

CREDIT RESTRICTIONS UNDER SECTION 17(5) OF CGST ACT, 2017

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CHARTERED ACCOUNTANTS

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Input Tax Credit : Relevant Provisions

▶ **Section 2 (54) – ‘Input’** – defined as:

*“goods other than capital goods, subject to exceptions as may be provided under this Act or the rules made thereunder, **used or intended to be used by a supplier for making an outward supply in the course or furtherance of business;**”*

▶ **Section 2(19) – ‘Capital goods’** –

“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.”

▶ **Section 2(55) – ‘Input service’** – defined as:

*“any service, subject to exceptions as may be provided under this Act or the rules made thereunder, used or intended to be used by a supplier **for making an outward supply in the course or furtherance of business;**”*

▶ **Section 2(57) - Input tax** – defined as

*“input tax” in relation to a taxable person, means the {IGST and CGST}/{IGST and SGST} charged on any supply of goods and/or services to him **which are used, or are intended to be used, in the course or furtherance of his business** and includes the tax payable under sub-section (3) of section 7;”*

▶ **Section 16** (Eligibility and conditions for taking input tax credit) and **Section 17** (Apportionment of credit and blocked credits)

Input Tax Credit: Conditions for availment of ITC

- ▶ **Condition 1: Section 16(1) allows availment of ITC subject to the satisfaction of the following twin conditions:-**
 - Supplies should be made to a registered person; and
 - Such supplies are meant to be used or intended to be used by such registered person in the course or furtherance of his business.

- ▶ **Condition 2: As per Section 16(2), ITC is available if the following conditions are fulfilled:**
 - Possession of a tax invoice or duty paying document
 - Receipt of goods/services
 - Tax charged has been paid to the Government
 - Filing of Return

- ▶ **Condition 3:** ITC as is claimed should not be restricted as per the stipulations under Section 17(5) of the CGST Act

Section 17(5)(a):

ITC shall not be available in respect of following:

<i>Before Amendment*</i>	<i>After Amendment*</i>
<ul style="list-style-type: none"> ➤ Motor vehicles and other conveyances except when used for making: ❑ certain taxable supplies (further supply, passenger transportation and imparting training); ❑ for transportation of goods 	<ul style="list-style-type: none"> ➤ Motor vehicles for transportation of persons ≤ seating capacity of 13 persons including driver [Specified Motor Vehicles] ➤ Vessels and aircraft ➤ Services of general insurance, servicing, repair and maintenance relating to motor vehicles, vessels or aircrafts ➤ Leasing, renting or hiring of motor vehicles, vessels or aircraft

Exceptions to Section 17(5)(a) – Motor Vehicles

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- ▶ ITC on Specified Motor Vehicles (post amendment*) for transportation of persons admissible when used for making following taxable supplies
 - ❑ further supply of such motor vehicles; or
 - ❑ transportation of **passengers**; or
 - ❑ imparting training on driving such motor vehicles;

Exceptions to Section 17(5)(a) – Vessels and Aircrafts

- ▶ ITC on Vessels and Aircraft (post amendment* era) admissible *when they are used for*
 - making specific taxable supplies namely
 - ❑ further supply of such aircraft or vessels; or
 - ❑ transportation of **passengers**; or
 - ❑ imparting training on navigating such vessels; or
 - ❑ imparting training on flying such aircraft
 - Transportation of goods.

Common Exception – ITC on Motor Vehicle, Vessels and Aircrafts

▶ Pre-amended* era:

- ▶ **Credit on motor vehicles and conveyances per se denied** unless used for making permissible taxable supplies and transportation of goods.
- ▶ **Mode of procurement** of motor vehicle and other conveyance wholly irrelevant.

▶ Post-amended* era:

- ▶ Credit on motor vehicles, vehicles & aircrafts per se denied unless used for permissible purposes (i.e. **Eligible Criteria**) regardless of the mode of procurement continues.
- ▶ Credit also denied where such motor vehicles, vessels & aircrafts procured by way of lease, rental or hiring unless used for permissible purposes.
- ▶ As such, the **amendment is inconsequential and merely clarificatory**.
- ▶ Vide a **proviso** provided that credit of ITC on inward supply of leasing, renting or hiring of motor vehicles/ vessels/ aircraft available so long as the recipient makes a further supply of the same services.

ITC on Rent-a-cab

▶ Pre- amendment*:

- Input credit specifically **denied** in respect of **outward supply of rent a cab**; except
 - ❑ Where 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
 - ❑ Where rent a cab services procured for onward rent a cab services.

▶ Post – amendment*:

- Restriction on rent a cab **entirely withdrawn.**

Exceptions Section 17(5)(a) – Insurance, Repairs or maintenance

▶ Pre-amended* position

- Insurance, servicing and repair or maintenance of motor vehicles/ other conveyance expressly **not denied**.
- However, since credit on motor vehicles/ other conveyances was per se denied (unless used for permissible activity), it was doubtful.
 - ❑ whether credit towards inward supply of insurance, servicing and maintenance or repair for such motor vehicle (which were per se ineligible) could be claimed without restriction

▶ Post amendment*

- **ITC of Input services of insurance, repair and maintenance specifically allowed when:**
 - ❑ Motor vehicle/Aircraft/ Vessel is used for **prescribed purposes**; or
 - ❑ Received by a person engaged in the **manufacture** of such motor vehicles, vessels or aircraft; or
 - ❑ Received by a person engaged in the **further supply** of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him.

Section 17(5)(b): Food & Beverages, Catering etc:

- ▶ Credit **denied** on inward supply of :
 - ▶ Food and Beverages, Outdoor catering, Beauty treatment, Cosmetic and plastic surgery & Health services

- ▶ Credit **allowed** if these inward supply :
 - ▶ Used for making outward taxable supply of same category

Section 17(5)(b): Club membership, Health and Fitness Centre, etc:

▶ Pre- amendment*

- ▶ Credit **denied** on inward supply of club membership and health and fitness Centre
- ▶ **No exception** for credit permitted, unlike that for food, catering, etc.

▶ Post- amendment*

- ▶ Credit on these continue to be **denied unless** –
 - ▶ Provision of such benefit is statutorily mandated on an employer

Section 17(5)(b): Travel Benefits :

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▶ Pre- amendment*

- ▶ Credit **denied** on inward supply of travel benefits extended to employees on vacation such as leave or home travel concessions
- ▶ **No exception** for credit permitted, unlike that for food, catering, etc.

▶ Post- amendment*

- ▶ Credit on these continue to be **denied unless** –
 - ▶ Provision of such benefit is statutorily mandated on an employer

Section 17(5)(b): Life Insurance, Health Insurance :

▶ Pre- amendment*

- ▶ Credit **denied** on inward supply of life insurance and health insurance **unless**
 - ▶ Where 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
 - ▶ Where life insurance and health insurance procured for **onward supply** of same services
- ▶ Ambiguity existed w.r.t. whether the government notification referred to above meant
 - ▶ A specific GST notification needed or
 - ▶ The obligation for an employer to provide such services to the employee emanated from a notification issued under the parent non GST law imposing such obligation

▶ Post- amendment*

- ▶ Credit on these continue to be **denied unless** –
 - ▶ Provision of such benefit is statutorily mandated on an employer (Ambiguity surrounding issuance of notification removed)

Section 17(5)(c): Works Contract

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Services :

- ▶ Credit denied on supply of **works contract services** for construction of **immovable property**
- ▶ Exception to the above -
 - ▶ When supplied for construction of a plant and machinery
 - ▶ When it is an input service for a further supply of works contract service
- ▶ Key points for consideration for availing credit under exception:
 - ▶ Claimant of credit should receive works contract services as defined and not pure service
 - ▶ Such works contract service must be an input service for further supply of works contract services (i.e. clear nexus warranted)
 - ▶ Restriction only applicable when Works Contract Services are availed for 'construction' of immovable property
 - ▶ Construction defined to include reconstruction, renovation, additional alteration or repairs - **to the extent of capitalisation.**
 - ▶ Plant & Machinery – A defined term and ingredients thereunder must be satisfied.

Section 17(5)(c): Works Contract Services :

- ▶ **Plant & Machinery** – Defined to mean
 - ▶ Apparatus, Equipment & Machinery
 - ▶ Fixed to earth by foundation or structural support
 - ▶ Used for making outward supply of goods/services
 - ▶ Includes such foundation and structural support
- ▶ But excludes -
 - ▶ Land, building or any other civil structure
 - ▶ Telecommunication Towers &
 - ▶ Pipelines laid outside the factory premises

Section 17(5)(c): Works Contract Services :

- ▶ Critical test for eligibility to credit
 - ▶ Must be P&M as defined (essentially functionality test) and
 - ▶ Must be used for making outward supplies
- ▶ The phrase “used for” not explained under GST law – Therefore,
 - ▶ Liberal interpretation accorded under erstwhile CCR regime may be adopted
 - ▶ Tests laid down by judiciary (under erstwhile law) such as commercial expediency, quality and efficiency, functional utility, nexus with the final product can be guiding principles
- ▶ Important to note that the wide eligibility condition (i.e. use in the course or furtherance of business) under Section 16 (1) cannot be adopted

Section 17(5)(c): Works Contract Services :

▶ **Exclusion to Plant & Machinery : Civil Structure**

- ▶ Land, Building and 'any other Civil Structure' excluded from the definition of 'Plant and Machinery'
- ▶ Ambiguity w.r.t the scope of the term 'Civil Structure' as it is undefined and generic
- ▶ Similar phrase used in Notification No. 15/2017 dated June 28, 2017 denying refund of un-utilised ITC to supply of services for 'construction of a complex, building, civil structure or a part thereof'
- ▶ Recourse to the principle of 'Ejusdem Generis' in both the situations – however leads to different interpretation -
 - ▶ In the first case meaning takes color from 'land' and 'building'
 - ▶ In the latter case, meaning takes color from 'complex' and 'building'

Section 17(5)(c): Works Contract Services :

▶ **Exclusion to Plant & Machinery : Telecommunication Towers**

- ▶ As such construction of telecom towers – Credit denied
- ▶ This is predicated on the assumption that construction of telecom towers leads to creation of immovable property i.e. works contract services
- ▶ If however, construction of telecom tower leads to creation of movable property, restriction under Section 17 (5) (c) may not even apply

▶ **Whether telecom tower movable or immovable?**

- ▶ Telecommunication towers and pre-fabricated shelters are not per se immovable property and 'attached to the earth'- **Hon'ble Delhi High Court in Vodafone Mobile Services Ltd v. Commissioner of Service Tax (Delhi) [2018 (11) TMI 713]**
- ▶ Distinguished **Hon'ble Bombay High Court in Bharti Airtel Ltd. vs. CCE, Pune – III [2014 (19) TMI (38)]** and relied upon **CCE, Ahmedabad vs. Solid and Correct Engineering Works & Ors. – Supreme Court [2010 (4) TMI (15)]**
- ▶ Both Vodafone and Bharti Airtel are pending before the Supreme Court- notice issued in both Special Leave Petitions.

Section 17(5)(c): Works Contract Services :

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- ▶ **Exclusion to Plant & Machinery : Pipelines laid outside the factory premises (i.e. Credit available to pipelines within the factory)**
 - ▶ Is there a discrimination between pipelines within the factory and that which are outside ?
 - ▶ What happens where pipeline is partly within the factory and partly outside – Proportionate credit?

Section 17(5)(d): Receipt of goods or services or both for Construction:

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- ▶ Receipt of any goods/ services or both by a taxable person for construction of an immovable property (other than P&M) **on his own account – Credit denied**
- ▶ Credit denial extended even when such goods/ services or both are used in the course or furtherance of business
- ▶ Most in the trade are interpreting this provision to mean –
 - ▶ If you receive construction services.
 - ▶ Such construction service leads to creation of immovable property.
 - ▶ Credit will be denied (unless it is P&M) even where the property so constructed is used in making further taxable supply/ furtherance of business.

Section 17(5)(d): Receipt of goods or services or both for Construction:

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- ▶ **Safari Retreats Private Limited v Chief Commissioner of CGST:**
 - ▶ Contention being that it discriminates between assessee leasing out property for rent vis-a-vis- assessee disposing off property before obtaining the completion certificate
 - ▶ The Court read down the provision holding –
 - ▶ Narrow interpretation by the Department cannot be accepted, as it frustrates the object of the Act.
 - ▶ Relied upon Eicher Motors v UOI (1999) 2 SCC 361- the very purpose of the credit is to give benefit to the assessee.
 - ▶ The assessee is required to pay GST on the rental income arising out of the investment, should be entitled to utilise the credit on inputs under Section 17(5)(d).
 - ▶ Assessee not retaining the property for his own purpose, but letting the property out.
 - ▶ The Department has filed an SLP before the Supreme Court. Matter is sub-judice **(SLP No.37367 of 2019)**

Section 17(5)(d): Receipt of goods or services or both for Construction:

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- ▶ **Safari Retreats Private Limited v Chief Commissioner of CGST**
 - ▶ Tamil Nadu AAR in **Sree Varalakshmi Mahaal LLP** (GST AAR Tamil Nadu) dated January 03, 2020 refuses to follow Orissa High Court ruling in Safari Retreat
 - ▶ To be decided on a case to case basis.
- ▶ Similar writ petitions in other High Courts-

Party Name	Relevant High Court	Writ Petition No.
DLF Cyber City v. UOI	Punjab and Haryana High Court	C.W.P 34660 of 2019
Riveria Commercial Developers v. UOI	Delhi High Court	W.P (C) of 11633 of 2019
R.R. Kabel Limited v. UOI	Gujarat High Court	Spl Civil Appln No. 16973 of 2019
Bamboo Hotel & Global Centre (Delhi) Pvt Ltdv. UOI	Delhi High Court	W.P. No. 5457 of 2019

Section 17(5)(d): Receipt of goods or services or both for Construction:

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- ▶ Time limit for availing credit under Section 16 (4) – A significant hurdle even if writs succeed.
- ▶ Section 16(4), provides that no credit can be claimed -
 - ▶ beyond the due date for furnishing the return for the month of September following the end of the financial year to which the input tax credit relates;
 - ▶ or furnishing of annual return, whichever is earlier
- ▶ What if writ petitions, if decided in favour – rendered post the 16 (4) time frame.
- ▶ Unless Section 16 (4) *per se* challenged – It would be a case '**Operation Successful Patient Dead**'
- ▶ Therefore in **DLF Cyber City Developers Limited v. UOI CWP- 34660 of 2019**
 - ▶ Petitioner challenged Section 16 (4); and
 - ▶ Punjab and Haryana High Court, issued interim direction vide order 28.11.2019 - *if the petition is allowed, the assessee would be entitled to claim credit, even if the time limit has lapsed*

Section 17(5)(e): Tax paid under Section 10:

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- ▶ Credit denied for goods or services or both on which tax has been paid under Section 10 (i.e. Composition Scheme).

Section 17(5)(f): Non – resident taxable person

- ▶ Credit denied for goods or services or both received by a non-resident taxable person **except** on goods imported by him;

Section 17(5)(g): Supplies for Personal Consumption

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- ▶ No credit where usage is for personal consumption purposes
- ▶ Personal consumption v. Course or Furtherance of Business
- ▶ Personal consumption means for non-business consumption by partners or directors or proprietor.

Section 17(5)(h): Goods Lost/Stolen/destroyed/ Written off goods

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- ▶ **Section 17 (5) (h) prescribes ITC shall not be available in respect of :-**
 - ▶ Goods lost, stolen, destroyed, written off or
 - ▶ Goods disposed of by way of gift or free samples.
- ▶ **Goods Lost/Stolen/Destroyed –**
 - ▶ **Treatment under earlier regime**
 - ▶ Rule 21 of C.E Rules – where goods have been lost or destroyed by natural causes or by unavoidable accident – remission of duty on such goods,
 - ▶ **Rule 3 (5C) CCR, 2004 – Credit of inputs to be reversed on goods where duty remitted.**

Section 17(5)(h): Goods Lost/Stolen/destroyed/ Written off goods

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▶ Goods written off

▶ No clarity whether

- ❑ Write off should be actual or mere making of provision to write off is covered
- ❑ Write off could be partial or complete
- ❑ Whether write off should be prior to putting it to use or post usage
- ❑ Whether Credit can be claimed post write off on account of subsequent usage of the goods

▶ Rule 3(5B) CCR, 2004 –

- ❑ If the value of any, input, or capital goods before being put to use, on which CENVAT credit has been taken is written off fully or partially or where any provision to write off fully or partially has been made in the books of account then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods
- ❑ Provided that if the said input or capital goods is subsequently used in the manufacture of final products or the provision of output services, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules.

Section 17(5)(h): Gifts and Free Supplies

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- ▶ **Section 17 (5) (h) prohibits availment of input tax in respect of goods disposed off by way of gift or free sample**
 - ▶ **Circular No. 92/11/2019 dated 07.03.2019 :**
 - ▶ Inputs, **input services** and capital goods used in relation to **gifts** or **free samples** – No ITC by virtue of Section 17 (5) (h)
 - ▶ **Buy one get one free** –
 - ▶ Not an individual supply of free goods but a case of two or more individual supplies for a single price
 - ▶ Taxability basis composite/ mixed supply principle
 - ▶ ITC allowed
 - ▶ **Sectoral FAQ - Replacement of parts under warranty is a free supply still no reversal required**
 - ▶ Since value of warranty services includes the charges to be incurred for parts replacement during the warranty period.

Section 17(5)(h): Gifts and Free Supplies

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- ▶ **GST on CSR activities?**
- ▶ In case of M/S Polycab Wires Private Limited (Kerala AAR), it was held that ITC would not be available for the goods distributed free of cost under CSR activities.
- ▶ In case of M/s Indian Institute of Corporate Affairs (Delhi AAR), it was held that the amount paid by the companies to external agencies for CSR activities to undertake specified projects would be considered as 'Consideration'. Thus, executing CSR activities as per companies' direction would be interpreted as Supply, and GST would be applicable on the same.
- ▶ Our comments:
 - ▶ Since CSR activities is mandatory compliance for specified companies under Section 135 of Companies Act, 2013.
 - ▶ It should be considered in the course or furtherance of business. Also, ITC on input goods and services should be allowed.
 - ▶ Thus, Government shall take into consideration and issue necessary clarifications.

Section 17(5)(i): Tax paid under Section 74, 129 and 130:

- ▶ Credit is denied for any tax paid under:
 - ▶ **Section 74** (SCN for mala fide acts) ; or
 - ▶ **Section 129** (Detention, seizure and release of goods and conveyances in transit); and
 - ▶ **Section 130** (Confiscation of goods or conveyances and levy of penalty)



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