automobile dealer and a car rental company under this provision. Having said this, one needs to check tariff notification in case any restriction is placed on availment of input tax credit. Further, in case any supply is exempt in terms of section 2(47) of the CGST Act there shall be reversal of input tax credit in terms of the restrictions placed by section 17 of the CGST Act read with rule 42 / 43 of CGST Rules.

BLOCKAGE OF ITC ON VESSELS AND AIRCRAFTS

1. ITC would be blocked on purchase of vessels and aircraft. This would include a private yacht, boat, ship etc. used for leisure or business purposes by any person.
2. However, if the vessels and aircraft are used for making the following taxable supplies, ITC would be allowable:
    a. transportation of passengers
    b. transportation of goods
    c. imparting training on navigating such vessels
    d. imparting training on flying such aircraft
    e. further supply of such vessels or aircraft
3. This means that the shipping lines or airlines would be allowed ITC if they are used exclusively for transportation of goods.
4. Also, where any vessel has the primary purpose of transportation of passengers and is used for commutation purposes,
5. ITC would be allowable. However, where the same is used for the purpose of leisure or tourism, then ITC on the vessels or aircraft would not be available.
6. ITC would be allowable to training schools which provide training for navigation of vessels and flying of aircraft.
7. Also, the companies which are engaged in supplying including selling, renting, leasing of such vessels and aircraft, ITC would also be allowed on purchase / renting of vessels and aircraft.

GENERAL INSURANCE, SERVICING, REPAIR AND MAINTENANCE OF MOTOR VEHICLES

1. Section 17(5)(ab) of the CGST Act provides that ITC would not be available on certain expenses relating to motor vehicles. The expenses on which ITC would be disallowed are the services of general insurance, servicing, repair and maintenance on such motor vehicles.
2. At the outset, it may be noted that ITC would be blocked in respect of expenses on motor vehicles only where ITC on the purchase of such motor vehicles also stands disallowed. This means that the restriction on

relevant expenses of each nature of motor vehicles would be the same as upon purchase of motor vehicles. Thereby, the ITC would be allowable on the expenses with regard to motor vehicles in the following cases:

a. Motor vehicles for transportation of goods

b. Vehicle seating capacity is more than 13 persons

c. It is used for transportation of passengers

d. It is used for providing training on driving of vehicles

e. It is used for further supply of motor vehicles

3. It may be noted that the expenses mentioned in the heading are exhaustive. This means that only on the expenses of general insurance, servicing, repair and maintenance, ITC would be blocked. If there are any other expenses in respect of motor vehicles (say car parking), then ITC would not be blocked.

4. Section 17(5)(ab) is on the disallowance of input tax credit on the services of general insurance, servicing, repairs and maintenance in so far as they relate to motor vehicles, vessels or aircraft and this disallowance is applicable from 01/02/2019.Thus, for the period from 01/07/2017 to 31/01/2019 there was no entry to bar the availment of input tax credit on general insurance, servicing, repairs and maintenance. Hence, the ITC may be allowable.

5. For services of general insurance, servicing, repairs and maintenance, credit of input tax is allowed where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein and where such services are received by a taxable person engaged—

   a. in the manufacture of such motor vehicles, vessels or aircraft; or [for e.g free maintenance during first year of sale. The said benefit is not allowed if the same are incurred by the dealer]

   b. in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him; [for e.g. repair expenses incurred by the insurance company during settlement of claims.]

   Thus, in case of services of general insurance, servicing, repairs and maintenance, input tax credit shall be allowed in scenarios as explained above.

RENTING OF MOTOR VEHICLES

The scope of restriction under section 17(5) of the CGST Act was widened by placing restriction on rent-a-cab to leasing, renting or hiring of motor vehicles, vessels or aircraft from 01/02/2019. Thus, before the amendment, a registered person was allowed to avail input tax credit on leasing of motor vehicles, vessels and aircraft (other than rent a cab) when the same was used for furtherance of business. However, after the amendment, the scope of blocking has been widened to include leasing, renting or hiring of motor vehicles, vessels or aircraft.

After the amendment from 1st February 2019, section 17(5)(b) of the CGST Act disallows input tax credit on leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) of section 17(5) except when used for the purposes specified therein. This means that ITC on renting of motor vehicles would be disallowed in those cases where ITC on their purchase is also blocked. Therefore, ITC is allowed on renting of motor vehicles in the following cases:

a. Motor vehicles made for transportation of goods;

b. Vehicle for transport of passengers having approved seating capacity is more than 13 persons;

c. Vehicles for transport of passengers having approved seating capacity upto 13 persons when used for making following taxable supplies:-

   - transportation of passengers; or
   - providing training on driving such motor vehicles; or
   - further supply of such motor vehicles

Renting vs Transport

One needs to note here, that leasing, renting and hiring [Heading 9966] [Heading 9973] are not the same as passenger transportation [Heading 9964]. Input tax credit is not available only in case of renting, hiring or leasing of conveyance.

Circular No. 177/09/2022-TRU dated 03/08/2022 distinguished between transportation of passenger and renting a vehicle used for transportation. The circular clarified the following:

i. Renting of motor vehicle with operator for transport of passengers falls under Heading 9966. According to the explanatory notes to Heading

9966, the service covered here is renting of motor vehicle for transport of passengers for a period of time where the hirer defines how and when the vehicles will be operated, determines the schedules, routes and other operational considerations.

ii. On the other hand, "Passenger transport services' falls under Heading 9964. According to the explanatory notes, Heading 9964 covers passenger transport services over pre-determined routes on pre-determined schedules.

Therefore, a clear distinction exists between service of transport of passengers and renting of a vehicle that is used for transport. RCM would not be applicable on Heading 9964 i.e passenger transport services.

Based on the aforesaid circular one can even conclude that input tax credit shall not be blocked for passenger transportation services. Therefore, the blockage of credit would only be applicable on the service of renting of motor vehicles and not on the services of transportation.

Allowance of ITC on renting of motor vehicles for specified use

Input tax credit on goods and services specified under section 17(5)(b)(i) shall be available if the following conditions are met:-

i. The inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply; or

ii. Input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

There was a confusion as to whether the proviso appearing after sub-clause (iii) of section 17(5)(b) of the CGST Act would be applicable to sub-clauses (i), (ii), and (iii) or only to sub clause (iii). In respect of this, *Circular No. 172/04/2022-GST dated 06/07/2022* was issued by the CBIC, which clarified that the proviso after sub-clause (iii) of section 17(5)(b) was inserted based on the recommendations by the GST Council in its 28th meeting. The press note on recommendations made during the 28th meeting of the GST Council, dated 21/07/2018 clarified that "the scope of input tax credit is being widened and it would be made available in respect of goods and services which are obligatory for an employer to provide to its employees, under any law for the

time being in force. Accordingly, it was clarified that, the proviso after sub clause (iii) of section 17(5)(b) would be applicable to the whole of clause (b) of section 17(5).

The aforesaid circular also clarified that input tax credit shall be blocked only on leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) of section 17(5) and not on any other leasing, renting or hiring.

Examples:

1. Let's say a person is organizing an educational training camp. For the said camp it provides various services such as conducting conference, accommodation, food and beverage and rent -a-cab. The entire service is chargeable under composite supply under SAC 9983.

   Here input tax credit shall be available on renting of cab by the organizers, as there is a part further supply of such service as a part of taxable composite supply.

2. Where any of the State laws obligates the mandatory pickup and drop facility for employees of a company say after 10 pm, then the ITC would be allowable in respect of such renting of such motor vehicles.

3. Where the car rental company is engaged in receipt and provision of services of car rental, full ITC would be allowable on availment of such rental services.

Chapter 5
Food and Beverages, Outdoor Catering, Beauty Treatment, Health Services, Cosmetic and Plastic Surgery

STATUTORY PROVISIONS

Section 17(5)(b) reads as under:

Before 1st Feb 2019

The following supply of goods or services or both:—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession;"

From 1st Feb 2019

The following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

BRIEF SUMMARY OF THE PROVISIONS

Before 01/02/2019, input tax credit was not allowed for food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply

Post amendment i.e., from 01/02/2019, input tax credit is not allowed in respect of food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except -

i. where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply or

ii. where it is obligatory for an employer to provide the same [nature of supplies] to its employees under any law for the time being in force

APPLICABILITY OF THE EXCEPTIONS

Inward supply used for making outward supply

Pre-amendment

Before 1st February 2019, clause (i) on food, beverage, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery clearly stated that the ITC would not be allowed subject to the exception that inward supply of the particular category is used for making outward supply of the nature.

Post-amendment

After 1st February 2019, the first proviso to clause (i) also provides this exception. Thereby, ITC continues to be allowed on food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery if inward and outward supply are of the same nature.

Obligation of the employer to provide goods and/or services to its employees

Pre-amendment

Before 1st February 2019, the proviso allowing the ITC in cases where it is obligatory under any law on the employer to provide the respective nature of supply to its employees, has been provided only for '(iii) rent-a-cab, life insurance and health insurance'. It was not applicable for '(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery'.

Therefore, ITC would not be allowable on 'food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery' even if it was obligatory on the employer to provide the same to its employees under any law for the time being in force.

Post-amendment

After 1st February 2019, the proviso to clause (iii) states that ITC would be allowable where it is obligatory under any law on the employer to provide the respective nature of supply to its employees. However, *Circular No. 172/04/2022-GST dated 06/07/2022* provides that the said exception is applicable to all the three clauses (i) to (iii). Therefore, ITC would be allowed in all the following cases where it is obligatory on the employer to provide the services to its employees:

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft, life insurance and health insurance

(ii) membership of a club, health and fitness centre;

(iii) travel benefits extended to employees on vacation such as leave or home travel concession

ITC ON FOOD AND BEVERAGES

ITC is restricted to be availed on food and beverages. At the outset, one needs to understand the meaning of both the terms 'food' and 'beverages'.

Food

The term "food" has nowhere been defined under the GST laws. As per Oxford Dictionary *food* means "any nutritious substance that people or animals eat or drink or that plants absorb in order to maintain life and growth".

Going by the above definition can raw materials such as spices, which are used to prepare food, be also termed as food?

Here one needs to note that the term used in the CGST Act is "food". In the legal sense, the term "food" can be used in a wide as well as a narrow sense and the meaning will depend upon the context and background.

Where any legal definition is not available, one needs to understand the term in the sense it is understood in common parlance i.e their popular meaning[17]. Going by the popular meaning even food will generally mean the composite preparations which normally go to constitute a meal--curry and rice, sweetmeats, pudding, cooked vegetables etc. Reference can be made to the decision in *The State of Bombay vs Virkumar Gulabchand Shah 1952 AIR 335, 1952 SCR 877.*

If the term "food" is given a wider meaning that does not restrict it to prepared food, cooked food, raw food, packed food or unpacked food, even unprepared items like spices, ready to eat items etc. could be considered as food. Even *Circular No. 75/49/2018 dated 27/12/2018* issued by the CBIC, mentions ghee, edible oil, sugar/burra/jaggery, rice, atta/ maida /rava /flour and pulses as food items. Thus, in a wider sense the term food would mean all food items-prepared, unprepared, cooked or raw.

The term 'food" appearing in section 17(5)(b) would have to be given the meaning as used in common parlance and considering the context it should be given a narrow meaning. The use of the term "food" along with the term "beverage" further supports this view. The term food would only cover the food which is prepared food for consumption and not the foodstuff which are

[17] *Indo International Industries vs. Commissioner of Sales tax, U.P [1981 (8) E.L.T 325 (S.C)]; Commissioner of Central Excise New Delhi vs Connaught Plaza Restaurant (P) Ltd [2012 (286) ELT 321 (SC)]*

used for preparing it. The scope of the term "food" under the GST law depends on how the Courts interpret it in future.

Beverage

The term 'beverage' has not been defined anywhere in the GST law. As per the oxford dictionary, 'beverage' means a drink other than water. The term beverage under GST, covers both alcoholic and non-alcoholic drinks[18]. Further, a beverage may be aerated or non-aerated, hot or cold. Section 9 of the CGST Act deals with levy and collection which excludes alcoholic liquor for human consumption from the scope of GST.

The Division Bench of the High Court of Kerala in *Deputy Commissioner of Sales Tax (Law), Board of Revenue (Taxes), Ernakulam vs. P. Sukumaran [1989] 74 STC 185* held that since 'Rasna' is only a concentrate and not a liquid, therefore, it would not come within the ambit of the expression "beverage".

The Bombay High Court in the case of *Commissioner Of Sales Tax vs Food Specialities Ltd. on 11 January, 1995* observed that "Paloma lime tea mix" sold in powder form is not a beverage but a powder from which non-alcoholic beverage can be prepared.

Can drinking *water* be covered under the definition of "beverage"?

Since beverage has not been defined under the GST Act, one would have to derive its meaning from the general parlance. In general parlance, water is never referred to as a beverage. Further, food has been defined under section 2(v) of The Prevention of Food Adulteration Act, 1954, which exclude water.

Section 2(v) reads as under:

"*food" means any article used as food or drink for human consumption other than drugs and water and includes—*

(a) any article which ordinarily enters into, or is used in the composition or preparation of, human food,

(b) any flavouring matter or condiments, and

(c) any other article which the Central Government may, having regard to its use, nature, substance or quality, declare, by notification in the Official Gazette, as food for the purposes of this Act;

[18] Circular No. 164/20/2021-GST dated 6/10/2021

The Hon'ble Supreme Court in the case of *Hamdard (wakf) Laboratories vs. Collector of Central* Excise [1999 (113) E.L.T. 20 SC] observed that beverages, broadly speaking, are liquids for drinking, other than water, which may be consumed neat or after dilution. Even under common parlance the term "beverage" is different from water. Thus, it can be argued that the restrictions under section 17(5) do not apply to water.

The question whether input tax credit would be allowed on drinking water under GST provisions is yet to be tested in the courts of law.

Can Input Tax Credit be denied on water used for a purpose other than for drinking?

One needs to understand that the restriction is on food and beverage. This term can by no stretch of imagination be related to anything apart from that which cannot be consumed. There are entities which incur cost of water for running their industries. Input tax credit on such expenses can be availed. However, one needs to be cautious before availing such credit.

Where inward and outward supplies are of same nature

Input tax credit is allowed on food and beverage where there is further output taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply. Food and Beverages are served at the restaurants as an outward supply,

Restaurant service has been defined under *Notification No. 11/2017 -Central Tax [Rate] dated 28th June 2017* which means supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied.

Hence, ITC will not be blocked under section 17(5) of the CGST Act on food and beverage purchased for providing restaurant services. However, one also needs to refer Notification No. 11/2017-Central Tax [Rate] dated 28th June 2017 before availing the input tax credit. ITC will be allowed only where the restaurant services are provided at hotels having declared tariff above Rs. 7,500.

Where there is further sale of goods viz food and beverage, there is no restriction on the availment of input tax credit on purchase of food and beverages. Further, where in a single premises, there are two types of

supplies namely, supply of restaurant services and sale of goods, input tax credit on food and beverage would be available only for outward supplies pertaining to sale of goods (food and beverage).

Where there is sale of goods viz food and beverage, there is no restriction on availment of input tax credit. Thus, if there is purchase of food and/ beverage and subsequent sale of such food and beverage as goods, input tax credit can be availed. One needs to analyze the nature of outward supply before availment of input tax credit under this clause. *Circular No. 164/20/2021-GST dated 06/10/2021* has clarified that ice cream parlours sell already manufactured ice-cream; they do not have the character of a restaurant. Thus, the ice-cream parlours are treated as providing outward supply of goods and hence will be eligible to avail ITC on purchase of ice-cream / waffle cones, etc.

Input tax credit on food and beverage is also available when there is outward taxable supply as an element of taxable composite or mixed supply. For instance, there is seminar which is being organized. The organizers of the seminar provide a variety of services like accommodation, lectures by eminent speakers, transport, food etc as a part of their composite supply of event organisation. They raise bill for their principal supply i.e seminar. Since food was provided as part of composite supply, input tax credit on the same would be available.

Obligation of the employer to provide goods and/or services to its employees

ITC would be allowable where it is obligatory on the employer to provide the same supply to its employees in terms of any other statutory law in force. For further details, refer Chapter 8.

ITC ON ITEMS LIKE COFFEE MACHINE RENTALS, CHEF SERVICES, ETC.

There are two schools of thoughts; one says that ITC in respect of food and beverages including chef services, coffee machine rentals, utensils used for serving the food / beverages is not allowed as per provisions of section 17(5). However, there is also other school of thought which says that the restriction under section 17(5) is only in respect of food and beverages and hence the said restriction will not apply to items like chef services, coffee machine rentals, utensils used for serving the food / beverages, etc. Therefore, one should be cautious before availing ITC.

ITC ON OUTDOOR CATERING

Input tax credit in respect of goods or services or both is not allowed on outdoor catering services subject to the following conditions:

I. there is further supply of the same category of service or used as an element of a taxable composite or mixed supply; or

II. where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

The term "outdoor catering" has been defined in *Notification No. 11/2017-Central Tax (Rate)* which means *supply, by way of or as part of any service, of goods, being food or any other article for human consumption or any drink, at exhibition halls, events, conferences, marriage halls and other outdoor or indoor functions that are event based and occasional in nature.*

The basic difference between restaurant services and outdoor services is that outdoor catering is event based and occasional in nature.

For the eventual recipient of the services of outdoor catering, ITC would be blocked in their hands as per the aforesaid provisions. Therefore, even if a company organizes an event for its office employees or its clients and receives catering services in the course of its business, ITC would continue to be blocked.

The Hon'ble Supreme Court in the case of *Tamil Nadu Kalyana Mandapam Association vs. Union of India and Others 2004-TIOL-36-SC-ST* has also explained the concept of outdoor catering as follows:

- In case of services rendered by outdoor caterers the food/eatables/ drinks are the choice of the person who partakes the services. The customer is free to choose the kind, quantum and manner in which the food is to be served. But in the case of restaurant, the customer's choice of foods is limited to the menu card.
- In the case of outdoor catering, the customer is at liberty to choose the time and place where the food is to be served. In the case of an outdoor caterer, the customer negotiates each element of the catering service, including the price to be paid to the caterer.
- Outdoor catering has an element of personalized service provided to the customer. Clearly the service element is more weighty, visible and predominant in the case of outdoor catering.

Where inward and outward supply are of same nature

From the perspective of the caterer, the inputs may be in the form of food and beverages or another sub-contract of outdoor catering services. In such cases, ITC is fully eligible in the hands of the caterer because his inward and outward supply are of the same nature.

However, the final eligibility to ITC would also depend on the entry in the rate notification.

Obligation on the employer to provide goods and/or services to its employees

ITC would be allowable where it is obligatory on the employer to provide the same supply to its employees in terms of any other statutory law in force. For further details, please refer Chapter 8.

ITC ON BEAUTY TREATMENT

The term 'beauty treatment' has not been defined in the GST Act. Reference can be taken from Section 65(17) of Chapter V of Finance Act, 1994 which defines 'beauty treatment' as under:

"beauty treatment includes hair cutting, hair dyeing, hair dressing, face and beauty treatment, cosmetic treatment, manicure, pedicure or counselling services on beauty, face care or make-up or such other similar services"

The said definition is an inclusive definition, the above is an illustrative list of what can be classified as a beauty treatment. Beauty treatments are superficial treatments; there is no major transformation of a person as in the case of cosmetic and plastic surgery.

The law uses the term "beauty treatment" and the term beauty treatment is used in the company of the words cosmetic and plastic surgery. Hence, a view can be taken that only those procedures which are in the nature of treatments done to enhance the beauty will be covered in the said phrase. For instance, acne treatment with laser.

However, in a lot of industries, providing beauty treatment services are an integral part of their business. The outward supplies of such industries, not being beauty treatments cause a significant loss to such industries. Example of such industries are television and film, news, modelling, etc.

Blocking of input tax credit would significantly increase the cost of these industries. Now, many other industries avail services of these industries in

order to market their products. The cost of such industries would also increase due to increased cost of the aforesaid industries.

Considering the fact that the make-up services procured by those industries is only for specific time and task and not with a view to undertake beauty treatment on a permanent or enduring nature, industries are taking a view that ITC is not blocked on the same. However, such view is likely to be disputed by the Department and the courts will have to decide the dispute.

Where inward and outward supply are of the same nature

From the perspective of the salons, parlors and beauty treatment companies, the inputs may be in the form of cosmetics, professional services by stylist etc. In such cases, ITC is fully eligible in the hands of the beauty treatment provider because his inward and outward supply are of the same nature.

ITC ON HEALTH SERVICES, COSMETIC AND PLASTIC SURGERY

Section 17(5) uses the term "health services". The said term is not defined under the GST law.

However, "health care services" is defined in *Notification No.11/2017-Central Tax (Rate)* as under -

"any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma"

The above definition would, therefore, cover any kind of diagnosis, treatment or care for any illness, injury, deformity, abnormality or pregnancy. It would cover treatment under any recognized system of medicine including allopathic, homeopathic, ayurvedic etc.

The services of cosmetic and plastic surgery, are separately covered under the blocked credit.

Cosmetic surgery has not been defined under the GST law, however, as understood in trade, cosmetic surgery is a medical discipline focused on enhancing beauty and appearance through surgical and medical techniques.

It is an extremely broad field and can be performed on all areas of the body, face, thigh, stomach, etc. Cosmetic surgery is a part of plastic surgery but concentrated on enhancing the beauty of a person. Types of cosmetic surgeries include botox, liposuction, filler treatments etc.

Plastic surgery on the other hand is a surgical specialty dedicated to reconstruction of facial and body defects due to birth disorders, trauma, burns and diseases. Plastic surgery is intended to correct dysfunctional areas of the body and is, by definition, reconstructive in nature. Forms of plastic surgery include rhinoplasty, scar revision surgery, jaw reconstruction, cleft lip etc.

It is pertinent to note here that input tax credit is allowed in case of health services, cosmetic and plastic surgery where there is outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply.

The legislative intent is to disallow the credit on the aforesaid services as these services can be availed by a person for personal use also.

ITC ON PURCHASE OF MEDICINE / FIRST AID BOX.

One needs to note that in case the entity purchases medicines, band aids etc and maintains a first aid box, such purchases will not be covered under health services. Purchases of basic medicines and maintenance of first aid kit does not result in the provision of any medical treatment. Provision of First aid is a treatment given to a patient in an emergency before formal or appropriate medical help is made available.

Where inward and outward supplies are of the same nature

Normally where the inward and outward supplies are of the same nature, ITC would be fully allowed. Therefore, if the health services are received and provided by a clinic or a hospital, ITC is not blocked under section 17(5). The allowability of input tax credit extends even to those services that are provided as a part of composite supply/ mixed supply.

However, a registered person providing outward supplies of similar nature should check the tariff notification before availing input tax credit. For example, a registered person providing health care services is not allowed to avail Input tax credit for outward exempt supplies as health care services relating to treatment are exempt. Even if there is an outward taxable supply in the form of renting of hospital rooms @ 5 percent, ITC would not be allowable as it is restricted by means of the rate notification.

Similarly, where food is supplied by hospitals to their in-patients, it is a part of composite supply of healthcare for which there shall not be any charge of GST. Since there is no tax on outward supplies, input tax credit shall not be allowed on inputs for food.

Obligation on the employer to provide goods and/or services to its employees

ITC would be allowable where it is obligatory on the employer to provide the same supply to its employees in terms of any other statutory law in force. For further details refer Chapter 8.

Chapter 6
Types of Insurance and Eligibility of Input Tax Credit

STATUTORY PROVISIONS

Section 17(5)(b) of the CGST Act reads as under:

Before 1st Feb 2019

The following supply of goods or services or both:—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness center;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession;"

From 1st Feb 2019

The following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

As per the above provisions, ITC is blocked on life insurance and health insurance services. The exceptions are where the inward and outward supply are of the same nature or where it is obligatory on the employer to provide the same to its employees under any law. At the outset, we need to understand the scope and ambit of life insurance and health insurance.

LIFE INSURANCE

The term "Life Insurance" as per Notification No. 12/2017-Central Tax [Rate] has the same meaning as assigned to it in clause (11) of section 2 of the Insurance Act, 1938 (4 of 1938).

As per section 2(11) of the Insurance Act, 1938 "life insurance business" means the business of effecting contracts of insurance upon human life, including any contract whereby the payment of money is assured on death (except death by accident only) or the happening of any contingency dependent on human life, and any contract which is subject to payment of premiums for a term dependent on human life and shall be deemed to include—

(a) the granting of disability and double or triple indemnity accident benefits, if so provided in the contract of insurance,

(b) the granting of annuities upon human life; and

(c) the granting of superannuation allowances and benefit payable out of any fund applicable solely to the relief and maintenance of persons engaged or who have been engaged in any particular profession, trade or employment or of the dependents of such persons

[Explanation. — For the removal of doubts, it is hereby declared that "life insurance business" shall include any unit linked insurance policy or scrips or any such instrument or unit, by whatever name called, which provides a component of investment and a component of insurance issued by an insurer referred to in clause (9) of this section.]

Life insurance is basically a contract between an insurance policy holder and a life insurance company. Here the insurer promises to pay a designated beneficiary a sum of money (sum assured) in exchange for a premium, upon the death of an insured person or maturity of the policy (depending on the policy contract). Other events such as terminal illness or critical illness can also trigger payment.

Few types of life insurance plans have been explained hereunder:

Term Life Insurance or Term Plan- Term insurance is a type of life insurance that offers death benefit to the beneficiary if the life insured dies during the policy tenure.

Whole Life Insurance Plan- Whole life insurance is a type of life insurance that offers coverage right until the death of the policyholder.

Unit Linked Insurance Plan (ULIP)- This is a type of life insurance product that offers dual benefits of investment and life insurance. A portion of the premium paid towards ULIPs is directed towards ensuring insurance coverage, while the rest of the premium is invested into a bouquet of investment instruments, which can include market-backed equity funds, debt funds and other securities.

Endowment Policy- This is essentially a life insurance policy which, apart from covering the life of the insured, helps the policyholder to save regularly over a specific period of time so that he/she is able to get a lump sum amount on the policy maturity in case he/she survives the policy term.

Money Back Policy- A money-back policy offers policyholders a percentage of the total sum assured at periodic intervals in the form of survival benefits. Once the policy reaches maturity, the remaining amount of the sum assured is handed over to the policyholder. However, if the policyholder dies while the term is subsisting, their dependents are given the entire sum assured without any deductions.

Child Insurance- A child insurance plan is a savings cum investment plan that provides financial protection for the child's future upon the unfortunate demise of the policyholder.

HEALTH INSURANCE

The term "health insurance" has been defined under section 2(6C) of the Insurance Act, 1938 as under:

> *"health insurance business" means the effecting of contracts which provide for sickness benefits or medical, surgical or hospital expense benefits, whether in-patient or out-patient travel cover and personal accident cover*

Few types of health insurance have been explained in the following paragraphs:

Individual Health Insurance- One can purchase an individual health insurance policy to provide cover for self, spouse, children and parents. These policies typically cover all kinds of medical expenses, including hospitalization, daycare procedures, hospital room rent and more. Under an individual health insurance plan, each member has his/her own sum insured amount.

Family Floater Health Insurance- A family floater plan provides cover to the proposer's family members under a single policy and everybody shares the sum insured amount.

Senior Citizens Health Insurance- These health plans have been designed specifically keeping in mind the medical needs and requirements of senior citizens.

Critical Illness Insurance- Critical illness benefit provides coverage against specific life-threatening diseases.

GENERAL INSURANCE

There is a restriction on availment of input tax credit only on life insurance and health insurance. However, there is no restriction on availment of input tax credit on any other type of insurance. A business entity avails several types of insurances which are in the nature of general insurance.

As per Notification No. 12/2017-Central Tax Rate "general insurance business" has the same meaning as assigned to it in clause (g) of section 3 of the General Insurance Business (Nationalisation) Act, 1972 (57 of 1972).

The term "general insurance" has been defined under section 3(g) of The General Insurance Business (Nationalization) Act, 1972 as under –

general insurance business" means fire, marine or miscellaneous insurance business, whether carried on singly or in combination with one or more of them, but does not include capital redemption business and annuity certain business

These types of insurance could be -

i. Theft insurance

ii. Marine insurance

iii. Fire Insurance

iv. Agricultural Insurance etc.

On all of the above, full ITC is available to the business if they are in the course or furtherance of business.

Upon comparison with the erstwhile law, rule 2(l) of the CENVAT Credit Rules, 2004 placed similar restriction in respect of life and health insurance as under the GST regime. Clause C of sub rule L of Rule 2 of CENVAT Credit Rules, 2004 excludes input services in relation to -

"(c) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or home travel concession, when such services are used primarily for personal use or consumption of any employee."

Hence, ITC is blocked only on life insurance and health insurance. On the services of general insurance, ITC would be available to the businesses.

MULTI-INSURANCE

In case the business entity pays for an insurance policy which has elements of both general insurance and life / health insurance, it should be able to bifurcate clearly which are the elements which relate to general insurance and which relate to life insurance in order to avail input tax credit. In the case of *Fidelity Business Services India (P.) Ltd. vs Commissioner of Central Tax Bengaluru East [(2021) 127 taxmann.com 545 (Bangalore-CESTAT)]* the appellant had availed general insurance services in relation to insurance for safeguarding assets, building and property and employees' health and life. However, they had not been able to bifurcate insurance service availed on assets of the company and on lives of persons working in the said company.

Hence, in the absence of clear bifurcation and lack of documentary evidence, CENVAT credit on general insurance services was also to be denied. Therefore, it is recommended that one should not avail any multi-insurance where the elements of life insurance and general insurance cannot be bifurcated.

GROUP HEALTH OR GROUP LIFE INSURANCE

Group health/life insurance is nothing, but health / life insurance availed for a specific group. For instance, when an employer takes health/ life insurance for 10 of his employees, it shall be a group insurance. If the nature of such insurance is health or life, input tax credit on the same stands blocked. ITC is allowed only when it fulfills the following conditions specified in the provisos under section 17(5)(b) of the CGST Act:

- when it is obligatory under any law to provide the same to its employees; or
- the inward and outward supplies are of the same nature or the inward supply used as an element of a taxable composite or mixed supply.

If none of these conditions are satisfied, then ITC on group health or life insurance stands blocked in the hands of the registered person.

ACCIDENTAL INSURANCE AND WORKMAN'S COMPENSATION POLICY

An accidental insurance covers accidental bodily injury directly resulting in death or disablement to insured person. When this insurance is taken for personal purpose of the employees, one should be cautious before availing ITC as the same has an element of life insurance also, unless the policy does not cover life. However, where accidental insurance is taken for accident taking place at work premises, input tax credit on the same should be allowed as it is taken purely for mitigating the cost which the business entity would have to bear for accidents at workplace.

A workmen's compensation insurance policy is meant for commercial establishments. It provides legal liability coverage to an employer and also assists employees in times of financial emergencies. The policy compensates employees if they are injured at the workplace. Work-related fatalities and illnesses are also covered under this policy. The said policy is generally taken to cover the employer's liability. Even though it covers the life of an employee, the nature of such insurance is not personal.

In the case of M/s *Checkmate Industrial Guards Pvt Ltd vs Commissioner of Central Goods & Service Tax, Noida [ST Appeal No. 71259 of 2018] [2020-TIOL-1323-CESTAT-ALL],* the appellants were in the business of providing 'Security Services' and 'Detective Agency Service'. The appellant had subscribed to the workmen's compensation insurance policy in respect of employees with the intention of covering the appellant for payment of compensation to the employee if any mis-happening occurs with the employees when they are on duty. It was held by the CESTAT that the expenditure incurred was for running of the business and therefore service tax paid on the premium under workmen's compensation insurance is admissible as CENVAT credit.

KEYMAN INSURANCE POLICY

Keyman's insurance policy is taken out by a business entity to compensate that business for financial losses that would arise from the death or extended incapacity of an important member of the business. Explanation 1 to section 10D of the Income Tax Act, 1961 defines keyman insurance policy as *a life insurance policy taken by a person on the life of another person who is or was the employee of the first-mentioned person or is or was connected in any manner whatsoever with the business of the first-mentioned person and includes such policy which has been assigned to a person, at any time during the term of the policy, with or without any consideration*. Even though the said compensation is in relation to life, the same is received by the employer. This is not to secure the personal life of the employee but for mitigating the losses incurred against the loss of a keyman for the business entity. Hence, input tax credit should be allowed on the same. Reliance can also be placed on the judgement of *M/s Om Logistics Ltd vs. Commissioner (Appeals) Central Goods and Service Tax, Delhi, Central Tax/GST, Delhi [2020-TIOL-16-CESTAT-DEL]* which allowed CENVAT credit on keyman insurance services under the erstwhile laws.

INWARD AND OUTWARD SUPPLY OF THE SAME NATURE

Where an insurance company receives services from a re-insurance company, it will be eligible to claim input tax credit on such services. The said inference was drawn in the case of *M/s Shriram General Insurance Company Ltd vs Commissioner of Central Goods and Service Tax [2021-TIOL-505-CESTAT-DEL]* and further applied in the case of *M/s Oriental*

*Insurance Company Ltd. vs Commissioner, Large Taxpayer Unit [2021-TIOL-72-CESTAT-DEL**]** [ST Appeal No. 51676 of 2016].* This is because one can state that inward and outward supplies are of the same nature i.e., that of receipt and provision of the services of insurance.

Chapter 7
Membership of Club, Health and Fitness Centre

STATUTORY PROVISIONS

Section 17(5)(b) of the CGST Act read as under:

Before 1st Feb 2019

(b) The following supply of goods or services or both:-

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession

From 1st Feb 2019

(b) The following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

ITC has been disallowed on membership of club, health and fitness centre.

CLUB

The term 'club' has not been defined under the GST regime. As understood in common parlance, a club is an association of people united by a common interest or goal. There can be several types of clubs like religious, social, political etc.

As per Oxford Dictionary the term 'club' has been defined as "an association dedicated to a particular interest or activity"

In the context of the section 17(5) of the CGST Act, the term club would refer to recreational places like gymkhanas, recreational club's, resort, etc. Generally, the purpose of this club is for the personal interest or use of the employees or owner of the entity. Hence, the law deemed it fit to disallow ITC in such cases.

Under the erstwhile regime, rule 2(l) (ii) (C) of the CENVAT Credit Rules, 2004 (CCR) exclude the following input service in relation to -

"(c) such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as leave or home travel concession, when such services are used primarily for personal use or consumption of any employee."

Thus, CENVAT credit under the erstwhile regime was not allowed on membership of club, health and fitness centre when the same was used for personal use or consumption of any employee. The same analogy has been

made applicable in the GST regime also. Hence, ITC on the membership of clubs, gymkhanas, gym, etc. is disallowed.

Business entities often take corporate membership in clubs, gymkhanas etc. whose facilities are thereafter used for conducting client meetings, business meetings, etc. Although such expenditure is business expenditure, there is a specific disallowance of ITC for such membership.

It must be noted that disallowance is only with respect to services of membership of club and not to other services which are availed in such club. For example, if the company holds a sales meeting in the banquet hall of a club, then there is no restriction to avail the ITC on such expense.

TRADE ASSOCIATION

It may be noted that a club cannot be equated with a trade association. The purpose of a trade association is for enhancing the business or trade of the registered person. It is not set up for furthering the religious, social, political or personal interest of any person or community. Also, trade associations have not been mentioned in the list of blocked credit under section 17(5). Therefore, the ITC on the same is allowed.

Section 17(5) of the CGST Act does not include the words "personal use or consumption of employees" along with club. However, the word 'club' is mentioned along with the words 'health and fitness centre'. Health and fitness activities are something which are meant for personal consumption of an individual. Therefore, applying the principle of *ejusdem generis,* the word 'club' would also take colour from its adjacent words. Hence, ITC is not allowed in case the club facility is used for personal benefit of a person and ITC is allowed in case of trade associations which are established for the growth of the business.

Suppose a business entity pays for membership of Golf club for its directors, ITC shall not be allowed on the same. However, in case the business entity takes membership of ASSOCHAM, ITC would be allowed.

In the case of *Alliance Globe Services IT India (P.) Ltd. vs. Commissioner [(2016) 71 taxmann.com 82 (Hyderabad-CESTAT)]*, the assessee took membership in associations like American Chamber of Commerce in India, and International Market Assessment India (P) Ltd. It was held that membership in such associations augments the business of the organization. It is actually for the benefit of organization and not for personal use or consumption of any employee and therefore it would not be excluded from the definition of 'input service'.

Similar inference was drawn in the case of *CGST, C.C & C.E-Ujjain vs Rohit Surfactants Pvt Ltd [Appeal No. E/50972, 51575-51577/2018-SMC],* it was held that membership of Indian Home & Personal Care Industry Association, Foreign Exchange Information Service etc. are for pursuing the business activities of the appellant. Thus, CENVAT credit shall not be denied on the same.

In the case of *Fidelity Business Services India (P.) Ltd vs. Commissioner of Central Tax, Bengaluru East [(2021) 127 taxmann.com 545 (Bangalore-CESTAT)],* it was held that:

"This finding of the learned Commissioner is wrong because the membership of the club was used in relation to promoting the trade and hence it falls within the definition of Input Service."

HEALTH AND FITNESS CENTRE

ITC would not be allowable on the membership services availed in respect of health and fitness centre.

The term "Health and Fitness Centre" has nowhere been defined under the GST law. However, section 65(52) of Chapter V of the Finance Act, 1994 define the term "Health club and fitness centre" as under: -

"Health club and fitness centre" means any establishment, including a hotel or a resort, providing health and fitness service;

Further, section 65(51) of Chapter V of the Finance Act, 1994 defines the term "*health and fitness service*" as under-

"health and fitness service" means service for physical well-being such as, sauna and steam bath, turkish bath, solarium, spas, reducing or slimming salons, gymnasium, yoga, meditation, massage (excluding therapeutic massage) or any other like service;

Health and fitness services are provided by clubs, fitness centre's, health salons, hotels, gymnasium and massage centres. The services which fall under this category might be for weight reduction and slimming, physical fitness exercise, gyms, aerobics, yoga, meditation, reiki, sauna and steam bath, Turkish bath, sunbath and massage for general wellbeing. However therapeutic massage is not covered under 'health and fitness service'. Therapeutic massage basically means a massage provided by qualified professionals under medical supervision for curing diseases such as arthritis, chronic low back pain, sciatica etc. Ayurvedic massages, acupressure therapy, etc. given by qualified professionals under medical supervision for curing diseases/disorders will come under the category of therapeutic massages.

Chapter 8
Goods / Services made available by Employer to Employee, whether obligatory or not

STATUTORY PROVISIONS

Section 17(5)(b) of the CGST Act read as under:

Before 1st Feb 2019

(b) The following supply of goods or services or both:—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre;

(iii) rent-a-cab, life insurance and health insurance except where—

(A) the Government notifies the services which are obligatory for an employer to provide to its employees under any law for the time being in force; or

(B) such inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as part of a taxable composite or mixed supply; and

(iv) travel benefits extended to employees on vacation such as leave or home travel concession.

From 1st Feb 2019

(b) The following supply of goods or services or both—

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:

Provided that the input tax credit in respect of such goods or services or both shall be available where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply;

(ii) membership of a club, health and fitness centre; and

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

OBLIGATION FOR THE EMPLOYER TO PROVIDE GOODS AND/OR SERVICES TO ITS EMPLOYEES

Pre-amendment

Before 1st February 2019, the proviso allowing the ITC where it was obligatory under any law on the employer to provide the respective nature of supply to its employees provided only for *'rent-a-cab, life insurance and health insurance'*. It was not applicable for *food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery'*.

Therefore, ITC would not be allowable on f*ood and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery* even if it was obligatory on the employer to provide the same to its employees under any law for the time being in force.

Post-amendment

After 1st February 2019, the proviso in section 17(5)(b) states that the ITC would be allowable where it is obligatory under any law on the employer to provide the respective nature of supply to its employees. Moreover, *Circular No. 172/04/2022-GST dated 06/07/2022* (serial no. 2) provides that the said exception is applicable to all the three clauses, namely clauses (i) to (iii). Therefore, ITC would be allowed in all the following cases where it is obligatory on the employer to provide the services to its employees:

(i) food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft, life insurance and health insurance;

(ii) membership of a club, health and fitness centre;

(iii) travel benefits extended to employees on vacation such as leave or home travel concession.

DIRECTOR AS EMPLOYEE

In the case of a company, one needs to understand the coverage of various types of directors in order to understand the implications under GST.

As per *Circular No. 140/10/2020-GST dated 10/06/2020* an independent director defined in terms of section 149(6) of the Companies Act, 2013 read with rule 12 of Companies (Share Capital and Debentures) Rules, 2014 or any other director who is not an employee of the company shall not be regarded as an employee. A managing director or whole-time director whose remuneration is declared as "Salaries" in the books of a company and subjected to TDS under section 192 of the Income Tax Act, 1961 shall be treated as an employee.

MANDATORY FACILITIES FOR THE EMPLOYEES

One should refer the Labour laws as applicable to the respective States (labour is in the concurrent list of the Constitution) to check which facilities are mandatory for an employer to provide to its employees/ workers. Some such facilities which are mandatory for an employer to provide to its employees have been illustrated in the following paragraphs.

Food

Factories Act, 1948

The State Government may make rules requiring that in any specified factory wherein more than two hundred and fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.

It is to be noted here that factory has been defined under section 2(m) of the Factories Act, 1948 (the Factories Act) as under:-

"factory" means any premises including the precincts thereof—

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of [the Mines Act, 1952], or [a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place

A factory does not include an office premise unless the said office is within the factory or within the precincts of the factory. For example, Company "X", has its office in the main city and factory at the outskirts of the city. It provides canteen facility to its employees at the factory and offices. ITC will be available for food expenses incurred at the factory, if it meets the criteria mentioned in the Rules made under the Factories Act.

It is pertinent to mention here that the term worker has been defined by the Factories Act to include persons employed directly or through any agency including a contractor. However, the proviso in clause (b) uses the term "its employees". Hence, the services received in respect of workers engaged through contractor will not be covered under the exception. So, the benefit of ITC will be denied if such canteen facility is used by other workers employed through contract.

Motor Vehicle

Act / rules and regulation of various States may make it mandatory for its employers to provide - drop facilities to its women employees after a particular time.

The Karnataka Shops and Commercial Establishments Act, 1961

In general women are not permitted to be employed for a night shift. However, where the establishment provides services of information technology or information technology enabled services, women are allowed to work late night subject to the condition that the establishment provides facilities of transportation and security to such women employees.

There are other States also which have laid down certain conditions in relation to transport for having women employees in the night shift.

Hence, in such cases ITC shall be available on leasing, renting or hiring of motor vehicle. It should be noted that purchase of motor vehicle is not covered by this exemption.

Health Services

One needs to note that in case the entity purchases medicines, band aids etc. and maintains a first aid box, such purchases will not be covered under health

services. Health Care Services is as defined in *Notification No.12/2017-Central Tax (Rate) dated 28th June.2017* as under -

"health care services" means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma;

Purchases of basic medicines and maintenance of first aid kit do not lead to provision of any medical treatment. Provision of first aid is a treatment given to patient before formal or appropriate medical help is available.

Ordnance Factory Medical Regulations

Various types of health care services are mandatory as per the Ordnance Factory Medical Regulation. ITC will be available on such expenses.

Health and Life Insurance

Various State Governments have mandated welfare schemes for unorganized sector workers under the Unorganized Worker's Social Security Act, 2008 for health/ life insurance coverage. Where insurance is availed due to such mandatory provisions ITC shall be available on the same.

In 2019 and 2020, several Central Labour laws were amalgamated, rationalised and simplified into four abour codes, viz, the Code on Wages 2019; the Industrial Relations Code, 2020; the Code on Social Security, 2020; and the Occupational Safety, Health & Working Conditions Code, 2020. Under the Labour Codes the Centre and States are required to notify Rules under the four Codes to enforce these laws in their respective jurisdictions. Thus, the relevant labour code and applicable rules should be referred to check the eligibility of ITC under section 17(5)(b) of the CGST Act.

For example, under the Occupational Safety, Health and Working Conditions Code, 2020, section 24 (1) states that the employer shall be responsible to provide and maintain in his establishment welfare facilities for the employees like ambulance room in every factory, mine, building or other construction work wherein more than five hundred workers are ordinarily employed or uniforms, raincoats and other like amenities for protection from rain or cold for motor transport workers. Thus, if the provision of such facilities is mandatory under the particular labour law, then the ITC on such expenses would be eligible.

Further, in case ITC is available to an entity which is obligated to provide to its employees certain services, there will still be a need to check the outward tariff notification for knowing the restriction applicable on availment of ITC.

OUTWARD TAXABLE SUPPLIES OF SAME CATEGORY OF GOODS OR SERVICES OR BOTH OR AS ELEMENT OF A TAXABLE COMPOSITE OR MIXED SUPPLY BY AN EMPLOYER TO ITS EMPLOYEES

Section 17(5)(b)(i) of the CGST Act allows for ITC of food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft [referred to in clause (a) or clause (aa) of section 17(5) of the CGST Act except when used for the purposes specified therein], life insurance and health insurance, where an inward supply of such goods or services or both is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply.

There are many business entities that may provide one of the aforementioned facilities to their employees like canteen facilities, renting of motor vehicles, insurance etc. For these services the employer may have any of the following three models:

1. Provide the entire services free of cost as a part of perquisite.
2. Provide the entire services free of cost as gift.
3. Charge a nominal value for the services provided rest to be included as a part of perquisite.

Where the services have been provided completely free of cost by the employer to the employee, one f needs to find whether the nature of such services is that of outward supply or not.

ITC eligibility on Specified services under section 17 (5) (b) - Supplies by way of gift / perquisite to employees

Gift vs Perquisite

1. At the outset, one needs to understand the nature of the incentive – gift or incentive. The word 'gift' has not been defined in the CGST Act. Thus, to determine the meaning of this term, one would have to refer to other laws as well as case laws.

i. The Gift Tax Act had defined the word "gift" to mean transfer by one person to another of any existing movable or immovable property voluntarily and without consideration in money or money's worth.

ii. Black's Law Dictionary, defines gift to mean a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously, and not upon any consideration of blood or money.

iii. The Supreme Court cited the definition of 'gift' from Corpus Juris Secundum, Volume 38 in the case of *Sonia Bhatia v. State of UP [(1981) 2 SCC 585]* as a 'gift' is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefor.

2. Therefore, a 'gift' is a gratuity and an act of generosity and does not require consideration. However, if there is a consideration for the transaction, it is not a gift. Thus, for any item to be held as a gift, following two basic ingredients must exist:

   (i) Absence of any contractual obligation

   (ii) Absence of consideration in money or money's worth either.

3. Further, in the *C.B.E. & C. Press Release No. 73/2017 dated 10/07/2017*, the Government distinguished gift and perquisites in case of employment. It was stated that perquisite is provided out of contractual obligation whereas gift is voluntary and without consideration. Further, it cannot be demanded as a matter of right by the employee and the employee cannot move a court of law for obtaining a gift.

4. In *Circular No. 172/04/2022-GST dated 6/07/2022*, perquisite in case of employment arises in terms of contractual agreement entered into between the employer and the employee. Hence, perquisite arises from the terms of contract between two persons.

Taxability and eligibility of ITC in respect of perquisites

The Government in its press release dated 10/07/2017 (*C.B.E. & C. Press Release No. 73/2017, dated 10.07.2017*) clarified the taxability of perquisites and stated that the services by an employee to the employer in the course of or in relation to his employment is outside the scope of GST (neither supply of goods or supply of services). It follows therefrom that supply by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST.

Point No.5 of *Circular No. 172/04/2022-GST dated 06/07/2022* was also in relation to the taxability of perquisite. The circular clarified as follows:

S. No.	***Issue***	***Clarification***
Perquisites provided by employer to the employees as per contractual agreement		
5.	*Whether various perquisites provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are liable for GST?*	*Schedule III to the CGST Act provides that "services by employee to the employer in the course of or in relation to his employment" will not be considered as supply of goods or services and hence GST is not applicable on services rendered by employee to employer provided they are in the course of or in relation to employment.* *Any perquisite provided by the employer to its employees in terms of contractual agreement entered into between the employer and the employee are in lieu of the services provided by employee to the employer in relation to his employment. It follows therefrom that perquisites provided by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST when the same are provided in terms of the contract between the employer and employee.*

From the above it is clear that any perquisite arising out of contractual obligation is not a supply and hence, there is no levy of GST on the same.

Section 17(5)(b)(i) allows ITC on the supplies mentioned in the said provision only when there is further outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply.

Since supply made by employer to employee in the form of perquisite is not an outward supply in itself, ITC shall not be allowable on the inward supplies mentioned in section 17(5)(b)(i).

Taxability and eligibility of ITC in respect of Gifts

Where there is no contractual obligation to provide any goods / services by the employer to the employee and the same is made voluntarily free of cost, the same shall be treated as a gift. The taxability in respect of gifts made by the employer to the employee has been provided in Schedule I of the CGST Act.

As per Schedule I, GST is to be levied where there is supply of goods or services or both between related persons even when the same is made without consideration. It has been provided that gifts not exceeding fifty thousand rupees in value in a financial year by an employer to an employee shall not be treated as a supply of goods or services or both.

As per section 15 of the CGST Act an employer and employee are related persons. Thus, where a gift is provided by the employer to an employee in excess of fifty thousand rupees, GST shall be levied on the full value.

The limit of Rs.50,000 is applicable per employee per financial year. Valuation for the same is to be done as per rule 28 of the CGST Rules. In such cases, one can avail full ITC of the relevant supply services as the inward and outward supply would be considered to be of the same nature.

Where there are no outward taxable supplies, due to non-crossing of limit of Rs. 50,000, ITC shall not be allowed. However, where there is charging of GST due to crossing of limit of Rs.50,000 ITC shall be allowed.

Charge a nominal value for the services provided rest to be included as a part of perquisite

Many a times the employer bears some part of the cost of service, while the rest is recovered from the employees. For example, if the cost of health insurance premium is Rs. 1,000 per month per employee, the employer may bear Rs. 600 and recover Rs. 400 from his employees. Rs. 600 which is borne by the employer if it is out of contractual obligation will not be subjected to GST as the same is in the nature of perquisite.

In case of Rs. 400 which has been received from the employee the following two views are possible: -

1. Tax is leviable- The term business has been defined under section 2(17) of the CGST Act to include an activity which is incidental or ancillary to the main business activity. Any facility which is provided by the employer to the employee, helps in the furtherance of business thus the same is covered under section 2(17) (b) of the CGST Act i.e., an activity or transaction

incidental to the main business. Further the absence of profit motive will not have any impact on such transaction as there is a recovery of an amount from the employees.

In the case of *Caltech Polymers Pvt. Ltd. [2018 (10) TMI 1313 (AAAR, KERALA)],* the Appellate Authority for Advance Ruling has upheld the decision of Advance Ruling Authority which held that GST is payable on recovery made from employees for providing the canteen facility and it was held as follows:

"14. The contentions raised by the appellant have been examined in detail. The crucial aspects to be considered in this case are the elements of "supply" and "consideration". The appellant company has admitted that they are serving food to the employees for cash, though there is no profit involved in the transaction. In spite of the absence of any profit, the activity of supplying food and charging price for the same from the employees would surely come within the definition of "supply" as provided in Section 7(1)(a) of the GST Act, 2017. Consequently, the appellant would definitely come under the definition of "supplier" as provided in subsection (105) of Section 2 of the GST Act, 2017. Moreover, since the appellant recovers the cost of food items from their employees, there is "consideration" as defined in Section 2(31) of the GST Act, 2017"

…….

17……..

The supply of food items to the employees for consideration in the canteen run by the appellant company would come under the definition of 'supply' and would be taxable under GST. Therefore, the appeal fails and stands dismissed."

2. Tax is not leviable - Any service which is provided by the employer to employee which is not mandated by any law cannot be termed as a business activity. Further, the same cannot even be said to be ancillary or incidental to the main business activity. These services are merely facilities provided by employer to employee and since it is not in the course of furtherance of business GST cannot be levied on the same. Also, it can be said to be arising in the course of employer-employee relationship.

There are multiple advance rulings supporting the view that GST is not leviable on recovery of the expenses from the employees for third party services. Some of the notable rulings are discussed hereunder.

a. *In Re: M/s Tata Motors Ltd [2023-TIOL-01-AAAR-GST]*, it has been observed as follows:

- On the nominal amount recovered by applicant from employees (for usage of canteen facility) and paid to the canteen service provider, the applicant does not retain with itself any profit margin in this activity of collecting employees' portion of canteen charges and hence GST is not leviable on this amount.
- ITC will be available to the appellant in respect of food & beverages as canteen facility, is obligatorily to be provided under the Factories Act, 1948, to its employees working in the factory.
- However, ITC will be available in respect of such services provided by canteen facility to its direct employees but not in respect of other type of employees including contract employees/workers, visitors etc.
- Appellant during the course of personal hearing had submitted that they will not take input tax credit to the extent applicable on the amount of canteen charges recovered from their employees and will reverse the credit to that extent. Therefore, it was held that ITC will be available to the appellant on GST charged by the service provider in respect of canteen facility provided to its direct employees working in their factory. Further, ITC on the above is restricted to the extent of the cost borne by appellant for providing canteen services to its direct employees, but proportionate credit to the extent embedded in the cost of food recovered from such employees will be disallowed.

b. *In Re: Tata Power Company Ltd. [2022 (57) G.S.T.L. 141 (AAR. - GST - Mah.)],* it has been observed as follows:

- The applicant is not engaged in providing insurance service. The service of insurance is actually provided by the insurance company for which the insurance company is charging GST.
- The applicant is just paying the insurance premium amount to the insurance company and recovering the premium amount from its employees. The applicant is not taken input tax credit of the GST paid to the insurance company.
- Non-providing of top-up insurance/parental insurance coverage will not affect applicant's business by any way. Therefore, activity of recovery of

the cost of insurance premium cannot be treated as an activity done in the course of business or for the furtherance of business.

- The activity undertaken by the applicant like providing of mediclaim policy for the employees and their parents (parents of the employees) through the insurance company neither satisfies conditions of Section 7 to be held as "supply of service" (in the instant case, insurance service) nor is it covered under the term "business" of section 2(17) of CGST Act, 2017.
- Hence, the applicant is not rendering any services of health insurance to their employees' parent and hence, there is no supply of insurance services in the instant case of transaction between employer and employee.

c. *In Re: Amneal Pharmaceuticals Pvt. Ltd. [2022 (58) G.S.T.L. 382 (App. A.A.R. - GST - Guj.)]* it was observed as follows:

- The appellant does not supply any goods or services to its employees against the amount collected from the employees.
- The appellant collects employees' portion of amount and pays the consolidated total amount, which includes appellant's share also, to the canteen service provider towards the foodstuffs provided to employees by the canteen service provider.
- The appellant neither keeps any margin in this activity of collecting employees' portion of amount nor makes any separate supply to the employees.
- It is not the appellant who is supplying the foodstuff or canteen service to its employees, but it is a third party who is supplying the foodstuff or canteen service to the employees of the appellant.
- Hence the appellant is not carrying out the said activity of collecting employees' portion of amount to be paid to the canteen service provider, for any consideration, such transactions are without involving any 'supply' from the appellant to its employees and is therefore not leviable to Goods and Services Tax.

d. *In Re: Emcure Pharmaceuticals Ltd. [2022 (60) G.S.T.L. 231 (A.A.R.-GST-Mah.)]* it has been observed as follows:

- The provision of canteen facility to the employees is a welfare measure, also mandated by the Factories Act and is not at all connected to the

functioning of their business of developing, manufacturing and marketing pharmaceutical products. Further, the said activity is not a factor which will take the applicant's business activity forward.

- The applicant is not supplying any canteen service to its employees in the instant case. Further, the said canteen facility services are also not the output service of the applicant since it is not in the business of providing canteen service. Rather, this canteen facility is provided to employees by the third-party vendors and not by the applicant.
- GST is already discharged on the gross value of bills raised on the applicant by the third-party vendors, providing canteen facility. The partial amounts recovered by the applicant from its employees in respect of use of such canteen facility are part of the amount paid to the third-party vendors which has already suffered GST.
- As the provision of canteen facility by the applicant to its employees is not a transaction made in the course or furtherance of business, the canteen services provided by the applicant to its employees cannot be considered as a "supply" and is not liable to pay GST on the recoveries made from the employees towards providing canteen facility at subsidized rates.

Though there are conflicting views by the various Advance Ruling authorities, one can throw weight being the latter of the two views as the recovery of premium charges are only a recovery of cost for a supply made by the third party and not the employer. The employer is merely facilitating the recovery of the part of premium from the employees on behalf of the insurance companies. Therefore, the said amount Rs. 400 should also not be subject to GST.

If the ITC is blocked under section 17(5) and not under any obligation by the employer to employee under any law, ITC would not be allowed. Since the outward supply is not taking place in the given case either for Rs. 600 and Rs. 400, the exception for allowance of credit (outward and inward supply of same nature) does not get triggered. Therefore, ITC would continue to be blocked.

Chapter 9
Construction of Immovable Property and Works Contract

STATUTORY PROVISIONS

Section 17(5)(c) & (d) reads as under:

Section 17(5): Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) .....

(b) ……

(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 capitalisation, to the said immovable property;

….

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.

The provisions of section 17(5)(c) and section 17(5)(d) of the CGST Act relate to blocking of ITC in relation to goods or services or both used for construction of immovable property. The provisions of both the said sub-sections are to be read along with the explanations given after section 17(5)(d) and section 17(6). The provisions of both clauses (c) and (d) are inter-linked to each other and are to be read conjointly.

Blocking of ITC is applicable under section 17(5)(c) and 17(5)(d) only when the following conditions are satisfied: -

(i) The property being constructed should have been capitalized in the books of accounts.

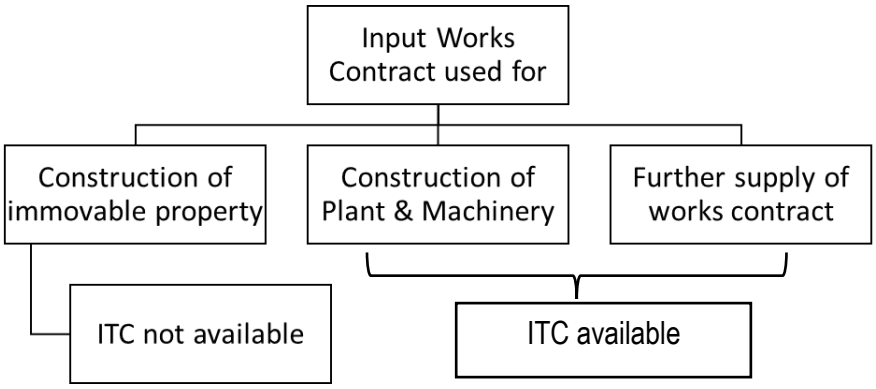
(ii) The property being constructed should be an immovable property.

(iii) It should have been used for construction of property other than plant and machinery.

A summary of the eligibility of ITC as per the provisions of section 17(5)(c) and (d) is given in the following Table:

Type of property	**Construction of**	**Treatment in books**	**ITC eligibility**
Immovable	Other than plant and machinery	Capitalized	Not eligible
Movable	P&M or otherwise	Capital or Revenue	Eligible
Movable or Immovable	Plant and machinery	Capital or Revenue	Eligible
Movable or Immovable	P&M or otherwise	Revenue	Eligible

The availability of ITC in case of a works contract service is shown in the following flowchart:



Meaning of the term Works Contract

The term "works contract" has been defined under section 2(119) of the CGST Act thus:-

> "*works contract" means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immovable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract;*

The words used in the definition of "works contract" have not been defined anywhere in the GST law. One can thus rely on other laws, dictionary meaning or common parlance meaning for the same. It is to be kept in mind that for the purpose of works contract all the above services should be:

i. Carried out in respect of immovable property.

ii. It should not be pure services but transfer of goods should be involved along with such services.

Building- Section 2 (j) of the Real Estate (Regulation and Development) Act, 2016 defines building to include *any structure or erection or part of a structure or erection which is intended to be used for residential, commercial or for the purpose of any business, occupation, profession or trade, or for any other related purposes;*

In Black's law dictionary 'building' has been defined as - *a structure with walls and a roof, esp. a permanent structure.* The dictionary further defines accessory building as- *A building separate from but complementing the main structure on a lot, such as a garage.*

Construction

The word 'construction' is defined in dictionaries as follows:

- the building of something, typically a large structure (New Oxford Dictionary of English)
- to make or form by combining or arranging parts or elements (Webster's Ninth New Collegiate Dictionary)
- the act or process of constructing (Chambers Dictionary)
- the process of bringing together and correlating a number of independent entities, so as to form a definite entity; creation of something new, as distinguished from the repair or improvement of something that already exists; the act of fitting an object for use or occupation in usual way and for some distinct purpose (Black's Law Dictionary).

In the present context, construction refers to the activity of building a structure. The definition nowhere provides that such structure shall be built only with the help of cement, sand, stone, etc. Such structure can be built with iron and steel, plywood, etc. Thus, the meaning of the word 'construction' is wide to cover also the structures which are built with the help of any metal and other materials.

Further, as per the explanation provided under section 17(5)(d) of the CGST Act, construction includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property. Thus, for the purpose of this clause construction would mean supply of construction services whose value has been capitalized in the books.

Fabrication- According to Oxford Dictionary *fabrication is the action or process of manufacturing or inventing something.*

Completing – Completing simply means completing any immovable property as mentioned in the definition. The completion and finishing will cover activities such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry and similar services done in relation to an immovable property to complete and finish the same.

Erection -As per Black's Law Dictionary the word "erect*" means to construct.*

Installation- According to Oxford Dictionary the term 'install has been defined as *place or fix (equipment or machinery) in a position ready to use.*

Fitting out- Fit out is basically done to make a space suitable for occupation. Electrical fittings, mechanical fittings, furnishing etc. are all various types of fit outs.

Improvement- As per the Black's Law Dictionary *improvement is addition to real property whether permanent or not; esp. one that increases its value or utility or that enhances its appearance.*

Modification – As per the Black's Law Dictionary 'modification' means *a change to something; an alteration.*

Repair- According to Oxford Dictionary repair means to *restore (something damaged, faulty or worn) to a good condition.*

Maintenance – As per Black's Law Dictionary *maintenance is the care and work put into property to keep it operating and productive; general repair and upkeep.*

Renovation -The term 'renovation' as seen from the meanings given in the dictionaries includes the act of making of repairs and also includes the act of making or creating a new thing. The term 'repair' would not include the meaning of creating or making of a new thing.

Alteration – As per the Oxford Dictionary alter *means making structural changes to building.*

Commissioning - As per the Webster's Ninth New Collegiate Dictionary, the word 'commissioning' *is the process of commencement of an item (plant, equipment, machinery etc.) which had been installed.* It involves the process of testing an equipment.

ITC FOR ACTIVITIES OF REPAIR, RE-CONSTRUCTION, RENOVATION, ALTERATION, ETC.

The concept of "construction" has been widened to include the activities of re-construction, renovation, additions or alterations or repairs. The term 'construction' generally refers to the act of making or creating the immovable property for the first time. On the other hand, the activities of repair, renovation, alteration, etc. would involve carrying out the works on an existing immovable property. It must be noted that generally the process / steps which are done during the construction are repeated during its repair.

For e.g., wall plastering will be done for the first-time during construction by applying cement mixture and when such wall plaster needs repair, then similar processes of applying wall plaster will be done for undertaking the repairs. Even though similar processes are employed the latter activity would be treated as repair since the same is done on an already constructed structure and with an intent to rectify / cure the defects.

Therefore, the eligibility of ITC need not be decided with reference to the processes / treatment carried out but with reference to the purpose for which such processes / treatment is done.

Further, in terms of explanation to section 17(5), ITC is not allowed in case of re-construction, renovation, additions or alterations or repairs to the said immovable property, to the extent it is capitalized. Hence, it is imperative to understand the term 'immovable property' and 'capitalized'.

MEANING OF THE TERM 'IMMOVABLE PROPERTY'

The blocking of ITC is only in relation to immovable property. Thus, it is important to understand the meaning of the term 'immovable property' which has not been defined under the GST law. Therefore, one needs to borrow the definition from other Acts.

Registration Act 1908

Section 2(6) - "Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries, fisheries or any other benefit to arise out of land, and things attached to the earth, or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass.

The General Clauses Act, 1897

Section 3 (26) - "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".*

Transfer of Property Act, 1882

As per section 3, "Immovable property" does not include standing timber, growing crops or grass;

Real Estate (Regulation and Development) Act, 2016

Section 2 (z) - "immovable property" *includes land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth*

or permanently fastened to anything which is attached to the earth, *but not standing timber, standing crops or grass;*

From the above, the definition of immovable property not only includes land and building with its benefits but also things attached to earth. It is pertinent to understand the meaning of the term 'things attached to earth'.

Section 3 of the Transfer of Property Act, 1882 defines the term "attached to the earth" to mean:

i. rooted in the earth, as in the case of trees and shrubs;

ii. embedded in the earth, as in the case of walls or buildings;

iii. attached to what is so embedded for permanent beneficial enjoyment of that to which it is attached.

The understanding of this term 'things attached to earth' has been dealt with in depth in the Apex Court judgement in case of Commr*. of C. Ex., Ahmedabad v. Solid & Correct Engineering Works [2010 (252) E.L.T. 481 (S.C.)],* wherein following principles were laid down:

i. Attachment of plant with nuts and bolts intended to provide stability and prevent vibration is not covered by the term attached to earth. [similar to *Sirpur Paper Mills Ltd. vs Collector of Central Excise, Hyderabad [1998 (97) E.L.T. 3 (S.C.)]*

ii. Where attachment is easily detachable from the foundation, it is not permanent.

iii. Immovable property involves permanent fixing, embedding or attachment in the sense that would make the machine part and parcel of the earth permanently.

iv. If it can be dismantled without causing substantial damage to the asset, it is a movable property.

Further, the Hon'ble Supreme Court in the case of *Triveni Engineering & Indus. Ltd. vs Commissioner of Central Excise [(2000 (120) E.L.T. 273)* [where the determination was required as to whether a property is movable or immovable], held as under: -

i. Whether an article is permanently fastened to anything attached to the earth requires determination of both the intention as well as the factum of fastening to anything attached to the earth

ii. this has to be ascertained from the facts and circumstances of each case.

In the case of *Duncans Industries Ltd. v. State of U.P, & Ors [Civil Appeal No. 5929 of 1997, dated 3/12/1999]* it was held as under:-

i. Whether a property is movable, or immovable would depend upon the facts and circumstances of each case.

ii. Primarily the court should consider the intention of the parties when it decided to embed the machinery whether such embedment was intended to be temporary or permanent.

From the above discussion, one needs to check the following before concluding whether a supply is that of an immovable property.

i. Test of permanency

ii. Whether there is substantial damage in dismantling such property

iii. The intention behind installation of such property -whether temporary or permanent use

iv. Further, a proper study of facts and circumstances should be done of each case before deciding upon the immovability of the property.

Note:

- It is relevant to mention here that, under GST regime sale of land and building (except activities/transactions covered under clause (b) of paragraph 5 of Schedule II of the CGST Act) shall neither be treated as supply of goods nor as supply of services as per Schedule III.
- One needs to note here that even if the goods and services or both received by a registered person are used for the furtherance of his business, ITC in relation to immovable property shall be allowed only subject to the restrictions placed by section 17(5)(c) and (d) of the CGST Act.

Meaning of the term 'Capitalized'

As per section 17(5)(c) and (d) of the CGST Act one of the pre-conditions for denial of ITC on activity of repair, renovation, alteration, re-construction, etc. is that such expense should have been capitalized in the books of accounts. If the expense is part of the revenue account for such activities, then ITC on the same cannot be denied under section 17(5)(c) and (d) of the CGST Act.

The question as to what is to be treated as capitalized has been answered through the definition of 'inputs' and 'capital goods' provided under sections 2(59) and 2(19) of the CGST Act respectively. These definitions have been reproduced hereunder:

"Section 2(59): "input" means any goods other than capital goods used or intended to be used by a supplier in the course or furtherance of business;

Section 2(19): "capital goods" means goods, the value of which is capitalised in the books of account of the person claiming the input tax credit and which are used or intended to be used in the course or furtherance of business;"

From the above, it can be stated that capital goods refer to the goods which have been capitalized 'in the books of accounts' of the relevant person.

To fortify the stand that capitalization refers to the treatment as per the books of accounts itself, the same has been clarified in Para 62 of the *Circular No. 125/44/2019-GST, dated 18-11-2019* as follows:

"It has been represented that on certain occasions, departmental officers do not consider ITC on stores and spares, packing materials, materials purchased for machinery repairs, printing and stationery items, as part of net ITC on the grounds that these are not directly consumed in the manufacturing process and therefore, do not qualify as input. There are also instances where stores and spares charged to revenue are considered as capital goods and therefore the ITC availed on them is not included in net ITC, even though the value of these goods has not been capitalized in his books of account by the applicant. It is clarified that the ITC of the GST paid on inputs, including inward supplies of stores and spares, packing materials etc., shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under Section 17(5) of the CGST Act. Further, capital goods have been clearly defined in Section 2(19) of the CGST Act as goods whose value has been capitalized in the books of account and which are used or intended to be used in the course or furtherance of business. Stores and spares, the expenditure on which has been charged as a revenue expense in the books of account, cannot be held to be capital goods".

The above circular provides a clear inference that if any item has not been capitalized in the books account, then the same cannot be capital goods and ITC cannot be restricted under section 17(5) of the CGST Act. Hence, it is

important to determine the treatment of invoices pertaining to repair, renovation, alteration, etc. in the books of accounts for determining whether it has been capitalized or not.

Nature of supply in a works contract

In a works contract there is both, rendering of service and transfer of property in goods. Under the erstwhile taxation regime, the goods were taxed under VAT/ CST and services were taxed under service tax. Thus, supply of works contract attracted both VAT/CST and service tax after considering the specified deduction. After introduction of GST, both supply of goods and services attracts only one tax i.e., GST. Since, in a works contract both supply of goods and services are involved, it shall be treated as a composite supply. Composite supply has been defined under section 2(30) of the CGST Act as under:

"*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;*

Illustration. - Where goods are packed and transported with insurance, the supply of goods, packing materials, transport and insurance is a composite supply and supply of goods is a principal supply;

Now a question arises as to whether the supply of works contract should be treated as supply of goods or services under GST i.e., what should be treated as a principal supply. In case of a works contract, dominant nature of a contract is not required to be reviewed. This is because Entry no. 6 to Schedule II of the CGST Act deems a works contract to be a supply of service.

Here one needs to note that the principal supply (i.e., whether goods /service) is to be reviewed only where the specified work is carried out in relation to the transfer of movable property. In case of immovable property, the deeming fiction i.e., Entry 5 (b)of Schedule II shall also apply, which states that:

" 5. Supply of services

The following shall be treated as supply of services, namely:-

(a) ……..

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier."

ITC in case of Plant and Machinery

Both clauses (c) and (d) allow ITC on plant and machinery. One needs to understand here that there is no restriction on availability of ITC on movable plant and machinery. However, section 17(5) places restriction on items which are in the nature of immovable property. Here an exception has been carved out in respect of plant and machinery which are immovable in nature and thus ITC will be allowed for goods and services which are used for construction of such plant and machinery.

For better appreciation, let us understand the meaning of "plant and machinery".

The term "plant and machinery" has been defined by way of an explanation under section 17(6) of the CGST Act to state the following-

"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."

From the above, any apparatus, equipment and machinery which is used for making outward supply of goods or services or both qualifies as plant and machinery. Land, building or any other civil structures are excluded from the purview of "plant and machinery". Telecommunication towers and pipelines laid outside the factory premises are also specifically excluded.

The meaning of the term apparatus, equipment and machinery has not been defined anywhere in the GST law. As per Black's Law Dictionary the term' equipment' is defined as the articles or implements used for specific purpose or activity (esp. a business operation). As per the P. Ramanatha Aiyar's Legal Lexicon, apparatus has been defined under various case laws as:

"The word apparatus would certainly mean the compound instrument or chain of series if instruments designed to carry out specific function or for a particular use" [Commissioner of Customs v. C-NET Communication (1) (P.) Ltd. [(2007) 12 SCC 72], 82-83, para 36].

"Apparatus is a compound instrument designed to carry out a specific function or for a particular use". I.C.B. (P.) Ltd. v. CCE [1997 (95) ELT 239 (T)].

To have a better understanding of the term "plant and machinery" one can rely on various judicial pronouncements. In the case of *Scientific Engineering House Pvt Ltd. [(1986) 157 ITR 0086 (SC)]***,** it was held as under:-

i. Plant in its ordinary sense includes whatever apparatus is used by a registered person for carrying on his business. It is not his stock-in-trade which he buys or makes for sale;

ii. In order to qualify as plant the article must have some degree of durability

iii. In order to determine whether something is apparatus/ plant, the functional test whether the article fulfils the function of a plant in the assessee's trading activity is to be performed. 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.

In the case of *Commissioner of Income Tax, Gujarat-II vs. Elecon Engineering Co. Ltd. [(1974) 96 ITR 672 (Guj)],* the Hon'ble Gujarat High Court held as under: -

i. Plant does not cover stock in trade.

ii. Plant also does not include an article which is merely a part of the premises in which business is carried on as distinguished from a part of the plant with which the business is carried on.

A plant and machinery which is fixed to the earth need not always be immovable. As discussed, above "things attached to earth" has been discussed at depth on various occasions by the Apex Court. One needs to remember the principles laid down by the Courts in determining whether a plant and machinery is movable or immovable.

Land, Building and Civil Structure

The term 'plant and machinery' excludes within its ambit land, building and

civil structures. Any expenses made on land or building would not be considered as pertaining to plant and machinery. It would be considered to be part of 'land and building' and not 'plant & machinery' even if it is not used as an apparatus / tool for carrying out manufacturing activity. If it is an equipment used for manufacturing, it needs to be classified as plant and machinery. Of course, if there is no connection with manufacturing activity, it would be classifiable purely as land and building.

The term "any other civil structure" is to be read after applying the principle of *ejusdem generis* to the preceding words land and building. The phrase "any other civil structures" is to be restricted to cases where civil work is involved. Any structure which is used as an apparatus in the manufacturing activity will not be "any other civil structure" and it will be a "plant and machinery for which ITC is admissible.

The Karnataka High Court in the case of *M/s. Jayadev Oil Mill, Hubli vs. The Additional Commissioner of Commercial Taxes, Belgaum [STA No. 23 of 1994]* distinguished a plant from a building and held as under: -

"10. In deciding whether a 'building' or a structure is a plant, the functional test has to be applied as indicated in the said decisions. If the 'building' is an apparatus or tool used by the Assessee for carrying on the business or manufacturing activity, then it would be part of the 'plant'. If on the other hand, if a building or a part of a building has no connection with the business or manufacturing activity that is being carried on, then obviously such a building or portion of the building will not be part of the plant."

Foundation or Structural Support

The inference whether a construction is a foundation and structural support for plant and machinery or whether it is a land, building and other civil structure has always been a debatable issue. Land, building and civil structures are also used for mounting of plant and machinery. How does one differentiate the same from foundation and structural support? One should bear in mind that a foundation should be exclusively used for fixing of plant on machinery on it. A land, building or civil structure has even other purpose and when only a part of it is used for mounting of plant and machinery, it cannot be said to be a structural or foundation support. The items to be fixed on the foundation should be "plant and machinery."

The Hon'ble Madras High Court in the case of *India Cements Ltd. vs CESTAT, Chennai [2015 (321) E.L.T. 209 (Mad.)]*, held that ITC shall be

available on fabrication of structure to support various machines if without such structures, the machinery could not be erected and would not function.

Telecommunication Towers

ITC is also not allowed in case of telecommunication towers. Therefore, the telecom companies would not be able to avail ITC if any type of supply is received in respect of telecom towers.

The exclusion of telecommunication towers from the ambit of the term 'plant and machinery' in explanation to section 17(5)(d) of the CGST Act and the *vires* of section 17(5)(d) of CGST Act with regard to bar on availing ITC on construction of immovable property has been challenged in the case of *Bharti Airtel Limited vs. Union of India [2020 (43) G.S.T.L. J54 (Del.)]*. The High Court issued notice to Government for examining the legality and validity of the explanation to section 17(5)(d) of the CGST Act.

Pipelines

ITC is not allowed where pipelines are laid outside the factory premises. Here one needs to note that the restriction on pipeline is only when these are laid outside the factory premises. Where a pipeline qualifies as plant and machinery and is laid within the factory, ITC shall be allowed. In the case of *Shorewala Global Industries P. Ltd. vs. Commissioner of C. Ex, Jaipur-I [2014 (310) ELT 171 (Tri- Del)],* the Hon'ble Delhi Tribunal *inter alia* allowed ITC in respect of pipes used in effluent treatment plant and held as under:

"*In my view, the term "pipes and tubes" covers all pipes and tubes whether of iron and steel or of PVC or HDPE. Therefore, disallowing the credit in respect of PVC/HDPE pipes which according to the appellant were used in effluent treatment plant, is totally wrong".*

Can ITC be allowed on pipeline laid outside the factory?

The explanation to section 17(6) of the CGST Act does not allow ITC for pipelines laid outside the factory premises. What is outside the factory premises could be an area of litigation. As per the Factories Act, factory includes precincts thereof. The term "precincts" has been defined under various dictionaries as under:

i. Cambridge International Dictionary of English - "area around building";

ii. Collins English Dictionary - "the surrounding region or an area"

iii. Merriam Webster - "the region immediately surrounding a place."

Thus, precincts also include the area around the factory as per the Factories Act. Therefore, one would have to wait for the Courts to decide if factory would also include the precincts thereof.

It is pertinent to discuss the eligibility of ITC if the pipeline which is being laid outside the factory is being continued inside the factory also. Though, this issue is not addressed in GST law, as per legal and logical interpretation ITC may be allowed on proportionate basis.

Applicability of Section 17(5) on few examples of works contract service in relation to immovable property.

Purchase and installation of lift

Supply and installation of lift is to be treated as works contract. A lift comprises of components or parts(goods) like lift car, motor, ropes, rails etc. and each of them has its own identity prior to installation and they are assembled/installed to create the working mechanism called lift. Lifts are assembled and manufactured to suit the requirement in a particular building and are not something sold out of shelf. Parts of the lift are assembled at the site in accordance with its design and requirement of the building which may include the floor levels and the lift has to open on different floors or otherwise depending upon the requirement. It has to synchronize with the building and each door has to open on the level of each floor. The lift therefore becomes part of the building and is not a separate thing *per se.* A lift does not have an identity when removed from the building. Therefore, lift cannot be said to be separate from a building. Thus, a lift can be said to be an immovable property. This was also affirmed by the Supreme Court in the case of *Kone Elevator India (P) Ltd. vs. State of Tamil Nadu [2014 (304) ELT 161 (SC)].*

Lift is a machine run by electrical energy which is capable of carrying out specific functions, in the form of carrying passengers or goods or both. Though the lift, for its smooth functioning or operation, may be fixed on the earth or building with foundation or structural support and for this reason it may partake the characteristics of immovable property. A lift comes into existence after the installation of the various components.

As regards the question whether lift can be classifiable as 'plant and machinery', the same is yet to be decided by the Court of law. If lift is construed to be an integral part of building, it would not be considered as plant and machinery and hence ITC thereon would be blocked under section 17(5)(c) and 17(5)(d) even when such lift is used in the course or furtherance

of business. However, if the lift is construed as plant and machinery, ITC thereon would be available as plant and machinery is specifically excluded from section 17(5)(c) and (d).

Central Air Conditioning Plant (Centralized A/c)

These are basically systems comprising of compressors, ducting, pipings, insulators and sometimes cooling towers etc. They are in the nature of systems and are not machines as a whole. They come into existence only by assembly and connection of various components and parts. Though each of the component is leviable to tax under GST, the air conditioning plant as such is not goods. The same becomes part of building and treated as an immovable property. The Hon'ble Supreme Court in the case of *Commissioner of C. Ex., Indore vs. Globes Stores (P) Ltd. [2011 (267) E.L.T. 435 (S.C.)]* had held air conditioning plant as an immovable property.

However, in the case of centralised air-conditioning system, the ducts are fastened to the walls and hence to that extent it can be said that for construction thereof ITC should be blocked under section 17(5)(c) of the CGST Act. Only if it is categorized as plant and machinery, one can avail ITC on it.

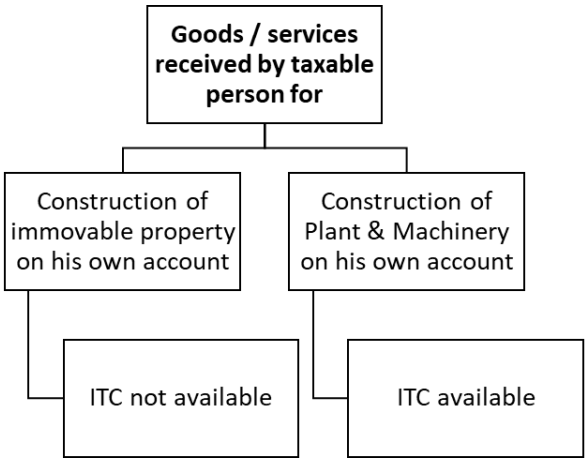
Fire Fighting Equipment's

Internal fire hydrant system consists of a system of pipe work connected directly to the water supply main to provide water to each and every hydrant outlet. They cannot be called as plant and machinery; further the said systems become part of the immovable property. Hence, the same shall be considered as immovable property. ITC would be blocked in such cases if it is treated to be part of the building. However, if, the firefighting equipment is classified as *"plant and machinery*" as per the explanation to section 17(5), ITC on such firefighting equipment would still be available.

However, if the fire-fighting system only includes basic facilities like fire alarm, fire extinguisher etc. which can be dismantled and moved without making substantial damages to it, it would be treated as movable property and the ITC would be available on it.

Availability of ITC in case of Goods and Services received on his own account

This could be better understood by the following Flowchart:



Meaning of the term 'on own account'

As per section 17(5)(d) of the CGST Act, ITC shall not be allowed when 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. The use of the term "on own account" has been done only in section 17(5)(d) However, even if a works contract service as specified in section 17(5(c) is used on own account credit of the same shall not be allowable. Credit of works contract service is allowed only when used for providing further works contract services.

The term "on own account" has nowhere been defined under the GST law. Therefore, ordinary meaning of the expression can be derived. Ordinarily the term "on own account" means for one's own use. The Department has, till date, limited the credit of ITC under section 17(5) (c) and (d) of the CGST Act when used for own account.

Applicability of the provisions of Section 17 (5) (c) And 17 (5) (d) to Real Estate Sector

a. Eligibility of Works contract and other goods or services procured by the Builder / Developer for the construction of buildings, apartments, etc. meant for sale.

Section 17(5)(d) allows ITC for goods and services for construction of immovable property not done on own account. It is relevant to point out that Entry 5 (b) of Schedule II of the CGST Act is a supply of service which is not treated as on own account. The said entry reads as-

"5(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration has been received after issuance of completion certificate, where required, by the competent authority or after its first occupation, whichever is earlier.

Explanation. — For the purposes of this clause —

(1) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely: -

(i) an architect registered with the Council of Architecture constituted under the Architects Act, 1972 (20 of 1972); or

(ii) a chartered engineer registered with the Institution of Engineers (India); or

(iii) a licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(2) the expression "construction" includes additions, alterations, replacements or remodelling of any existing civil structure;

Thus, where the construction is done with the intention to sell the property, it shall be said that the same is not on own account i.e., not for the taxpayer's own use. Thus, ITC shall be allowed to developer / builder who is constructing the building / apartment intended for sale.

However, the availment of such ITC will be subject to any restriction stipulated in the rate notification. The present GST rate notifications prescribe concessional rate on construction and sale of residential apartments subject to the condition that the ITC on goods / services is not availed by the said builder / developer. Hence, ITC for works contract or other goods or services will not be available for construction and sale of residential apartments for builders / developers of new project.

In case of construction and sale of commercial projects the builder / developer is liable to pay GST at the applicable full rate and is allowed ITC. Hence in case of construction and sale of commercial apartments, the ITC will be admissible to the builder / developer for goods / services covered under section 17 (5) (c) and section 17 (5) (d).

It is to be noted that ITC shall not be allowed to the developer on units for which he has received the consideration after issuance of completion certificate or first occupation, whichever is earlier. [Section 17(3) of the CGST Act]

b. Eligibility of Works contract and other goods or services procured by the Builder / Developer for the construction of commercial buildings like malls, offices which are meant for providing renting services.

A question arises about the eligibility of ITC, in cases where the registered person does not sell a property, but builds a property which is given on rent.

This question can be examined in the light of the following decision:

Safari Retreats (P.) Ltd. vs. Chief Commissioner of Central Goods and Services Tax [2019 (105 taxmann.com 324 Orissa)]

i. The registered person (X) was carrying out business activity of construction of shopping malls for the purpose of letting out of the same to numerous tenants and lessees.

ii. 'X' had accumulated ITC of Rs. 34,40,18,028 for purchases made for construction of shopping mall.

iii. Subsequent to the construction of the said shopping mall, the units of the shopping mall were given on rent on which GST was charged.

iv. 'X' contended as under: -

   a. In case there is no breakage of GST chain i.e. where there is charge of GST on outward supplies, there should not be any denial of ITC. The Department is justified in denying ITC on units sold after the completion certificate as there is no charge of GST on outward supplies of such sale.

   b. Construction of immovable property which would lead to generation of GST stream on outward supplies should be treated on the same lines as those immovable property which are intended for sale.

   c. There is charge of GST on construction services provided. Similarly, when an immovable property is given on rent, there is charge of GST. Thus, denial on ITC on the latter transaction leads to inequality which is violative of Article 14 of the Constitution of India.

   d. Disallowance of ITC is violative of Article 19(1)(g) of the Constitution of India i.e., right to practice any profession or to carry on any

occupation, trade or business. Disallowance of ITC leads to substantial loss of credit thereby increasing the cost to the business and making it uncompetitive.

e. Disallowance of ITC under section 17(5) of the CGST Act would lead to double taxation thereby defeating the purpose of GST laws i.e. removal of cascading effect. It is a well settled law that the interpretation which defeats the very intention of the Legislature should be avoided and that interpretation which advances the legislative intend will have to be accepted.

f. Section 17(5)(d) of the CGST Act should be read down to allow ITC on construction of immovable properties where ITC chain is not broken.

g. Immovable property constructed by 'X' is neither "intended for sale" nor for his "own account". The property was "intended for letting out" and therefore, it shall not attract the provisions of section 17(5) of the CGST Act.

h. Reliance was placed upon the doctrine of *contemporaneo expositio* i.e., a document should be read to interpret it as it would have been at the time it was written. Reliance was also placed on the Circular dated 8/12/2018 [SIC] [Press Release: Posted on 8/12/2018 by PIB Delhi, Release ID: 1555274] issued by the Ministry of Finance on effective tax rate on complex, building, flat etc.

i. 'X' also relied upon case laws in support of the stand that literal interpretation should not be adopted where it gives absurd results.

v. The Department contended as under:

a. Section 16 of the CGST Act places certain restrictions and conditions for claim of ITC

b. The Department relied on various case laws to drive the point that Legislature can impose restrictions on availment of ITC.

c. Section 17(5) of the CGST Act prescribes denial of ITC. The Legislature has decided in its wisdom the credit of taxes which would be allowed and which would not be allowed.

vi. It was held by the Hon'ble High Court of Orissa as under: -

a. The petitioner would have been required to pay GST if he had disposed of the property after obtaining the completion certificate. In

the case at hand 'X' is not using the property for his *own purpose* but is letting out the property.

b. Giving section 17(5)(d) of the CGST Act a narrow meaning would frustrate the very objective of the Act.

In the Orissa High Court, the term on "own account" was given a narrow meaning. The Court included only those properties in its ambit which did not lead to any outward revenue stream. If one goes by the literal meaning of the term "own account" coupled with the words "in the course of furtherance of business", one may say that even if a property is generating rental income it will be termed for "own account" as its not constructed with an intention to sell. However, the final outcome can only be arrived at once the matter has been decided by the Apex Court where the case is pending. For the time being a registered taxpayer can avail credit of ITC on all such properties which would be generating outward GST revenue stream and not utilize the same till the final verdict is given by the Apex Court to avail time barring ITC.

c. Eligibility of ITC of GST paid on expenses towards FSI, TDR, Development Rights.

Effective from 1st April 2019, the relevant reverse charge notification covers the supply of TDR, FSI, development rights and the GST is payable under reverse charge if the said FSI, TDR and development rights are supplied to a promoter of a project (residential / commercial). In other cases and before 1st April 2019, GST will be payable under forward charge.

The construction of the building will require utilization of the available FSI / TDR and the same has to be construed as being used for construction of building / apartment for sale and hence ITC of the same will be eligible if the said service is used for construction of building / apartment for sale. However, the ultimate eligibility of ITC will depend on conditions / restrictions which may be imposed under the rate notification.

With respect to the FSI / TDR purchased for construction of mall, offices, etc., the eligibility of ITC will have to be determined in terms of view explained in para (b) above.

d. ITC eligibility in case of Joint Development Transactions (JDA).

Under a JDA transaction the land owner will transfer the development rights / FSI to the builder / developer. Against the supply of the development rights / FSI by the land owner, the builder will supply the flats to the land owner.

ITC eligibility of the development rights by the landowner to the builder / developer will be covered by point (c) as above.

Chapter 10
Goods or Services or both used for Personal Consumption

STATUTOIRY PROVISIONS

Section 17(5): Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) .....

……...

(g) Goods or services or both used for personal consumption

Section 17(5) of the CGST Act overrides section 16(1) of the CGST Act. Thus, only those input tax credits which have surpassed the eligibility criteria as per section 16 are blocked under section 17(5).

Section 16(1) of the CGST Act allows availment of input tax credit only on those goods or services or both which are used or intended to be used in the course or furtherance of his business. The term furtherance of business can be said to input tax credit having nexus/ connection with the registered persons business. The Hon'ble Supreme Court in the case of *Malayalam Plantation Ltd., In re 1964 AIR 1722* held that the expression 'for the purpose of the business' may include not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery. It may include measure for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile titles. It may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for the carrying on of a business. It may comprehend many other acts incidental to the carrying on of a business.

Thus, the term “furtherance of business” is wide enough to cover credit of input tax which helps directly and indirectly in the furtherance of business. No credit which does not help in the furtherance of business is allowed as credit. Logically there should not be any input tax credit which would get covered in clause (g) of sub-section (5) to section 17 of the CGST Act as it would be

eliminated at the first instance. However, the insertion of such clause could mean that there are input tax credits which the legislature feels might get covered under section 16(1) of the CGST Act and needs to be covered under section 17(5)(g). This may include expenses accounted for the advancement of business from entity perspective but the supply is consumed for personal benefit.

STATUS OF PERSONAL CONSUMPTION IN THE ERSTWHILE REGIME

Earlier as per the CENVAT Credit Rules, 2004 credit of inputs and input services used for personal consumption was ineligible when: -

a. It was used for certain specified purpose and

b. Used by the employees

The definition of input as contained in rule 2(k) of the CCR, 2004 excluded from its ambit the following vide sub clause (E) thereof:

"any goods, such as food items, goods used in a guest house, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee".

Further, the definition of input service as contained in rule 2(l) of the CCR, 2004 excluded from its ambit the following vide sub clause (c):

"*such as those provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as leave or home travel concession, when such services are used primarily for personal use or consumption of any employee*

Thus, the erstwhile provisions of the law specifically restricted the credit only when such goods or services were used primarily *for personal us*e or consumption of the employees.

Meaning of Personal Consumption

The term "personal consumption" has nowhere been defined under the GST law. The term personal consumption should be understood in its ordinary sense. Ordinarily personal consumption would mean anything meant for private use. In the case *M/S. Anwarkhan Mahboob Co vs The State Of Bombay [1961 AIR 213***]** the term consumption was explained as under :-

"*…The act, of consumption with which people are most familiar occurs when they eat, or drink or smoke. Thus, we speak of people consuming bread, or fish or meat or vegetables, when they eat these articles of food; we speak of people Consuming tea or coffee or water or wine, when they drink these articles; we speak of people consuming cigars or cigarettes or bidis, when they smoke these. The production of wealth, as economists put it, consists in the creation of " utilities ". Consumption consists in the act of taking such advantage of the commodities and services produced as constitutes the " utilization " thereof… Again, the final act of consumption may in some cases be spread over a considerable period of time. Books, articles of furniture, paintings may be mentioned as examples"*

Therefore, any supply received for the purpose of private benefit of the owner or employee of the company would be covered herein. They are not used in the process of manufacture or supply directly. However, they are for the individual welfare and advancement of the persons affiliated to the entity. This may include personal insurance, personal travel benefits, expenses for personal laptop / mobile phone, health services etc.

The CENVAT credit rules disallowed ITC only when the activities listed therein were primarily for personal use or consumption. Further the law specifically listed down such activities. However, under the GST regime there is widening of the scope of blocked credit in relation to personal consumption or use by removal of specified services and the term employee. It must also be noted that the activities which were disallowed in the various clauses of the CENVAT Credit Rules, 2004 are already covered in various other clauses of section 17(5). Therefore, section 17(5)(g) has to be read in a manner which avoids redundancy.

The section will thus have to be read to restrict ITC for those goods or services which are used by the owner / employees for private and personal benefit and will not cover the goods or services which are used for legitimate business purposes.

JUDICIAL DECISIONS

In the case of *ABAN Offshore Ltd. vs. Commissioner of CGST, Mumbai West [2020 (43) GSTL 213 (Tri- Mumbai)],* the Hon'ble Tribunal held that short term accommodation for crew members to stay the base until the choppers take them offshore has been held to be eligible and it was held that such expenses cannot qualify as a service availed for personal consumption.

Therefore, it was held that the said service is in relation to and in pursuance of the service being provided by the appellant and therefore, CENVAT credit availed on the same is admissible.

Excel Industries Ltd. Vs. Commissioner of Central Excise, Raigad [2018 (363) ELT 1183 (Tri- Mumbai) – All three services viz. air travel service, public relation media liaison campaign fee, renting of immovable property were used in or in relation to the manufacture of final product and/or overall business activity. None of the three services can be said to have been used for personal consumption of any employee of the appellant company. Therefore, exclusion provided w.e.f. 1-4-2011 is not applicable in the present case. It was held that, all the three services are covered in the first limb of definition of input service i.e., input service means any service used by manufacturer whether directly or indirectly, in or in relation to the manufacture of final product. Accordingly, CENVAT credit in respect of all the three services were allowed.

In the case of *Solar Industries India Ltd. 2022 (60) G.S.T.L. 216 (Bom.)* the Hon'ble High Court observed that the facility of transportation provided by the appellant to its employees was merely in the nature of service for personal use or consumption of its employees. The said judgement has been approved by the Apex Court as reported in 2022 (64) G.S.T.L. 257 (S.C.).

Chapter 11
Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples

STATUTORY PROVISIONS

Section 17(5): Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) .....

……..

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

The basic idea of the legislature is not to allow input tax credit on articles which would not be generating any further flow of GST from outward supplies.

Let us try and understand each of the terms mentioned in section 17(5)(h) of the CGST Act, 2017.

LOST

The term 'lost' has not been defined under GST law. As per the Oxford dictionary the term 'lost' means *"that has been taken away or cannot be recovered."* As per the Black's Law dictionary the term 'lost' means *"beyond the possession and custody of its owner and not locatable by diligent search"*

Reversal on account of normal loss which is inherent in nature

In case of *ARS Steels & Alloy International (P.) Ltd. [2021 (127 taxmann.com 787)],* the Assessee was engaged in manufacturing of MS Billets and Ingots. There was a loss of a small portion of inputs inherent to the manufacturing process. On this, the Department sought to reverse the ITC claimed by the petitioners, proportionate to the loss of the input and passed an assessment order to this effect. This assessment order was challenged in a writ petition before the Hon'ble Madras High Court. The Hon'ble Madras High Court held

that the reversal of input tax credit in case of loss by consumption of input which was inherent to manufacturing process was not contemplated or covered by situations adumbrated under section 17(5)(h) and therefore, ITC reversal was not required.

STOLEN

The term "stolen" has not been defined under GST. The word steal (past principle stolen) has been defined in the Oxford dictionary as "*take (another person's property) without permission or legal right and without intending to return it"*. As per the Black's Law dictionary the term steal has been defined as *"to take something by larceny, embezzlement, or false pretenses".*

DESTROYED

The term 'destroyed' has not been defined under GST. As per *P. Ramanatha Aiyer*' 'The Law Lexicon', the term destroyed means "*To pull down; unbuild; demolish; to make away with; to reduce to nothing; to kill; slay"*.

In the case of *CIT v. Sirpur Paper Mills Ltd. [(1978) 112 ITR 776 (SC)]* the apex court held as under:-

"The word "destroy" is a word in common usage, with well-defined non-technical meaning. As used in law, it does not in all cases necessarily mean complete annihilation or total destruction. But in the context and under particular circumstances the word many times has been defined as meaning totally obliterated and done away with as also made completely useless for the purpose intended—vide Corpus Juris Secundum, Volume 26, page 1246"

Thus, as per the Hon'ble Supreme Court, the term 'destroyed' does not mean that something should have been totally destructed. However, the term "destroyed" has been used in the company of the words "stolen, lost, written off or disposed" and hence applying the principle of *ejusdem generis,* the said term will take the color from the words surrounding it. 'Destroyed' would therefore mean when the goods are not in physical possession.

Sale of goods destroyed

The intention of the Government is to block credits in respect of those goods which will not generate any outward GST revenue. Where any goods have been destroyed, it may be possible that the same can be sold as a scrap. Sale of such scrap will attract GST. The area of litigation in such cases would be

i. Whether input tax credit will be allowed in relation to such goods.

ii. If allowed, whether the same would be allowed proportionately.

The GST law is based on the concept of value added tax and allows the ITC as long as the tax is paid on outward supply. There is no provision which restricts the ITC if the goods are sold at a lower value than the purchase. Thus, ITC of the goods will be available even if the said goods are partially destroyed and are in a saleable condition as such under the same HSN or any other HSN code.

Insurance Claim in case of goods lost, stolen, or destroyed

It is pertinent to note here that the blockage of input tax credit is irrespective of whether or not there was any claim of insurance on goods lost, stolen or destroyed.

Circular on treatment of expired medicines

The CBIC had issued *Circular No. 72/46/2018-GST dated 26/10/2018* specifying the treatment to be followed in respect of expired drugs or medicines under GST laws. The said circular clarified as under: -

i. *Return of expired goods as a supply*- Where the drugs have expired, the person returning such medicines ("Y") can raise an invoice charging GST to the supplier ("X"). The recipient "X" shall avail input tax credit on such supplies. When these expired drugs / medicines are destroyed by "X", there shall be reversal of ITC on GST charged by "Y" on "X", in terms of provisions of clause (h) of sub-section (5) of section 17 of the CGST Act. The circular further clarified that reversal should be of input tax credit availed on the return supply and not the ITC that was attributable to the manufacture of such time expired goods.

ii. *Return of time expired goods by issuing credit notes* – Where a credit note is issued by the original supplier ("X") to the person whose medicines have expired ("Y"), credit of such GST shall be reversed by "Y". Further, where the expired goods are destroyed by "X" there shall be reversal of input tax credit attributable to the manufacture of goods returned in terms of the provisions of clause (h) of sub-section (5) of section 17.

iii. The Circular clarified that even though it discusses the scenarios in relation to return of goods on account of expiry, the said circular shall be applicable to such other scenarios where the goods are returned on account of reasons other than expiry of medicines or drugs.

WRITE OFF

"Write off" is done in the books of accounts of a taxpayer. Write off is where a debit entry has been passed in the profit and loss in respect of any asset which is not having any value.

Write off vs Write down

In case of write off, the value of the asset is reduced to zero. A write off negates all present and future value of an asset.

In case of write down there is reduction in the value of asset. The value of the asset is not reduced to zero.

Input Tax Credit in case of write down or impairment of an asset

Section 17(5)(h) of the CGST Act only disallows input tax credit where the asset has been written off i.e., the entire value of the asset has been reduced to zero. There is no restriction on availment of ITC where an asset has been written down or impaired. Hence, ITC shall be allowed in respect of goods which have been written down as the restriction is only with respect to goods which are written off.

It is also worthwhile to note that the GST law do not contain any provision similar to erstwhile rule 3 (5B) of CENVAT Credit Rules, 2004 which specified reversal of CENVAT credit even when the provision for write off was created in the books of account.

GIFT

The word 'gift' has not been defined under CGST Act. As per the Black's Law Dictionary, 'gift' means a voluntary conveyance of land, or transfer of goods, from one person to another, made gratuitously and not upon any consideration of blood or money.

The Supreme Court cited the definition of 'gift' from Corpus Juris Secundum, Volume 38 in the case of *Sonia Bhatia v. State of UP [1981] 2 SCC 585* as follows: A 'gift' is commonly defined as a voluntary transfer of property by one to another, without any consideration or compensation therefore.

Thus, for any item to be treated as a gift, there are two basic ingredients that must exist:

(i) Absence of any contractual obligation

(ii) Absence of consideration in money or money's worth

Gift given as CSR Activity

Section 135 of the Companies Act, 2013 (the Companies Act) mandatorily provides for the specified companies to spend at least 2 percent of the average net profit for the immediately preceding three financial years on corporate social responsibility (CSR) activities.

Under the GST regime there have been adverse AAR which have disallowed input tax credit on CSR expenditure by covering it under the ambit of section 17(5)(h) of the CGST Act. Further in the case of *Dwarikesh Sugar Industries Ltd.* [2021] 125 taxmann.com 329 (AAR- UTTAR PRADESH), the Advance Ruling Authority has held that ITC for CSR activities is eligible.

There have been favorable judgements which have been rendered during the erstwhile indirect taxes regime, allowing CENVAT credit on CSR expenditure. In the case of *Essel Propack Ltd.* **V.** *Commissioner of CGST, Bhiwandi [2020] 117 taxmann.com 409* (CESTAT – Mum), the Hon'ble CESTAT, Mumbai under the service tax regime held that CSR expenditure is not a charity but has a direct bearing on the business activity of a company and helps a company to get positive credit rating and image in the corporate world. Thus, the CESTAT held that CSR activities can be considered as input services since they are included within the definition of "activities relating to business" and accordingly allowed the credit of the same.

Hence, CSR expenditure is a statutory obligation which a company has to fulfill. It cannot be termed as a gift as it is incurred out of compulsion. However, caution must be taken before availing the input tax credit as it is still an unsettled matter and an area of dispute.

SAMPLE

The word 'sample' has not been defined under the GST law. As per the Black's Law dictionary, a sample means a specimen i.e., a small quantity of any commodity, presented for inspection or examination as evidence of the quality of the whole.

Samples are considered as representative of the main product provided to the buyer before he places any order. It is generally provided to the buyer so that he gets an idea about the quality, composition etc. of the main product. From the above, the buyer would be able to judge whether his requirements get fulfilled or not.

TREATMENT UNDER GST LAW

In cases where goods have been lost, stolen or written off, the goods cannot be sold. However, in cases where goods are available for supply i.e goods destroyed or given as gift or free sample, the same will not be treated as supply under GST [except in case of activities mentioned in Schedule I of the GST Act]. If it is not treated as supply, then input tax credit will be reversed under section 17(5)(h) of the CGST Act.

CBIC had issued *Circular No. 92/11/2019-GST dated 7th March 2019* wherein it had provided the treatment that to be followed in case of goods given as free samples or as gifts. The circular clarified as under: -

i. In case a supply falls under Schedule I [i.e Activities to be treated as supply even if made without consideration] then GST shall be charged on it and ITC can be availed on the same.

ii. In other case, there shall be reversal of ITC under section 17(5)(h) of the CGST Act.

It was also clarified by the circular that input tax credit shall not be available to the supplier on the inputs, input services and capital goods to the extent they are used in relation to the gifts or free samples distributed without any consideration. However, where the activity of distribution of gifts or free samples falls within the scope of 'supply" on account of the provisions contained in Schedule I of the CGST Act, the supplier would be eligible to avail of the ITC.

TREATMENT OF "BUY ONE GET ONE FREE" OFFER

The treatment of buy one get one free offer was clarified by *Circular No. 92/11/2019-GST dated 7th March 2019* as under:

Where there is/ are products supplied free of cost with other products, it may appear at first glance that in case of offers like "Buy One, Get One Free", one item is being "supplied free of cost" without any consideration. In fact, it is not an individual supply of free goods but a case of two or more individual supplies where a single price is being charged for the entire supply. It can at best be treated as supplying two goods for the price of one. Taxability of such supply will be dependent as to whether the supply is a composite supply, or a mixed supply and the rate of tax shall be determined as per the provisions of section 8 of the said Act. It was also clarified that ITC shall be

available to the supplier for the inputs, input services and capital goods used in relation to supply of goods or services or both as part of such offers.

GIFTS GIVEN TO EMPLOYEES

Refer Chapter 8 of this Handbook.

GIFTS GIVEN AS DONATION

Circular No. 116/35/2019-GST dated 11/10/2019 was issued by CBIC clarifying the cases where donations were to be treated as a supply under GST. The said circular clarified as under: -

i. Where the name of the donor is displayed by the donee in such a way that it is an expression of gratitude and public recognition and not aimed at providing publicity to the donor, it shall not be treated as a supply.

ii. Where there is no obligation (*quid pro quo)* on the part of the done/recipient to do anything (supply a service), it shall not be treated as a supply.

Now one needs to bear in mind that where a donation is not treated as supply, there shall be reversal of input tax credit.

Chapter 12
Tax paid under Sections 74, 129 and 130

STATUTORY PROVISIONS

Section 17(5): Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:-

(a) .....

……..

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

SECTION 74

Section 74 of the CGST Act deals with issuance of show cause notice (SCN) where tax has not been paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of facts.

The blockage under section 17(5) of the CGST Act with respect to section 74 of the CGST Act would be applicable only for tax that has not been paid or short paid with malafide intention. Where any refund has been made erroneously or input tax credit has been wrongly availed or utilized, a registered person simply needs to pay the tax along with applicable interest and penalty demanded as per the SCN.

The tax which a registered person would be required to pay under section 74 can be on account of forward charge mechanism or reverse charge mechanism. Under forward charge, if the supplier has paid taxes under section 74 of the CGST Act, ITC would not be allowable to the recipient. If the taxes have been paid under reverse charge by the recipient under section 74, then taxes would not be available in the hands of the recipient.

In most of the cases, the SCN that is issued by the Department is under section 74 of the CGST Act. There are chances that the taxpayer might contest that the SCN should have been issued under section 73 of the CGST Act and not against section 74 of the CGST Act.

Section 74 of the CGST Act should not apply in revenue neutral situations where the tax paid under reverse charge is entirely available as ITC to the recipient. Reliance can be placed on the judgement of the Supreme Court in the case of *Nirlon Ltd vs. Commissioner of Central Excise, Mumbai [2015-TIOL-96-SC-CX]*, wherein it has been observed that no mala-fide intention can be attributed if the entire situation is revenue neutral. In such a case where payment has been made under reverse charge mechanism, one may decide to avail the credit and not utilize the same till the matter is decided in the favour of the registered taxpayer. Where the matter gets decided against the registered taxpayer, he can reverse the input tax credit. However, one must be cautious before availing the input tax credit.

Rule 53(3) of the CGST Rules specifies that "*any invoice or debit note issued in pursuance of any tax payable in accordance with the provisions of section 74 or section 129 or section 130 shall prominently contain the words "INPUT TAX CREDIT NOT ADMISSIBLE*". The supplier who intends to issue any debit notes / supplementary invoices for recovery of taxes needs to comply with the provisions of rule 53(3).

SECTION 129

Section 129 of the CGST Act deals with detention, seizure and release of goods and conveyances in transit. The said section was amended by the Finance Act, 2021 and the amended section became effective with effect from 1st January 2022 to allow release of goods / conveyance on payment of only penalty as against earlier provision of payment of tax and penalty. Thus, after amendment of section 129 of the CGST Act, now there is no relevance of section 129 in section 17(5)(i) of the CGST Act.

However, before the said amendment, the owner of the goods had to pay 100 percent tax and penalty in Form DRC-03 under section 129 of the CGST Act in case of detention of goods. In such cases, as per provisions of section 17(5)(i), the recipient was denied to avail the ITC of the said taxes paid under section 129 of the CGST Act.

Now, after the amendment, one needs to note here that disallowance of ITC under section 17 (5)(i) of CGST Act is not on taxes paid by the supplier and reflected in his GST returns as per the provisions of the Act.

SECTION 130

Section 130 of the CGST Act deals with confiscation of goods or conveyance and levy of penalty. Where any taxes are paid on goods confiscated under section 130 of the CGST Act, no input tax credit shall be allowed on the same.

Section 130 has been amended w.e.f. 1st January 2022. Now the amended section does not contain any provision for the payment of tax. Therefore, the disallowance of ITC does not get attracted.

Chapter 13
ITC Blockage on other Supplies

This Chapter deals with the following blocked services: -

a. Travel benefits to employees

b. Tax paid under composition scheme

c. Non-resident taxable person

STATUTORY PROVISIONS

Section 17(5): Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—

….

(b) the following supply of goods or services or both—

(iii) travel benefits extended to employees on vacation such as leave or home travel concession:

Provided that the input tax credit in respect of such goods or services or both shall be available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force

…….

(e) goods or services or both on which tax has been paid under section 10;

(f) goods or services or both received by a non-resident taxable person except on goods imported by him;

…..

TRAVEL BENEFITS EXTENDED TO EMPLOYEES

A registered person can offer its employees travel benefits. If these travel benefits on vacation are in the nature of leave or home travel concession then input tax credit shall not be allowed on any such expenditure. It may be noted that this is in the nature of personal travel expenditure for the employees which is provided as a perquisite. The blocking of ITC is applicable only where the expenses for such travel are borne directly by the

company. Where the employees are booking the travel in their own name and thereafter take the reimbursement, ITC does not even accrue in the hands of the company.

Blockage of ITC is also applicable for executive directors of the company as they are considered to be employees of the company. Where the travel benefit is extended to non-employees like non-executive directors, input tax credit has not been blocked on it specifically under the GST law.

GOODS OR SERVICES OR BOTH ON WHICH TAX HAS BEEN PAID UNDER SECTION 10

Section 10 of the CGST Act deals with composition levy. As per section 10(4) of the CGST Act, a registered person who has opted for composition levy under section 10 shall not collect any tax from the recipient on supplies made by him.

When the taxes have not been collected by the supplier, there is no question of availment of ITC by the recipient.

Even if the supplier who has opted for composition levy violates the provisions of the Act and levies GST, it cannot serve as a pretext for the recipient to avail input tax credit due to the blockage of credit provided herein.

NON-RESIDENT TAXABLE PERSON

A person who had taken registration as a non-resident taxable person under section 25 of the CGST Act shall not be allowed to take input tax credit of goods or services or both except on goods imported by him.

Non-resident taxable person is a person who does not have any place of business within India and temporarily conducts any business within India. For this, ITC would be available only for the goods which are imported from outside India. For the other input and input services which are procured indigenously, ITC would not be available to the non-resident taxable person. Needless to say, the output taxes would continue to be applicable on the outward supplies made by such person within India.

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