Practical FAQs
on
Input Tax Credit

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

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Foreword

It has been four years since the introduction of GST in India and the journey so far has been eventful and fast paced. With innumerable notifications, circulars, orders, instructions, FAQs etc. issued during the last four years coupled with annual Finance Acts, GST has been keeping all the stakeholders fully occupied. While the Government has been diligently making amendments to address the issues, tax professionals have been engaged in meticulously analysing such amendments and the impact thereof on their client's businesses and the taxpayers have been on their toes in implementing such changes in their business processes and ensuring compliances.

GST is one of the most prodigious tax reforms the country has witnessed since independence. The reform of such a magnitude cannot be without its share of bottlenecks and initial setbacks. However, the Government has been very receptive and quick in addressing the various challenges faced by the industry and public concerns by amending the law or issuing necessary clarifications as and when required. GST, along with its challenges, has also brought in various benefits like integration of State economies and creation of one national market and mitigation of the cascading effect of taxes by allowing seamless credit of input tax across goods and services.

The Institute of Chartered Accountants of India (ICAI), through its GST & Indirect Taxes Committee, has rendered unflinching support to the Government in ushering in the GST regime in India and continues to provide its unabated assistance in ironing out the post-implementation issues as well. Further, the ICAI has also been playing a crucial role in GST knowledge dissemination amongst all the stakeholders through its technical publications, GST Newsletter, live webcasts, e-learning, certificate courses, conferences and programmes.

I am happy to note that the GST & Indirect Taxes Committee of ICAI has come out with a useful publication titled, *"Practical FAQs on Input Tax Credit"*.

I congratulate CA. Rajendra Kumar P, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman, and other members of GST & Indirect Taxes Committee for

this initiative as this publication is a compilation of practical queries of stakeholders on the core concept of GST viz., input tax credit. The answers to such queries are drafted by erudite subject experts.

I am sure this publication will be of immense use to the members of ICAI and will also prove to be a handy guide for all the stakeholders.

Date: 30th June, 2021
Place: New Delhi

CA. Nihar N Jambusaria
President, ICAI

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Preface

Goods and Services tax (GST) is a destination-based consumption tax levied on value added at each stage of supply chain. Such are the advantages of this tax that today more than 160 countries across the globe have implemented VAT/GST. India adopted VAT in stages – first in the form of CENVAT at central level on manufacture of goods which was later extended to services as well and then in the form of State-Level VAT on sale of goods. Such a piecemeal and fragmented tax structure made the erstwhile indirect tax regime too complex and thus, the idea of nation-wide comprehensive GST was mooted by the experts. It took more than a decade of continuous and relentless efforts to introduce a unique dual model GST in India on July 1st 2017.

GST can unequivocally be hailed as the most pathbreaking tax reform in the indirect tax landscape of the country. The USP of a value added tax is the scheme of comprehensive and continuous chain of tax credits across the supply chain thereby taxing only the value added at each stage and removing the cascading of taxes. Input tax credit can thus, rightly be called as the lifeline of any GST/VAT regime.

The GST regime in India too allows seamless credit on all inputs, input services and capital goods used for the purposes of business of a taxable person except blocked credit where input tax credit is not available even when these goods or services are used for purposes of business. Further, credit is not available on supplies charged to tax under composition scheme and supply of exempt goods and/or services. One of the important features of the Indian GST is the 'matching concept' i.e., ITC claimed by the recipient of supply is matched with the tax paid by the supplier in relation to that supply. The Government is trying to achieve this objective through a robust automated return filing system.

The provisions relating to input tax credit in the erstwhile indirect tax laws as also in the current GST law have been prone to disputes and litigation. Further the matching concept in the GST law has made the related compliance cumbersome. Taxpayers, therefore, are continually on the lookout for answers to myriad of questions being faced by them while undertaking compliance or taking tax positions.

It has been the consistent endeavor of the GST & Indirect Taxes Committee of the ICAI to facilitate the members as also the other stakeholders in every possible way in matters related to indirect taxes. Also, we stand by the

Government as a "*Partner in GST Knowledge Dissemination*". We have been supporting the Government with our intellectual resources, expertise and efforts to make GST a real good and simple tax. The publication in your hands viz., "Practical FAQs on Input Tax Credit" is yet another initiative of the Committee in this direction.

The publication is a compilation of practical questions on input tax credit and their answers. The questions included in the publication were solicited from the stakeholders. Further, the questions raised by the audience in various programmes organized by the Committee on the topic of input tax credit were also collated and included in this publication. The answers to such questions have been drafted by the best of minds in the field and then reviewed by eminent subject experts.

We sincerely thank CA. Nihar N Jambusaria, President, ICAI and CA. (Dr.) Debashis Mitra, Vice-President, ICAI for the encouragement and support extended by them to the various initiatives of the GST & Indirect Taxes Committee. We express our gratitude for the untiring efforts of the **thirty four experts** in the development of this publication. We would also like to thank the members of our Committee who have always been part of all our endeavors. Last, but not the least, I commend the efforts made by the Secretary to the Committee, CA. Smita Mishra and her team comprising of CA. Ajay Kumar Ray, Ms. Impreet Kaur and CA. Tanya Pandey for providing the requisite technical and administrative assistance.

We envisage that this publication will facilitate the members in their professional endeavours and provide useful guidance to other stakeholders. Though all efforts have been taken to provide best possible answers to the questions, there can be different views/opinions on the various issues addressed to in this publication. We request the readers to bring to our notice any inadvertent error or mistake that may have crept in during the development of this publication. We will be glad to receive your valuable feedback at gst@icai.in. We request you to visit our website https://idtc.icai.org and share your suggestions and inputs, if any, on indirect taxes including GST.

CA. Rajendra Kumar P
Chairman
GST & Indirect Taxes Committee

CA. Sushil Kumar Goyal
Vice- Chairman
GST & Indirect Taxes Committee

Place: New Delhi
Date: 30th June, 2021

Contents

The answers to the questions in this publication are based on the GST law as amended till 30.06.2021.

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

- For the sake of brevity, the terms "Input Tax Credit", "Goods and Services Tax", "Central Goods and Services Tax", "State Goods and Services Tax", "Union Territory Goods and Services Tax", "Integrated Goods and Services Tax", "Central Goods and Services Act, 2017", "Integrated Goods and Services Act, 2017", "Central Goods and Services Tax Rules, 2017" and "Central Board of Indirect Taxes and Customs" have been referred to as "ITC", "GST", "CGST", "SGST", "UTGST", "IGST", "CGST Act, 2017", "IGST Act, 2017", "CGST Rules, 2017" and "CBIC" respectively in this publication.
- Unless otherwise specified, the section numbers and rules referred to in this publication pertain to CGST Act, 2017 and CGST Rules, 2017 respectively.

1
Eligibility and Conditions for taking ITC

Q1. A company has received grant from outside India. It has utilised the grant for purchase of computers and also for availing consultancy service. Can company claim ITC on all such expenditure?

Ans. Section 16(1) brings out the main requirement of any tax being eligible as ITC, which is 'it must be used or intended to be used in the course or furtherance of his business'. As long as this condition is satisfied along with other conditions in section 16, ITC is eligible for the company. The fact that these procurements are out of a grant received from outside India does not affect the ITC's eligibility.

Q2. A taxpayer's main business is dealing in electronic goods. He purchases gold bars (as investment) with the intention to resell when the price goes up.

Can he claim ITC on such gold bars purchased as the invoice is in the name of the firm? Will the answer change if he has purchased such gold bars with the intention of trading in them for a short period?

Ans. (i) It is worthwhile to recall the definition of the term "business" given in section 2(17). Relevant portion of the definition is given hereunder:

"(17) "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;"

(ii) Investment in gold bars is with the commercial motive as per the question. It constitutes business even though the same is undertaken on casual or irregular basis by virtue of clause (c) of the above definition clause.

(iii) At the time of re-sale of such investment the said taxpayer is liable to pay GST because the activity of sale constitutes supply as per section 7 and the said activity falls within the term "business".

(iv) As per section 16(1), a registered person is eligible to take ITC on goods or services used in the course or furtherance of business.

(v) In view of all the above aspects, whether investment is made for long term or short-term purposes, ITC is allowed as long as the conditions mentioned in section 16 are complied with.

Q3. IRP portal shows supplier's GSTIN has been enabled for e-invoicing. However, supplier does not provide e-invoice/ tax invoice with IRN.

Whether non-furnishing of e-invoice by supplier leads to disallowance of ITC in the hands of recipient?

Ans. The IRP portal decides the applicability of e-invoicing of a supplier based on the turnover as per the GST network in any preceding financial year from 2017-18 onwards. It may so happen that the particular supplier would have crossed the threshold exemption limit for e-invoicing in the current year and hence, the invoicing portal would have enabled the e-invoicing for the supplier.

However, if the supplier has already crossed the threshold and has become a qualified person to issue the e-invoice, it becomes mandatory for him to issue the e-invoice. If e-invoice is not issued, then as per rule 48(5), the said invoice shall be an invalid invoice. Therefore, if the recipient wants to claim ITC, he should have a valid invoice which is e-invoice with a valid IRN [as per section 16(2)(a)].

Q4. Impreet Pvt. Ltd. gets its manufacturing unit established in an industrial park. As per the lease deed, the company has to pay annual maintenance charges on the basis of per square meter area of the leased factory. Further, the rent comprises of rent for the factory as well as charges for maintenance and development of such an industrial park.

Whether ITC can be availed on annual maintenance charges paid by the company to the industrial park?

Ans. Section 16(1) provides that every registered person, subject to prescribed conditions and restrictions, is entitled to take credit of input tax charged on any supply of goods or services or both used or intended to be used in the course or furtherance of his business.

The consideration paid under the lease deed is classified as annual lease rent as well as the annual maintenance charges for maintenance and development of the industrial area. Though the maintenance charges include the charges for the maintenance of the industrial area beyond the borders of the factory, they are very much the part of the annual lease rental in terms of the following rationale:

a. Maintenance is one of the elements of the lease document.

b. Maintenance is calculated at the rate per square meter of the leased factory.

c. Rent and maintenance are naturally bundled and supplied in conjunction with each other in the ordinary course of business.

The availability of a suitable industrial plot is an essential requirement for manufacturing activity. Hence, ITC on the annual maintenance charges (which is a part of the rent) can be availed.

Q5. A registered person is into crusher business. By mistake, he paid GST under reverse charge on purchases made from unregistered persons and claimed ITC although reverse provisions were withdrawn at that time as he was not aware of the same.

Whether such ITC is allowable as the same was paid by mistake and there was no fraud or misappropriation by the registered person?

Ans. Section 16(1) provides that every registered person shall 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. Further, no registered person shall be allowed the credit unless he in possession of the tax invoice and has received the goods &/or services.

In the given case, the goods/services on which tax has been paid under reverse charge inadvertently are intended to be used for furtherance of business. Further, since purchases have been made from unregistered persons, a self-invoice needs to be issued and the goods/services on which tax is paid should be received.

If all such conditions are fulfilled, there is no restriction on availing ITC on tax mistakenly paid under reverse charge. Also, one may state that payment of tax under reverse charge and availment of ITC on the same is entirely a revenue neutral exercise to the extent it concerns the Governments exchequer. Reference in this regard may be made to the following judgments pronounced under the erstwhile indirect tax regime in India: -

A. *Commr. of C.Ex. & S.T., ITU, Chennai v Tami Nadu Petroproducts Ltd [2015 (40) S.T.R. 878 (Mad.)]*

B. *Bajaj Allianz General Insurance Co Ltd v. Commissioner of Central Excise, Pune-III [2014-Tiol-1540-CESTAT-Mum]*

C. *Commissioner of Central Excise & Customs, Bangalore- v. Vishal Precision Steel Tubes & Strips Pvt. Ltd. [2017 (349) E.L.T. 686 (Kar.)]*

D. *Commissioner of Central Excise & Customs, Surat - III v. Creative Enterprises [2009 (235) E.L.T. 785 (Guj.)]*

E. *Commissioner of Central Excise, PUNE-III v. Ajinkya Enterprises [2013 (294) E.L.T. 203 (Bom.)]*

F. *Balaji Aluminium Alloys Pvt. Ltd. v. Commr. of C. Ex., Delhi-IV 2019 [(365) E.L.T. 551 (Tri. - Chan.)]*

G. *Sarda Energy & Mineral Ltd. v. Commr. of Central Excise, Raipur-I [2014 (35) S.T.R. 946 (Tri. - Del.)]*

Q6. Whether GST paid voluntarily in TR-6 challan in relation to import bill of entry is available as ITC?

Ans. Section 16(2)(a) mandates that to avail ITC, one must have possession of tax invoice/debit note issued by supplier or any other document as may be prescribed. Further, rule 36 talks about *"Documentary requirements and conditions for claiming input tax credit"*. Clause (d) of sub-rule (1) of rule 36 states: *"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".*

Therefore, if IGST is paid voluntarily in TR-6 challan in relation to imports, then credit will be available as per clause (a) of section 16(2).

Q7. A taxpayer is having multiple registrations in different States. He places order for some goods on a seller in Maharashtra from his head office in Rajasthan. The goods are delivered at his Delhi office which is also registered under GST. The vendor issues the bill on Rajasthan office and mentions GSTIN of Rajasthan.

Whether the taxpayer can claim the ITC on such goods under Delhi GSTIN or an invoice for cross charge needs to be issued?

Ans. In the instant case, an order is placed with a seller in Maharashtra by a buyer in Rajasthan for the goods to be delivered at Delhi. By virtue of the Explanation to section 16 (extracted below), the Rajasthan office will be deemed to receive the goods when it is supplied to any other person on his direction, thereby satisfying the condition stipulated in section 16(2)(a).

> "*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."

Further, the invoice is having the GSTIN of head office in Rajasthan. Assuming all other conditions of section 16(2) are satisfied, the head office is eligible to claim the same and not the Delhi branch. Furthermore, the head office in Rajasthan will raise invoice on Delhi branch in order to make the Delhi branch eligible to claim ITC.

Q8. When should the ITC of tax paid under reverse charge be availed? To illustrate, the supply is received in the month of April 202X, and the tax is paid through the return for the month of April 202X filed in the month of May 202X. So, whether ITC of such tax can be claimed in the return filed for the month of April 202X or should be claimed in the return for the month of May 202X to be filed in the month of June 202X?

Ans. As per section 2(62), input tax includes tax payable under reverse charge in terms of sections 9(3) & 9(4).

Inward supplies liable to reverse charge procured from a registered person:

Section 16(2)(c) stipulates that in order to be able to avail ITC on an inward supply, subject to the provisions of section 41, the tax charged in respect of a supply should have been actually paid to the Government, either in cash or through utilization of input tax credit admissible in respect of the said supply. Rule 85(4) provides that tax payable under reverse charge shall be paid by debiting the electronic cash ledger maintained as per rule 87.

Going by the literal interpretation of section 16(2)(c), say for April 202X, the tax charged in the invoice in respect of the supply pertains to April 202X and even though it is actually paid to the Government by debiting the electronic cash ledger in May 202X, by making the payment for April 202X liability, the recipient satisfies the conditions prescribed for taking ITC for April 202X. Therefore, recipient becomes entitled to ITC in April 202X return which is filed in May 202X.

Inward supplies liable to reverse charge procured from an unregistered person:

Section 16(2)(a) specifies that in order to be able to avail ITC, the registered person should be 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. Rule 36(1)(b) states that an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax, is a valid document to claim ITC.

On a conjoint reading of section 16(2)(a) read along with rule 36(1)(b), in order to be eligible to avail ITC, one has to raise invoice in accordance with section 31(3)(f) and payment of tax should also have been made. Now if the invoice is raised in April 202X, it can be interpreted that even though the payment is made in May 202X, the liability discharged through electronic cash ledger pertains to April 202X. The conditions of 16(2)(a) read along with rule 36(1)(b) gets satisfied in the month of April 202X and recipient would be entitled to claim ITC in the return of April 202X which is filed in May 202X.

However, there is an alternative view that ITC can be claimed only after the tax payable under revere charge has been paid which in true sense gets paid in May 202X. Hence, the said claim of credit would be available in the return of May 202X which is filed in June 202X.

Q9. Whether in the absence of e-way bill for any inputs, the credit of the same can be denied in case of refund or GST Audit?

Ans. Section 16(2)(b) of the CGST Act, 2017 provides every registered person who has received the goods &/ or services shall be allowed to claim credit of input tax provided he has complied with the other conditions of section 16.

On an analysis of clause (b) of sub-section (2) of section16 read with the Explanation appended thereto, it is evident that section 16 provides for actual as well as constructive possession in cases when the goods have been delivered to a third person on the instruction of the buyer. Constructive possession is when the title in goods is transferred (through tax invoice or delivery challan) but the person is not in physical possession of the goods. In all such transactions, the buyer is considered to have received the goods as provided by the

above provision even though he has not received the physical possession of such goods.

While examining the eligibility of ITC to a registered person, one may check whether the taxpayer has *actually received* the goods to be eligible for the credit as per the condition laid down in section 16(2)(b). The easiest way to verify the receipt is to check the e-way bill against the invoices issued as the e-way bill is generated for the movement for the goods from the premises of the supplier to the premises of the recipient. It may be contended that ITC is restricted in cases where the taxpayer is unable to provide the officer with the physical copy of the e-way bill including in cases such as "*bill-to-ship-to*" transactions.

However, the deeming provision has been created in the Act by way of insertion of an explanation to section 16(2)(b) wherein the receipt of goods by ship-to party will also be considered as receipt of goods by bill-to party thus making them eligible for credit.

At this juncture, it is also pertinent to note that section 16(2)(a) read with rule 36 specifies the documents to be possessed by a taxpayer for availment of credit. The said provisions do not include an e-way bill as a document on the basis of which ITC can be availed. *Thus, eligibility to avail ITC is not dependent on e-way bill (which is only a document to track movement of goods).* Therefore, there cannot be a denial of ITC to a taxpayer who does not have physical possession of the e-way bill if he is otherwise able to prove the receipt of goods.

Q10. Mr. A in Delhi supplied goods to Mr. B in Mumbai. Though Mr. A made an inter-State supply, he showed GST liability as CGST and SGST instead of IGST in Form GSTR-1.

What should we do in this situation?

Ans. The claim of ITC will not depend on the fact whether the same is payable as CGST / SGST or IGST.

Section 2(62) defines *"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 ……."*

Section 2(63) - *"input tax credit" means the* ***credit of input tax;***

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 ……*

Rule 36(4) also restricts credit in respect of invoices or debit notes, the details of which have not been furnished in Form GSTR-1 by the supplier. It does not restrict the credit if, IGST is shown instead of SGST / CGST.

The supplier can amend the error if any, in the subsequent Form GSTR-1 and accordingly the claimant can also add / reduce the ITC claimed in his Form GSTR-3B return.

However, where the SGST/CGST relates to the other State where the claimant is not registered, ITC will be required to be reversed by the recipient, since he is not eligible to claim the ITC.

Q11. ITC of GST cannot be availed in excess of 105% of eligible ITC populated in Form GSTR-2B in terms of rule 36(4) as amended *vide Notification No. 94/2020- Central Tax, dated 22-12-2020*. In some cases, ITC of goods populates in one-month (let's say April) in Form GSTR-2B, and actual delivery of the goods occurs in subsequent month (let's say May). Due to this full benefit of ITC cannot be claimed because of ceiling of 105%.

a) Please suggest how to avail ITC in this case?

b) Please clarify, whether the condition of 105% is for a month or for the accumulated balance in Form GSTR-2B (like for example April month unclaimed ITC plus ITC for the month of May)?

c) Also clarify, whether the clarification/ procedure specified in *Circular No. 123/42/2019 GST dated 11-09-2019* can be applied to Form GSTR- 2B as well.

Ans. a) You can avail ITC only upon receipt of goods or services or both. Further*, ad hoc* 5% ITC is available only in cases where invoices with eligible ITC are not uploaded by the supplier and such 105% cannot exceed the total eligible ITC. Thus, availing of 5% of ITC in April month itself is incorrect.

b) Since you had received the goods in the month of May, you shall avail the credit only in the month of May. Certainly, there will be a mismatch between the values as per Form GSTR-2B and the ITC claimed in Form GSTR-3B. The colour of the particular ITC field in Form GSTR-3B will also turn to red. However, this is the correct procedure.

c) In case, you get an intimation from the Department asking why you have claimed in excess, then you will be able to substantiate and explain the position as under:

The said invoice is already reflected in Form GSTR-2B of April month and further, while comparing the ITC of April month that you have availed in Form GSTR-3B and the amount in Form GSTR-2B, it will be evident that, you had not availed the credit of that particular invoice for the reason that, you had not received the goods in the same month. In compliance with section 16(2)(b), you have availed the credit only upon receipt of the said goods and hence, the amount is showing excess of Form GSTR-2B.

Q12. Whether recovery of ITC from buyer, due to seller not depositing tax, is proper in law? Please elaborate the judicial position on this aspect under both pre-GST and GST regime.

Also, advise how should a taxpayer handle the situation practically when his supplier does not pay tax as there is no mechanism for the taxpayer to know that the tax has not been paid by the vendor.

Ans. The conditions for claiming ITC are specified in section 16 and these conditions are cumulative in nature. For taking credit on an inward supply, section 16(2)(c) requires that tax charged on such supply should have been actually paid to the Government. At present, in terms of rule 36(4), the recipient claims ITC on the basis of Form GSTR-2B which reflects the outward supplies uploaded by his vendors in their Form GSTR-1s. However, there is no mechanism for the recipient to know whether the vendor has paid the tax on the supply.

In earlier tax regimes, be it State Level VAT or CENVAT, the conditions for claiming ITC was restricted to availability of documents

and receipt of goods or services, as the case may be, and the supplier transactions were independent from that of the recipient without having a check on the other party. In GST regime the scope of ITC has been widened by allowing ITC on inputs, input services and capital goods. Therefore, to curb illegal use of ITC, the GST Law has inbuilt checks to counter- verify authenticity of ITC. The intention of the law is very clear that ITC other than ITC on import of goods and ITC on reverse charge shall not be allowed without cross verification of the counterparty records. Hence, the taxpayer has to exercise the following precautions while claiming ITC:

1. Verify the authenticity of the supplier and his compliance status in the common portal before entering into a transaction;
2. Communicate with the supplier in case of discrepancy in Form GSTR-2A.

The above conditions are in addition to fulfilling other conditions envisaged in section 16.

For the benefit of the readers, some judgements in pre and post GST era are given hereunder which discuss the litigable issues regarding claim of ITC:

- ***Arise India Limited v. CTT [2017 (10) TMI 1020 (Del)] -*** Delhi High Court;
- ***Commissioner of Central Excise v. Hari Chand Shree Gopal – [2010 (260) E.L.T. 3 (S.C.)]*** - A five-judge bench of the Supreme Court;
- ***Gheru Lal Bal Chand v. State of Haryana [2011] 45 VST 195 (P&H)-*** Punjab & Haryana High Court;
- ***M/s. Tarapore & Company, Jamshedpur. v. The State of Jharkhand n W.P. (T) No. 773 of 2018-*** Jharkhand High Court.
- **Payment has been made to vendor beyond 180 days due to relaxed payment terms by vendor.**

Q13. A vendor has paid GST on tax invoice issued to the registered person. However, while filing Form GSTR-1, he mistakenly enters wrong GSTIN of the registered taxable person. Due to limitations

of the portal, he cannot rectify this error subsequently. This results in ITC not getting reflected in registered person's Form GSTR-2B.

Whether such registered taxable person can claim ITC in the given case?

Ans.

(i) The GST law does not have any mechanism to revise the returns submitted by the taxpayer. Further, the GST portal also does not prescribe any mechanism to revise the returns once submitted. However, the supplier has an option to amend the invoice submitted in Form GSTR-1 of a tax period in the subsequent tax period. Pursuant to proviso to section 37, the facility to amend Form GSTR-1 of a particular tax period is available upto September of the next financial year or upto the date of furnishing of the relevant annual return, whichever is earlier.

(ii) Section 16(2)(c) prescribes a condition that *"subject to the provisions of section 41 or section 43A, the tax charged in respect of such supply has been* ***actually paid*** *to the Government, either in cash or through utilisation of input tax credit admissible in respect of the said supply".* Such taxes would be remitted through Form GSTR-3B by the supplier.

(iii) In the present scenario, the tax was paid by the supplier to the Government and only an error on account of wrong GSTIN occurred. Since the condition prescribed in section 16(2)(c) is satisfied, the registered person can avail the credit. The credit cannot be denied on the grounds of limitations in the GST portal.

(iv) The registered person should maintain appropriate record of tax invoice and payments made to the supplier and adhere with the other conditions of section 16

Q14. The taxpayer is providing software and hardware services. He procured few services from a registered person and the payment was made through banking channel in the financial year 2018-19. He has in his possession a valid tax invoice for the services and services have been provided by the vendor. However, the same is not reflecting in GSTR-2A as on date.

Whether ITC can be availed in respect of such bill?

Ans. Matching of ITC being availed with Form GSTR-2A is a pre-requisite in terms of section 16(1) & (2) read with rule 36(4). As per section 16(2)(c), ITC can be availed on any supply if, subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government, either in cash or through utilisation of ITC admissible in respect of the said supply. Hence, ITC can be availed only if the vendor has paid and reported the ITC.

However, it is important to note the Madras High Court Judgment in the case of *D.Y Beathel Enterprises vs. The State Tax officers (Data cell) dated 24-02-2021* wherein it has been held that when the seller has collected tax from purchasing dealer, the omission on the part of seller to remit the tax in question must be viewed very seriously and strict action ought to have been initiated against the seller. Thus, the impugned Order asking the recipient to reverse the credit suffers from fundamental flaws and it has been quashed for more than one reasons.

1. Non examination of seller in inquiry
2. Non-initiation of recovery action against seller.

Thus, relying on the said judgement of Madras High Court, one may avail ITC.

Q15. If the vendor has mentioned wrong HSN on the invoice and the recipient has availed ITC on that invoice, can ITC be denied to the recipient?

Ans. As per section 16(1), in order to avail ITC, a registered person has to satisfy the conditions prescribed in section 16(2) read with rule 36. Specifically, rule 36(2) provides that ITC shall be availed by the recipient only if all applicable particulars as specified in the provisions of Chapter VI of the CGST Rules, 2017 are contained in tax invoice.

However, the proviso to rule 36(2) gives a relaxation stating that ITC may be availed by the recipient even if the tax invoice does not contain all applicable particulars, but contains the following details:

- Amount of tax charged.
- Description of goods or services

- Total value of supply of goods or services or both
- GSTIN of the supplier or recipient
- Place of supply in case of inter-State supply

Thus, HSN code is not a mandatory requirement to avail ITC, going by the proviso to rule 36 (2). Thus, wrong mentioning of HSN code does not deprive the recipient from availing ITC.

Q16. As per section 16, ITC shall be claimed based on invoice. Tax paid on bank charges is reflected in Form GSTR-2A/2B and the customer takes ITC of GST paid on such bank charges. However, the bank never issues an invoice for the same.

Whether it is correct to claim ITC based on Form GSTR-2A/2B?

Ans. Section 16(2)(a) provides that the ITC claimant should be in possession of a tax invoice issued by a supplier. Forms GSTR 2A /2B are for information purpose required to verify the provisions of rule 36(4).

Section 2(66) defines *"invoice" or "tax invoice"* to mean the tax invoice referred to in section 31. The particulars of the invoice as per section 31 are prescribed in rule 46 which is also subject to rule 54. Rule 54(2) prescribes the requirements in case of a banking company. If the requirements as prescribed in rule 54 are fulfilled, then, the same will be treated as "*tax invoice*" as per section 2(66) and the condition as required in section 16(2) gets fulfilled.

Rule 54(2) provides that the said *supplier [banking company] may issue a consolidated tax invoice or* ***any other document in lieu thereof****, by whatever name called, for the supply of services made during a month at the end of the month, whether issued or made available, physically, or* ***electronically, whether or not serially numbered and whether or not containing the address of the recipient of taxable service but containing other information as mentioned under rule 46.*** **It also provides that a digital signature is not required.** Rule 54(2) provides relaxation in respect of the requirements of rule 46. If such relaxed conditions are fulfilled, the document will be eligible to be invoice as per section 31.

In addition, proviso to rule 36(2) provides further relaxation that if the document contains amount of tax charged, description of services, total value, GSTIN of the supplier and recipient and place of supply in case of inter-State supply, ITC may be availed by such registered person.

As inferred from the above, it can be concluded that ITC reflected in Forms GSTR-2A /2B can be claimed, if the banking company provides any document containing the particulars as per rule 54(2) read with proviso to rule 36(2).

Q17. A Cement company registered in Madhya Pradesh (MP) is importing coal from South Africa. The coal arrives at port and bill of entry is filed by the company and coal is kept at its own rented store at port. Subsequently, coal is shifted from storage at the port to plant in MP (factory) in intervals of say, 2 to 3 months.

In the given case:

1. **When can the company claim ITC?**
2. **What will be the documentation for filing e-way bill since shifting of coal from port to MP takes multiple railway racks?**
3. **If in the above scenario, a customs house agent (CHA) has been appointed to file bill of entry, whether the deeming fiction under explanation to section 16(2)(b) i.e., the goods being deemed to be received by the registered person when they are delivered to the recipient on his instruction, will be applicable?**
4. **In case of loss of material during handling, whether ITC needs to be reversed in proportion to the materials so lost?**

Ans. For the sake of clarity and understanding, it is assumed that the imported coal in the above given case study has been cleared at Navasheva Port, near Mumbai in Maharashtra.

1. Section 16(2) provides four fundamental conditions for availment of ITC. We can understand the conditions briefly as:

a) Possession of tax invoice / debit note / any other tax paying document by registered taxpayer

b) Receipt of goods or services by registered taxpayer

c) Taxes on supply has been actually paid by vendor / supplier.

d) Tax return has been furnished by registered taxpayer.

In the instant case, company has imported coal from South Africa and the CHA of the company filed bill of entry to clear the imported coal. The goods are deemed to be received in terms of Explanation (i) to section 16(2)(b) [explained at 3 below]. The company can claim ITC immediately after clearance of goods by CHA, subject to satisfaction of other conditions of section 16(2)

2. It is pertinent to note that the coal has been received by the company at the customs port immediately after filing of bill of entry & getting the same cleared from Customs Department. The company can shift the coal from the port to any other place by filing e-way bill along with delivery challan. Rule138(2A) provides that where goods are transported by railway, the EWB shall be generated by the registered person, being the supplier or recipient, at any time before or after the commencement of movement of such goods after furnishing the information in Part B of the Form GST EWB-01. With reference to the above, it is to be noted that, it is not necessary to carry EWB in physical or electronic form along with movement of goods by rail or air or vessel. However, EWB is required to be produced at the time of delivery of goods by railways.

3. With reference to Explanation (i) to section 16(2)(b), where the goods are received by third person or agent on the direction of registered person while acting as agent or otherwise, it is deemed as receipt of goods by the registered person. In the given case, the CHA has cleared the goods under the direction of the registered person and stored the same at the warehouse. Accordingly, the company is satisfying the condition posed by section 16(2)(b) read with

the Explanation to it and thus it shall be deemed that coal has been received by the company.

4. Clause (g) of section 17(5) blocks the credit in case the goods are lost. In the given case, coal has been received by the company on clearance from Customs Authority. On the basis of bill of entry, the company can claim ITC. Assuming that the company has availed ITC on the basis of bill of entry, if goods are lost during the transit from port to factory, the company has to reverse the ITC as per clause (g) of section 17(5).

Q18. Whether all the conditions under section 16(2) [clauses (a), (b), (c) & (d)] should be satisfied before / at the time of availing ITC or one or more conditions can be complied with after availing ITC?

Ans. The conditions laid down in section 16(2), are cumulative in nature and the registered person has to satisfy all of them to avail the ITC. ITC claimed is provisional and is liable to reversal if the tax is not paid by the supplier. Therefore, condition in clause (c) may or may not be satisfied before /at the time of availing ITC but the same needs to be satisfied for the ITC to be confirmed. However, there is no process of verifying the above condition as prescribed in clause (c) above as one can only check the date of filing of Form GSTR-3B of the supplier but not the tax paid therein.

Further, ITC will also need to be reversed if the condition set out in the Second Proviso to section 16(2)(d) is not satisfied. As per the Second Proviso where a recipient fails to pay to the supplier the amount towards the value of supply along with tax payable thereon within a period of 180 days from the date of issue of invoice by the supplier, an amount equal to the ITC availed by the recipient shall be added to his output tax liability, along with interest thereon.

Q19. Payment for goods or services or both should be done within 180 days as otherwise the whole ITC would be disallowed. State whether proviso to section 16(2) is also applicable to transactions between sister concerns. Further, what are the consequences, if ITC is not reversed after 180 days of non-payment to the supplier due to the bad financial position of the customer.

Ans. As per section 16(2)(d) read with rule 37, ITC shall be reversed in proportion to non-payment to supplier, immediately after the expiry of 180 days from the date of issue of invoice. Such ITC can be re-availed upon payment of the amount to the supplier.

The proviso to rule 37(1) provides that payment shall be deemed to have been paid for the purposes of availing ITC in respect of transactions covered by Schedule I. Transactions between sister concerns are related party transactions covered under Schedule I. Thus, such condition of 180 days payment does not apply to sister concerns.

Since payment within 180 days is mandatory for availment of ITC as per section 16(2), availment of ITC without payment within 180 days shall amount to wrongful availment of ITC, when the supplier is not a sister concern, and may give rise to demand and recovery proceedings. No exceptions are made for bad financial position of the recipient.

Q20. Till what time after the end of a financial year, can the ITC be claimed on invoices pertaining to that financial year?

Ans. As per section 16(4), due date to avail ITC is the due date of furnishing the return under section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Q21. Whether ITC needs to be reversed after 180 days?

Ans. 1. As per the second proviso to section 16(2), where a recipient fails to pay to the supplier of goods/services (other than in reverse charge cases), the amount towards the value of supply along with tax payable thereon, within 180 days from the date of issue of invoice by the supplier, an amount equal to the ITC availed by the recipient is required to be added to his output tax liability, along with interest thereon, in such manner as prescribed. The third proviso to section 16(2) provides that the recipient shall be entitled to avail of such credit on payment made by him to the supplier of the amount towards the value of supply of goods/services along with tax payable thereon. Further, as per rule 37(4), the time limit under section 16(4)

shall not apply for re-availing the ITC availed in accordance with the provisions, that had been reversed earlier.

2 In the aforesaid section as well as the rule, the words used are "*fails to pay to the supplier*." A view, therefore, is sometimes taken that the requirement of paying back / reversal of ITC is applicable only where there is failure on the part of recipient to pay as per the terms, consequently delaying the same beyond 180 days and not where the payment term is itself beyond 180 days as in that case no "failure" to pay the supplier can be attributed to the recipient. However, there is no ruling / authority/ guidance available to support such a view of distinguishing cases based on payment terms.

3. Therefore, provisions under the second proviso to section 16(2) are required to be treated as applicable in cases where payment has been made to the vendor beyond 180 days as per the relaxed payment terms and ITC will have to be paid back/ reversed, together with interest, after 180 days.

4. Incidentally, whereas the reversal of ITC due to non-payment to supplier within 180 days would also entail interest cost @18% p.a., there is also time limit for availing ITC, as provided under section 16(4) which cannot be lost sight of particularly in cases of long credit period, extending beyond 180 days.

In such cases, with a view to avoid interest @ 18% p.a. and also the risk of missing on the time line to avail ITC, it may be advisable to avail ITC when all other conditions are fulfilled but to pay back / reverse the same immediately (as payment will not be made within 180 days) and re-avail the credit on actual payment, for which there is no time limit as per rule 37(4) referred to earlier. Such a course of action would also be cash flow neutral.

Q22. In case, payment against the tax invoice is made after 180 days, whether a registered person can pay interest to the Government voluntarily for the period between the date of expiry of 180 days and actual date of payment to the supplier instead of reversing the ITC?

Ans. In cases where payment is not made within 180 days, the ITC availed must be reversed and interest should be paid. Section 16(2)(d)

clearly provides that ITC availed should be added to the output tax liability. Such ITC can be re-availed on payment of the amount to the supplier.

Further, it must be noted that interest shall be paid from the date of availment of such ITC till the date of its reversal.

Q23. Whether ITC can be claimed if depreciation availed on capital goods is reversed later on?

Ans. 1. Yes, provided the revised income tax return wherein depreciation earlier availed on tax component of capital goods has been reversed, is filed within the time limit allowed under section 16(4) for claiming ITC.

2. Section 16(3) provides that 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, ITC on the said tax component shall not be allowed.

   Further, section 16(4) provides that a registered person shall not be entitled to ITC in respect of any invoice or debit note for supply of goods/services after the due date of furnishing the return under section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

   Thus, broadly speaking, the time limit for claiming ITC is 20th October following the end of the financial year, unless the registered person has furnished his annual return for the year before 20th October, in which case the time limit for claiming ITC would be restricted to that date.

3. The claim for depreciation including that on tax element will be made through income tax return which would be filed after the end of the financial year. Any revision in the income tax return reversing such claim in respect of depreciation on tax component will have to be done by filing revised income tax return. The time limit for filing revised return would normally be beyond the time limit as mentioned earlier under GST Law for

claiming ITC. If such a revised income tax return is filed before the time limit for claiming the ITC, the registered person can claim ITC and not otherwise as the last date for claiming ITC would then be over. There is no specific requirement for ITC that the claim for depreciation on tax element cannot be revised but such revision has to be done by properly filing the revised income tax return in time for claiming ITC, and then there would be no bar on ITC claim.

Q24. Reverse charge liability is discovered during the course of filling of GST Annual Return.

Can the taxpayer avail ITC on such tax paid through Form GST DRC-03 along with interest while filing Form GSTR-9 of the respective year?

Ans. ITC on the taxes paid under reverse charge at the time of filing Form GSTR-9 through Form GST DRC-03 is permitted, however, the registered person has to ensure the compliance of section 16(4).

Even though tax under reverse charge is payable by the recipient, the effective supply relates to invoice issued by the supplier. As per rule 36(1) the registered person can avail ITC based on any of the following documents, namely, -

→ an invoice or debit note issued by the supplier of goods or services or both, **where the supplier is registered person**;

→ an invoice issued in accordance with the provisions of clause (f) of sub-section (3) of section 31, subject to the payment of tax, **where the supplier is un-registered person and tax is payable under RCM**;

→ 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;

→ an ISD invoice or ISD credit note, or any document issued by an ISD in accordance with the provisions of sub-rule (1) of rule 54.

From the above rule it appears that the receipt is eligible to take ITC of the taxes paid under reverse charge based on either tax Invoice of

the registered supplier or self-invoice generated for the supplies procured from unregistered persons. No other document is prescribed for claiming ITC in respect of tax paid under reverse charge. Hence, on conjoin reading of section 16 of the CGST Act, 2017 with rule 36 of the CGST Rules, 2017 we can conclude that, the ITC of tax paid under reverse charge is also *"in respect of invoice"* either self- generated or issued by the registered supplier should take ITC earlier of the below given dates:

a. the due date of furnishing of the return under section 39 for the month of September following the end of financial year.

b. furnishing of the relevant years annual return.

Q25. X Ltd. started setting up a project for thermal power generation, but the company went into bankruptcy & liquidation even before the operations started (only 30% of plant was completed). Now, the liquidator is selling all the assets including plant and machinery. Considering that there is no GST on their output, they have not availed any credit since the year 2017 and GST returns are yet to be filed.

Can X Ltd. avail that credit now ignoring the time limit restrictions?

Ans. The time limit for availing ITC is provided in section 16(4) which specifies that the supplier shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of the financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

If we analyse the above provision, it could be seen that it mentions about the bar on availment of ITC after the "*due date"* of furnishing of the return under section 39 for the month of September following the end of the financial year. The words used are "*due date of*" and not "*date of*". As the time limit for availment of credit is already over credit cannot be claimed.

Q26. Motu and Patlu Private Limited is registered under GST. It has been served a notice, in the month of December 2020, asking as

to why the GST registration should not be cancelled (*suo-moto*), since Form GSTR-3B has not been filed for more than 6 months. On perusal of the records, it appears that the returns have not been filed since March 2020. Further, as per the records it has carried on business only in the month of March 2020 and for the period April 2020 to December 2020 there was no outward supply, but it has received invoices for the input service pertaining to the financial year 2019 – 20. It decides to file all the returns and report compliance. The details for filing the returns are as follows:

(Amount in Thousands)

PARTICULARS	CGST	SGST	IGST
Liability of outward supply	100.00	100.00	200.00
Opening balance of ITC in electronic credit ledger	25.00	25.00	130.00
ITC against the inward supply for the month of March 2020	40.00	40.00	170.00
ITC against the inward supply accounted in books during April 20 to December 20; but pertaining to financial year 2019 – 20	10.00	10.00	-

The company is of the view that there is no cash pay-out of taxes since it has enough ITC to pay the tax liability.

Is the contention drawn by the company, correct?

Ans. From the above question, it is clear that the registered person is filing Form GSTR-3B belatedly (during or after December 2020) and it wants to pay the tax using the balances of electronic credit ledger. In this connection, the total ITC available in electronic credit ledger as opening balance i.e., Rs. 1,80,000.00 can only be used to pay the taxes for the month of March 2020. However, the ITC against the inward supply received in the month of March 2020 is time-barred as per section 16(4). The sub-section (as amended) is reproduced below:

> **"***(4) 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 due date of furnishing of the return under section 39 for the month of September following the end of financial year*** *to which such invoice or debit note pertains or* ***furnishing of the relevant annual return****, whichever is earlier."*

In the given scenario, the last date for taking the ITC pertaining to the financial year 2019-20 was the due date of filing the return for the month of September 2020, which is 20.10.2020. Since, Form GSTR-3B of March, 2020 is being filed during or after the month of December, 2020, neither the ITC of March 2020 nor the other ITC pertaining to financial year 2019-2020 can be availed. Thus, the balance tax needs to paid using electronic cash ledger along with interest.

Q27. My GST registration was cancelled due to non-filing of returns. After 8 months, cancellation of my registration was revoked from back date (from the date of cancellation).

Can I claim ITC on inward supplies received during the cancellation period?

Ans. As per section 16(4), a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier. Thus, in the given case ITC can be availed by the taxpayer for the inward supplies received during the cancellation period subject to the time limit as stated above.

Q28. For service provided during the financial year 2020-21, invoice would be issued by the supplier in December 2021 (e.g., invoice dated 15-12-2021). As per the agreement, invoice should be raised within 30 days of completion of services.

Whether in such case, the recipient would be able to claim ITC on the basis of such invoice in Form GSTR-3B of December 2021 (if all other conditions are complied with)?

Ans. As per rule 36, invoice issued by supplier of goods or services or both in accordance with provisions of section 31 is one of the specified documents on which ITC can be availed by a registered person provided other conditions therein such as invoice containing the specified particulars, tax claimed in invoice not being in pursuance of any order where demand has been confirmed on account of fraud, etc. and furnishing of the details of supply by the supplier in Form GSTR -1 are also fulfilled.

As stated in the question, all these conditions would be complied with in the instant case. The only issue is that the invoice would be raised on 15-12-2021 for the services provided in 2020-21 and whether such delay in raising invoice would bar credit in the hands of recipient.

Any agreement as to time for raising invoice will have no implication for ITC entitlement.

As per section 31(2) read with rule 47, the supplier of service is liable to issue tax invoice within a period of thirty days from the date of supply of service. While the supplier of service shall be liable for any penal consequences for the delay, there is no provision to bar ITC to recipient on account of delay by supplier in raising invoice so long as documentary requirements and other conditions to avail ITC are met.

We must also refer to the provisions under section 16(4) as to time limit for entitlement to take ITC. The time limit is due date of furnishing the return under section 39 for the month of September following the end of financial year to which the invoice (on which ITC is availed) pertains, or furnishing the relevant annual return, whichever is earlier.

In the instant case, since the invoice would be raised on 15-12-2021, it can be said that the invoice pertains to the year 2021- 22 and as ITC would be claimed in the return for December 2021 itself, it would be well within the time limit to claim ITC for 2021-22. As such, there would be no contravention on time limit as well.

Thus, we can fairly say that since all conditions would be fulfilled, the recipient can claim ITC in the return for December 2021.

Q29. Sub-section (4) of section 16 provides the time limit of taking ITC. However, sub-section (2) of section 16 has a non-obstante

clause, i.e., it is notwithstanding anything contained in section 16. Does this mean that ITC can be availed without the time limit restriction set under sub-section (4)?

Ans. The non-obstante clause in section 16(2), which mentions the conditions for the taking ITC, states that:

> *"Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him* ***unless,****-*
>
> *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
>
> *(b) he has received the goods or services or both*
>
> *(c) subject to the provisions of section 41, the tax charged in respect of such supply has been actually paid to the Government and*
>
> *(d) he has furnished the return under section 39".*

Section 16(4) provides the time limit within which the ITC can be claimed. It lays down that a registered person **shall not be entitled** to take ITC after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

Harmonious interpretation of the relevant sections 16(2), 16(4) and 39, is to be made to achieve the objectives of the legislation. Taking ITC is not a matter of right and it is to be granted by the authority if all the stipulated requirements / conditions are complied with. In this view of the matter, the time limit prescription cannot be overlooked or ignored inspite of the non-obstante clause contained in section 16(2).

It is to be noted that section 16(2) prescribes the conditions and eligibility for taking ITC whereas section 16(4) lays down the time limit within which one can take ITC.

Sub-clause (d) of sub-section (2) of section 16 stipulates "*furnishing of return under section 39"* for entitlement of ITC. This clause nowhere mentions timely submission of returns and/or debarring of filing of any return belatedly, for being entitled to avail ITC. The "*notwithstanding"* clause, in section 16(2) goes to convey the effect that section 16(2) supersedes all the sub-sections of section 16 including sub-section (4). As such, if a registered person who has complied with the conditions stipulated in section 16(2) including the furnishing of returns and or rectification of any return belatedly, he is entitled to ITC going by the wordings of the non-obstante clause contained in section 16(2).

It may be specifically noted that both sub-sections (2) and (4) mention about the disentitlement of ITC unless the conditions mentioned in section 16(2), or the timelines specified in section 16(4) are met. Since both, these sub-sections of section 16 talk about the disentitlement of ITC only, there is no conflict at all and hence both sub-sections (2) and (4) co-exist and operate simultaneously.

However, it is important to make a note of third proviso to sub-section (2) of section 16 read with rule 37(4) which lays down that the time limit specified in sub-section (4) of section 16 shall not apply to a claim for re-availing of any credit, in accordance with the provisions of the Act or the provisions of this Chapter, that had been reversed earlier.

Hence, ITC has to be taken within the time stated in section 16(4) – whenever it is to be availed for the first time. However, in case of re-availing of any credit, the time limit specified under section 16(4) shall not apply.

Q30. Company A did not avail ITC during financial year 2019-2020 considering certain items as ineligible. However, based on the recent judgement of High Court under the erstwhile indirect tax laws in similar cases, where the Court has allowed the credit, the company has availed the credit during financial year 2020-2021 before September 2020 by accounting the same as 'prior period income'.

Since ITC was earlier declared by the company as ineligible, whether it can avail ITC now?

Ans. This matter concerning claim of ITC which has been reversed earlier has been analysed by the Courts under the erstwhile law.

In *ICMC Corporation Ltd. v The Customs, Excise and Service Tax Appellate Tribunal [2014 (1) TMI 1473]* Madras High Court; the Hon'ble High Court held that:

> *"Availment of suo moto credit which was reversed earlier - eligible CENVAT credit under rule 6(5) of CCR - Refund claim under Section 11B - Whether the assessee was entitled to take credit to the tune of ₹ 3,21,308/- as per rule 6(5) of the Central Excise Rules, 2004 in respect of those services specifically mentioned in the book, which was earlier reversed by the assessee - Held that:-* ***assessee originally availed the Cenvat Credit on service tax for discharging its liability. However, for sound reasons, it reversed the credit. Strictly speaking, in this process, there is only an account entry reversal and factually there is no outflow of funds from the assessee to result in filing an application under section 11B of the Central Excise Act, 1944 claiming refund of duty - it was not a case of refund of duty falling under section 11B of the Central Excise Act, 1944 and that the assessee was to comply with the provisions of Section 11B of the Act.*** *The view of the Tribunal that the assessee should seek reversal in the appropriate judicial forum, if the assessee was aggrieved by the earlier order herein, does not arise at all.*
>
> *Sum of ₹ 3,21,308/- for which suo motu credit was taken by the assessee was forming part of ₹ 5,38,796/-, which was earlier reversed by the assessee.* ***On the admitted fact, ₹ 3,21,308/- represented the enumerated input services as given under rule 6(5) of the CENVAT Credit Rules, 2004, we have no hesitation in accepting the plea of the assessee that on a technical adjustment made, the question of unjust enrichment as a concept does not arise at all for the assessee to go by section 11B of the Central Excise Act, 1944*** *- order of the Tribunal is set aside and allow the appeal filed by the assessee and hold that legally speaking there is no impediment in the asseesee taking suo-motu credit - Decided in favour of assessee."*

From the above pronouncement we can infer the following:

→ The registered person is eligible to claim re-credit of the CENVAT, which was **originally availed as eligible** and the same was available for discharging tax pay out.

→ The reversal of CENVAT credit is only an accounting entry and factually there is no outflow of funds.

→ The reversal does not tantamount to the payment of taxes, which warrants filing a refund application.

→ Consequently, there is no unjust enrichment by the registered person.

→ Further, in the absence of legal provision refraining the registered person from availing back the credit reversed by him, re-credit is allowed.

However, the benefit of the above case will not be available in this case, since here ITC was originally classified as ineligible and the same was not available for making payment of outward tax liability.

Q31. Section 16(4) specifies the time limit for availing ITC. What is date of availment of ITC as per GST law? To illustrate, ITC is duly availed in books of accounts as per valid tax invoice and payment has also been made to vendor in same month. However, the GST return of that month is filed in November of next financial year. So, whether it is correct to say that ITC has been availed within the prescribed time limits in books of account and the delay is only in filing of GST returns?

Ans. Section 16(2) is an overriding section and it enlists the conditions to be satisfied for availing ITC. In clause (d) of this sub-section, it is clearly mentioned that '*no registered person shall be entitled to the credit of any input tax unless he has furnished the return under section 39'.*

Rule 61(1) states that GSTR-3B is the return specified in section 39(1). Combined reading of the above two provisions makes it amply clear that for availing / taking valid ITC, mere recording of the same in the books of accounts is not sufficient, it must be reported in the return and reflected in the electronic credit ledger too.

Hence, in the given case, if the return is filed in November of the next financial year, ITC will be considered as not availed within the time limit prescribed under section 16(4).

Q32. Registered person imports raw material under Advance Authorisation issued under Foreign Trade Policy without payment of duty. Advance Authorisation has been issued on the condition that the registered person will export material equivalent to specified quantity as per Standard Input Output Norms within the specified time. Registered person fails to export specified quantity of material as undertaken due to Covid 19. It pays duty on the value of raw material imported under Advance Authorisation along with applicable cess and IGST and interest thereon.

Can the registered person claim ITC of IGST paid on raw material imported under Advance Authorisation and used for goods sold in domestic market?

Ans. As per section 16(4), "a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both *after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier*".

A registered person can claim ITC on import of raw materials as per section 16(2) read along with rules 36(1) basis the prescribed documents. The document which enables an importer to claim ITC of IGST paid is 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.

In this case, the importer has failed to meet the export obligation of Advance Authorisation and the said bill of entry which allowed import of goods has been re-assessed under section 17 of the Customs Act mandating payment of customs duty & IGST on the imported goods. Based on these facts and the provisions of section 16(4), a view may be taken that the restriction to claim ITC within a specified time period is applicable only in the case of tax invoice or debit note and not for bill of entry and thus, the registered person is entitled to claim ITC.

Q33. Whether the time limit of availing ITC as provided under section 16(4) is also applicable for re-claiming the ITC which is reversed for non-payment of the value of supply and tax payable thereon within 180 days of the issue of invoice?

Ans. As per rule 37(4), the time limit specified in sub-section (4) of section 16 shall not apply to ITC, which is reversed on account of non-payment of the value of supply and tax payable thereon, within 180 days of the issue of invoice. In other words, in case of ITC re-claimed after payment to the supplier, the restrictions under the said section does not apply. It is thus amply clear that the time limit under section 16(4) applies only for taking ITC for the first time and not for re-claiming the ITC which has been availed earlier and then reversed.

Q34. A professional / CA firm obtains professional indemnity insurance (PII). Can he / it take ITC of GST paid on such PII?

Ans. Sub-section (1) of section 16 states: *"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."*

Obtaining a professional indemnity insurance by a professional or a CA firm to indemnify any future risk is an activity undertaken in the course of business. Further, section 17(5)(b)(i) blocks ITC only on life insurance & health insurance. Therefore, there is no restriction in availing ITC of GST paid on such PII.

Q35. On behalf of the recipient, a supplier has paid an amount to third party. The third party has raised invoice directly in the name of the recipient. The supplier has included the amount paid to third party on behalf of the recipient for the recovery in its invoice and has charged GST on it.

Is the recipient eligible to avail ITC on the invoices raised by third party as well as the supplier for this specific amount?

Ans. As per section 16(2) a registered person is eligible to take the ITC only if he has received the invoice as well as the invoiced goods

and/or or services, tax has been paid and he has furnished the return.

In the given case, the recipient has received the goods and/or services only once and hence he is not entitled to take credit on both the invoices. Even if he takes the ITC, he has to add the same to his output tax liability after expiry of 180 days as he will not pay any amount to third party. As per the proviso to section 16(2), if the recipient fails to pay the supplier of goods or services or both within 180 days from the date of issue of invoice, ITC is to be added to output tax liability along with interest thereon.

Q36. When multiple trucks are delivering the goods covered in one invoice, what is the time at which the ITC can be claimed?

Ans. In accordance with first proviso to section 16(2) of the Act, 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.

Therefore, in a case where multiple trucks are delivering the goods covered in one invoice, ITC for said invoice shall be availed by the person in the monthly return of the tax period in which he/she receives the last lot of goods for the said invoice i.e., when last truck carrying goods for said invoice reaches the recipient.

Q37. Whether ITC needs to be reversed in case of cross charge invoicing where there is no actual remittance of the payments in view of the condition laid down in the second proviso to section 16(2)?

Ans. Schedule-I to the CGST Act, 2017 referred in section 7 covers transactions made without consideration (e.g., branch transfer outside State). The proviso to rule 37(1) stipulates that the value of supplies made without consideration as specified in Schedule I shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16. Therefore, ITC reversal shall not apply to transactions covered under Schedule-I. Hence, there is no such requirement of reversal of ITC on account of non-payment by the branches.

Q38. Section 16(2) of the Act requires four conditions to be fulfilled for availing eligible ITC. One of the conditions in clause (d) is if

he has furnished the return under section 39. A person, who has opted for QRMP scheme, needs to pay tax on monthly basis and he has the option to pay such tax on self-assessment basis and in self-assessment working, he can use the eligible ITC for payment of GST. However, since he will be filing his Form GSTR-3B on quarterly basis the condition of clause (d) will not be fulfilled and whatever ITC he is utilizing for payment of monthly GST will be ineligible ITC.

What can be the possible solution in this scenario?

Ans. As per section 16(2), entitlement to ITC is based on the fulfilment of the following four conditions:

> *"(2) Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him unless-*
>
> *(a) he is in possession of a tax invoice or debit note issued by a supplier registered under this Act, or such other tax paying documents as may be prescribed;*
>
> *(b) he has received the goods or services or both*
>
> *(c) subject to the provisions of section 41, 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"*

Thus, out of the four conditions specified above, condition in clause (d) is relevant for this question and thereby ITC is available only if the recipient has filed Form GSTR-3B as per section 39(1). However, as a special case, the Board has issued a Circular to the effect that the registered person who is opting for Quarterly Return Monthly Payment Scheme (QRMP scheme) can discharge their output tax on self-assessment basis using ITC estimated as per Form GSTR-2B, which is explained in detail in the forthcoming paragraphs.

The Board has issued *Circular No. 143/13/2020 – GST dated 10-11-2020* by drawing the power conferred in section 168(1), in order to explain the QRMP scheme in simple terms and in order to

ensure the uniformity in implementation across the field formations. In the said circular in *Para No. 6.1 (b)* it is stated that, where a registered person who has opted for QRMP scheme and has also planned for payment of tax in Form GST PMT-06 under self-assessment method for the first two months of the quarter, can pay the tax due by considering the tax liability on inward and outward supplies and the ITC available. Further, the circular clarifies that for the ascertainment of ITC for the month, an auto drafted ITC statement in Form GSTR-2B for every month shall be considered. Hence, adjusting the ITC while making monthly payment through GST PMT-06 is just a method prescribed in the Circular to ascertain the amount of tax to be paid by debiting electronic cash ledger. However, eligibility to avail that ITC will depend upon the condition of filing Form GSTR 3B as per section 39, as prescribed under clause (d) of section 16(2).

Q39. Can ITC be denied in case of reverse charge where self-invoice is not issued? Whether ITC is available in the month when the expenditure was incurred?

Ans. A combined reading of sections 9(3) and 31(3)(f) read with rule 36(1)(b), would show that a self-invoice is applicable in case of supplies made by unregistered suppliers and tax liability is to be discharge on reverse charge basis. In case the supplier is a registered person, self-invoice is not required to be issued by the recipient.

Rule 36 contains an exhaustive list of documents based on which ITC can be claimed. The two relevant documents are (i) invoice issued by supplier; and (ii) self-invoice, subject to payment of tax.

Thus, for reverse charge supplies by registered person, ITC can be availed on the basis of supplier's invoice. For reverse charge supplies from unregistered suppliers, ITC cannot be availed in the absence of self-invoice.

It has already been clarified by CBIC that ITC in respect of reverse charge supplies is available in the same month as payment of reverse charge tax. However, there may be timing difference between the month of expenditure of reverse charge supply and the month in

which time of supply for such reverse charge supply may arise. Since, the words used in rule 36 are '*subject to payment of tax*', it can be said that ITC can be availed in the same month as expenditure, without waiting for the time of supply to arise.

It is worth noting here, that a Flyer on ITC issued by CBIC clarifies that ITC would be available based on self-invoice along with proof of payment of tax.

Q40. An invoice is in the name of a registered person located in a particular State, say Delhi but goods or services in respect of it are directly received/ consumed by distinct persons in the other State, say Maharashtra on the instructions of registered person located in Delhi.

Delhi avails ITC on that particular invoice and raises cross charge invoice on Maharashtra.

Can availment of ITC by Delhi be questioned since it has not received the goods/services though the invoice is in its name?

Ans. As per the Explanation to section 16, 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;

In the given scenario, the person located at Delhi is the registered person and the goods have been delivered to the distinct person in Maharashtra on the registered person's instructions. Therefore, the registered person located in Delhi is deemed to have received the goods and he is eligible to take ITC.

Similarly, the registered person in Delhi will be deemed to have received the services and thus, will be eligible to take ITC.

Q41. XYZ Ltd. has placed purchase order (PO) on supplier Y for one year with a clause that if Y defaults or fails to file Form GSTR-1/ GSTR-3B, XYZ Ltd. can deduct or withhold payment from subsequent payments to avoid ITC loss to the company. Initially, XYZ Ltd. made full payment of first two monthly invoices and availed ITC. Y failed to file Form GSTR-1/GSTR-3B for the second bill which involved ITC of Rs. 50,000/-.

While processing third bill of Rs. 3,00,000/- of Y, XYZ Ltd. withheld Rs. 50,000/- in terms of its PO clause till Y filed & furnished proof of filing GST return / payment and paid balance of Rs. 2,50,000/-.

Is any ITC reversal required by XYZ Ltd. for non-payment of such withheld amount within 180 days? Can it be said that XYZ Ltd. has failed to pay while the amount is withheld as per the terms of the purchase agreement to protect the interest of the corporation and to force the vendor for GST compliance?

Ans. To the extent of the withheld amount i.e., Rs: 50,000/- on the third invoice, XYZ Ltd. is required to reverse the proportionate ITC, if the same is not paid within 180 days. Even the claim of ITC for Rs. 50,000/- in respect of second invoice is not possible until the same is uploaded by the supplier in Form GSTR-1.

Q42. In cases where the registration status of a person is showing as inactive / suspended, whether such person can avail ITC for the GST IRN raised on his name?

Ans. Section 16 entitles only a registered person to avail the ITC and hence an inactive / suspended taxpayer will not be able to avail ITC unless the said registration is activated / restored by way of cancellation of the earlier order to inactivate / suspend the registration number of the supplier.

The provisions relating to suspension are contained in section 29 read with rule 21A. During the period of suspension, the taxable person is not allowed to make any taxable supply and refund is not granted to him.

Rule 21A(4) provides that the suspension shall be deemed to be revoked upon completion of the proceedings by the proper officer

under rule 22 and such revocation shall be effective from the date on which the suspension had come into effect. This clearly indicates that the suspension is temporary and if the registration is revoked/cancelled, still, the status of the taxable person is "Registered" from the date of suspension till the date of either cancellation or revocation.

GST registration is shown as inactive in cases where the taxpayer has migrated but had not fulfilled the requirements relating to the documents for registration. If the required documents are submitted, the registration is granted from the date of migration.

In all the above scenarios, the taxpayer will remain eligible for ITC.

Q43. What happens to the ITC which is availed on or before October' 2019 when compliance under rule 36(4) was not introduced in the law? Whether taxpayer is eligible to avail such credit even though such credits are not available in Form GSTR-2A report?

Ans. Form GSTR-2A is for information purpose only and not for disallowing the ITC of the claimant dealer. It reflects the details of invoices uploaded / furnished by the supplier in Form GSTR-1.

The Finance Act, 2021 has inserted section 16(2) (aa) which prescribes the condition of furnishing the invoice details in Form GSTR-1 for claiming ITC by the recipient. These details will be reflected in Form GSTR-2A. Section 16(2) (aa) is yet to be made effective. Hence, the condition of furnishing invoice wise details does not exist in the Act.

However, *Notification No. 49/2019 - Central Tax (Rate) dated 9-10-2019* introduced rule 36(4) from 9-10-2019. Hence, this rule has no application for the period prior to 9-10-2019. Prior to 9-10-.2019, the taxpayer was eligible to claim the ITC even if, the same was not appearing in Form GSTR-2A.

Hence, for the period prior to 9-10-2019, there is no restriction under GST law to claim ITC on invoices not appearing in Form GSTR-2A of the recipient.

Q44. Can sales invoices accounted for as B2C instead of B2B related to financial year 2019-20 be uploaded in Form GSTR-1 of March 2021 so that the buyer can avail the ITC in respect of the same?

GST on that invoice had already been paid in the respective month's Form GSTR-3B. Form GSTR-3B & Form GSTR-1 for the month of September 2020 and Form GSTR 9 for financial year 2019-20 have already been filed.

Ans. The error of declaring the invoice as B2C instead of B2B is procedural in nature. The GST law does not have any specific provision to deal with such type of errors. Further, as per section 37, the time limit for rectifying the error has already lapsed and therefore, it will not be possible to rectify that entry.

Q45. Whether ITC can be availed on sales promotion expenses?

Ans. Sales promotion expenses are integral part of any business and are undertaken in the course or furtherance of business. Accordingly, ITC on sales promotion is fully available.

Also, sales promotion expenses are of different types. It can be by giving something free along with the main product or floating of schemes like "*Buy 1 Get 1 free*" or like giving any product, gift, memento etc. on any festival or other occasions.

The only rule which needs to be kept in mind is that any product given without consideration will be liable for reversal of ITC or would be liable to tax, if the same tantamount to supply in terms of Schedule I.

If the promotional item is included along with the main product and sold together at a single price without mentioning that it is free, then it will mean that the sale value is inclusive of both the items and hence, ITC will be available.

[Refer *Circular No. 92/11/2019-GST dated 7-03-2019 for details]*

Q46. To avail ITC, the recipient has to make payment to the supplier within 180 days from the date of issue of the invoice. Whether this condition is to be fulfilled even in the case of branch transfers from head office to other regions and *vice versa* or a mere book entry to transfer the amount in the books of the recipient to a control account is enough?

Ans. Branch transfers from head office to other regions and *vice versa* fall under Entry No. 2 of Schedule I of the CGST Act,2017. By virtue of second proviso to section 16(2) read with proviso to rule 37(1), the condition of 180 days payment does not apply in cases covered

under Schedule I. The relevant extracts of Schedule I, second proviso to section 16(2) and First Proviso to 37(1) are as under:

Entry No.2 of Schedule I:

"2. *Supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business:"*

Second Proviso to section 16(2):

"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:"

First Proviso to section 37(1):

"Provided that the value of supplies made without consideration as specified in Schedule I of the said Act shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16:"

Q47. Mr. Z have claimed ITC in Form GSTR- 3B of January 2020 for an invoice dated January 2020 and also fully paid the vendor. Due to Covid-19 and cash flow issues, the supplier could file his returns for the period January 2020 to October 2020 only in the month of November 2020. The supplier paid tax with interest. Whether Mr. Z is required to reverse the ITC availed in the month of January 2020?

Ans. Sub-section (1) of section 41 entitles the registered person to take credit of eligible input tax, as self-assessed, in his return on a provisional basis. However, the above said provisional credit is permitted on satisfaction of the conditions and restrictions prescribed in the Rules.

One of the conditions, for the recipient to avail ITC is to match inward invoices with invoices uploaded by the supplier, prescribed in rule 36(4).

Rule 36(4) mandates that ITC can be availed only on those inward invoices which are uploaded by the supplier under section 37(1) in his Form GSTR - 1/ Invoice Furnishing Facility (IFF). Further, if the invoice is not furnished by the supplier as stated above, then the ITC is restricted to 10 % (applicable then i.e., from 1-01-2020 *vide Notification No 75/2020 – Central Tax dated 15-10-2020*) [substituted to 5% *from 10% vide Notification No. 94/2020 – Central Tax dated 22-12-2020* w.e.f. 1-01-2021] of the eligible credit taken in respect of invoices or debit notes uploaded by the suppliers as per section 37(1) of the Act.

Accordingly, ITC on an invoice, uploaded beyond the permitted time (belatedly) by the supplier will be subject to 10% of eligible credit taken on the ground of invoices or debit notes uploaded by the supplier on or before the due date of filing of Form GSTR-1. Needless to mention that excess ITC availed beyond the limit specified under rule 36(4) is liable to be reversed.

Q48. Whether an NRI who establishes a business in India, can claim ITC as NRI cannot avail ITC other than GST paid on imports?

Ans. As per the provisions of section 17(5)(f), ITC is blocked in respect of goods or services, or both received by a non-resident taxable person except on goods imported by him. As per the provision of section 2(77), a "*non-resident taxable person*" means any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India.

Thus, if the registration taken is that of a non-resident taxable person, ITC cannot be availed on any inward supplies other than imports. However, if the transactions undertaken are not occasional and the business is established in India, the person will not be a non-resident taxable person and regular registration will have to be taken. Therefore, in such a scenario, restriction of ITC as per the provisions of section 17(5)(f) will become non-applicable.

Q49. Services are rendered by the vendor and in consideration, instead of making payment, gift vouchers are issued to him which can be redeemed at a later point in time. Section 16(2)

requires the buyer to make payment within 180 days to the seller. Here, gift voucher is issued instead of payment.

Whether ITC needs to be reversed if the gift voucher is redeemed after 6 months?

Ans. The payment towards the supply of goods and / services can be made in money or otherwise. According to section 2(d) of Indian Contract Act, 1872, "*when at the desire of the promisor, promisee or any other person has done or abstained from doing or promises to do or abstain from doing something, such act or abstinence, or promise is called a consideration for the promise"*

Voucher according to section 2(118), is an instrument where there is an obligation to accept it as consideration or part consideration for supply of goods or services. Hence, on a comprehensive reading, in case of voucher, where there is a promise in the form of obligation to accept, is a sufficient consideration.

Thus, it is the date of issue of voucher that will be treated as the date of payment of consideration, and not the date of redemption of the voucher. Even if, the redemption of the voucher is after 180 days from the date of service rendered, no ITC is required to be reversed.

Q50. What is the maximum time limit within which the recipient of the supply should make payment to the supplier to avoid reversal of ITC?

Ans. The maximum time limit within which the recipient of the supply should make payment to the supplier to avoid reversal of ITC is 180 days from the date of invoice [second proviso to section 16].

Q51. Tax under reverse charge has been wrongly paid at 18% instead of 5%. Can the taxpayer claim ITC at 18% or will it be restricted to 5%?

Ans. As per section 9(3), the recipient of the supply liable to pay tax under reverse charge mechanism, is treated as if he is the person liable for paying the tax in relation to such supply. Hence, all the provisions of the Act are applicable to him, as if he is the supplier of goods or services or both.

Further, section 34 provides for issue of a credit note by the supplier within the prescribed time when the tax charged in a tax invoice is

found to exceed the tax payable in respect of such supply. In respect of any regular supply, which is not liable to reverse charge mechanism, the supplier will issue a credit note and reduce his output tax liability and the recipient shall reverse ITC to that extent and hence it is revenue neutral. Applying the same principle, the recipient of supply can issue a self-credit note within the time prescribed and keep the same for this record. The amount reported under Table 3.1(d) *[(d) Inward supplies (liable to reverse charge)]* and 4A (3) *[(3) Inward supplies liable to reverse charge (other than 1 & 2 above)]* may be reduced to that extent in GSTR-3B for the month in which self-credit note is recorded.

Q52. Whether ITC can be availed on goods/material like safety jacket, safety shoes, safety helmet and goggles, procured to ensure the safety of employees working at the construction site?

Ans. Every developer should ensure that his/her employees are provided with a safe work environment. It is mandatory for a developer with more than 50 workers, to issue a policy statement with respect to the safety and health of his/her workers and ensure that the said policies are followed. Usually, it is the Building and Other Constructions Workers (BOCW) Act, 1996 that regulates and provides assistance to workers engaged in construction activities.

As per section 16, every registered person shall, subject to such conditions and restrictions as may be prescribed, 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. The BOCW Act lays down health, safety and well-being measures relating to construction workers.

Accordingly, ITC can be taken on the tax component for procurement of required items to achieve the safety of their employees, which is a part of business activity as well as regulated by an Act.

Q53. Company A has a policy of reimbursing its employees the cost of mobile phones. Mr. B, an employee of Grade-A is entitled to reimbursement of upto Rs. 10,000/-. The Company purchased a mobile for Rs. 20000+GST on his behalf wherein Rs. 10000/- is borne by company and balance is deducted from Mr. B's salary.

Can the company claim 100% ITC on mobile phone? If the same is to be done partially, then on what basis disallowance is to be computed?

Ans. As per section 16, 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.

One important condition to claim ITC is that the registered person should be in possession of a tax invoice or debit note issued by a supplier registered under this Act.

In the given case, the mobile phone is purchased by the company in its name, the company is in possession of the tax invoice of the said mobile phone and the said mobile phone is used by the employee in the course or furtherance of the business of the company. Therefore, the company can claim ITC on full value of the mobile phone. Reimbursement of the amount of Rs. 10,000 from the employee via deduction from his salary won't make any impact on the claim of ITC.

Q54. ITC had been booked as expense against bills of December 2019 due to which it was not visible on the GST portal. Tax audit report and ITR for the financial year 2019-20 were filed in September 2020. Counter party filed GST return in December 2020.

Is it possible to revise the tax audit report and ITR by decreasing expenses and claiming ITC reflected in December 2020, in Form GSTR 9 of the financial year 2019-20? Can ITC be taken in the GST returns of financial year 2020-21?

Ans. As per section 16, a registered person shall not be entitled to take ITC in respect of any invoice or debit note for supply of goods or services or both after the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier.

In the given case, ITC pertains to financial year 2019-20 which can be claimed only upto the due date of furnishing of the return for the

month of September 2020 or furnishing the annual return for the financial year 2019-20, whichever is earlier. Since, ITC was not claimed before the said period, the same stands lapsed. It is also important to note that additional ITC cannot be claimed *via* Form GSTR- 9 (Annual Return). Tax audit report and ITR under Income Tax Act are irrelevant for claiming ITC.

Q55. Whether ITC can be availed on mobile phone, fridge, AC etc. in the name of firm?

Ans. As per section 16, 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.

In the given case, if the mobile phone, fridge, AC, etc. are purchased by the firm in its name and these are used by the partners and/ or employees of the firm in the course or furtherance of business of the firm, the firm can claim the ITC.

Q56. An employee books an air ticket for an official trip. He is later reimbursed by the company. The air ticket is issued by the airlines in the name of the employee. Whether the company can claim ITC on such air ticket?

Ans. As per section 16, every registered person is 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. Thus, the very test of availability of ITC requires the registered person to acquire such goods or services and thus, if the employee acquires it for the company and if invoice from the air travel agent is issued in the name of the company, ITC on such air ticket shall be available to the company.

This case acknowledges the fact that the ticket bears the name of the passenger (employee), and payment is made by the employee and later reimbursed by the company.

Q57. Can ITC be claimed on travelling expenses and accommodation charges incurred for attending a course, which will help in furtherance of business?

Ans. Section 16(1) provides that a registered person shall be entitled to avail ITC of inward supplies which are used or intended to be used in course or furtherance of business. Therefore, if travelling expenses or accommodation charges incurred are in the course or furtherance of business, ITC of said inward supplies shall be available.

However, with respect to travelling expenses the mode of transport plays a role. Let us see the options:

a) Travel by Cab - Ineligible as per section17(5)

b) Travel by Train in AC Coach- Eligible

c) Travel by Air- Eligible

With respect to accommodation expenses following points are noteworthy:

a) Accommodation within the State: If the room is booked in the name of the Company, ITC can be availed;

b) Accommodation outside the State: ITC cannot be availed since the place of supply provisions do not permit charging of IGST on immovable property services and ITC of CGST and SGST levied by a State different than the registered person's State is not available.

Q58. The recipient has fulfilled all the conditions of section 16 for availing ITC, but it is revealed from Form GSTR-2A/2B that the supplier has entered wrong invoice number or date or taxable value. Whether ITC can be denied in such case?

Ans. As per rule 36(2) the registered person is entitled for ITC in respect of any tax that has been paid only when the document based on which ITC is taken by him is, complete and contains all particulars as specified in the provisions of Chapter VI [Tax Invoice, Credit and Debit Notes] of the CGST Rules, 2017. However, the proviso to the rule 36(2) permits the registered person to avail ITC even in the cases, where the said document does not contain all the specified particulars but contains the following:

- 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.

In the given scenario, the registered person can take ITC, if the error is only in invoice no. and invoice date but all other mandatory requirements as prescribed in the proviso to the rule 36 (2) are satisfied.

However, as inferred from the above, where an error is on account of taxable value, ITC will not be permissible.

Q59. ITC is availed on the basis of Form GSTR 2B. Will photocopy of the invoice be sufficient if original invoice is not available?

Ans. As per rule 56 (1), it is the duty of the registered person to keep and maintain the relevant documents including invoices. However, if the original invoice is lost, the registered person should obtain a duplicate copy of the invoice from the supplier and keep it in records. Photocopy of the invoice is not sufficient to claim ITC.

Q60. If the supplier issues a time barred credit note he cannot reduce his output tax liability.

Whether in case of receipt of such time barred credit note, recipient needs to reverse the ITC?

Ans. Section 34 governs the principles of credit note. It specifies scenarios in which credit note can be issued & also the time limit, till which it can be issued for a particular financial year. If a credit note is issued post that specified time limit, the supplier shall not be entitled to reduce his liability.

On the buyer's end, the credit was claimed w.r.t original invoice and subsequently, a credit note is received, because of price drop or discount, or goods returned. As per provisions of section 16, the buyer needs to reverse the credit, even if the same is time barred, as the related ITC will not stand as eligible credit in his books.

Q61. A taxpayer is paying monthly maintenance charges and applicable GST to a housing society, where he has been allotted an apartment. The apartment is used for keeping his books of accounts. He is not claiming any depreciation on the apartment under Income-Tax Act, 1961.

Can he claim ITC on the GST paid on monthly maintenance charges as the premises is used for furtherance of business and the same is not falling under section 17(5)?

If no, then what precautions should be taken to substantiate the claim that the premises / apartment is used for business purpose.

Ans. Section 2(60) states that an "input service" means any service used or intended to be used by a supplier in the course or furtherance of business. Since, the ITC is not specifically blocked on maintenance charges under section 17(5) and the service satisfies the condition of being an input service, subject to fulfilment of other conditions under section 16, ITC on maintenance charges can be availed by the taxpayer.

Q62. How to re-avail ITC reversed as per rule 37 (payment beyond 180 days) on making payment for the value of supply and tax payable thereon, without violating the provisions of rule 36(4) thereof?

Ans. The restriction placed under rule 36(4) applies in context of ITC availed during the tax period and not in context of re-availing of ITC. Moreover, necessary working or reconciliation should be available with the registered person to explain that the said ITC claimed in the Form GSTR 3B during the tax period is not an excess claim of ITC but is the re-claimed ITC which had been reversed in earlier tax period in terms of rule 37 and is now being re-availed upon making the necessary payment.

2
Apportionment of ITC and Blocked ITC

Q63. A taxpayer lets out both residential and commercial properties on rent. Is ITC reversal required in such a case as residential properties are exempt from GST?

Ans. As per section 17(2) of the Act, where any goods or services are used partly for effecting taxable supplies and party for exempt supplies, ITC is restricted to the portion used for taxable supplies. Since "*services by way of renting of dwelling for use as residence"* is exempt under *S No. 12 of Notification No. 12/2017 - Central Tax (Rate) dated 28-06-2017* and renting of commercial properties is taxable, ITC attributable to the residential portion needs to be reversed.

Q64. Whether a hospital can claim ITC on stationary items like paper, pens, printing materials etc.?

Ans. S.No. 74 of *Notification No. 12/2017- Central Tax (Rate) dated 28-06-2017* exempts the services by way of health care services by a clinical establishment, an authorised medical practitioner or paramedics.

Section 17(2) read with rule 42 stipulates that ITC in respect of inputs or input services, being partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, shall be attributed to the purposes of business or for effecting taxable supplies in the prescribed manner therein.

Therefore, ITC relating to supply of taxable output is eligible for claiming ITC and that portion attributable to exempt supply is not eligible and not claimable.

The principal supply in a hospital is health care services, which is exempt from the levy of GST as mentioned above. Hence, there cannot be any question of availing ITC in the first instance.

In view of the foregoing, a hospital cannot claim ITC on stationary items like paper, pens, printing materials etc.

However, services of providing hair transplant, or cosmetic or plastic surgery are outside the scope of health services and thus, are liable to tax. Hence, ITC can be claimed on such inward supplies proportionately.

Therefore, if any other specific taxable supply is rendered by an hospital which has no nexus with exempt health care services, then the related ITC, on the above inputs, is claimable considering the provisions of section 16 (ITC eligibility) and section 17(2) read with rule 42 (restriction on ITC) e.g., supply of drugs and medicines by a pharmacy in an hospital to any person other than in-patients.

Q65. S Energy Pvt. Ltd. is setting up solar energy infrastructure and going to sell its electricity to the Electricity Board.

Whether the taxpayer is eligible to take ITC on material and input services used in construction of such solar energy project?

Ans. Supply of electrical energy is exempt *vide* S No. 104 of *Notification No.2/2017-Central Tax (Rate) dated 28-06-2017*.

As the supply of electrical energy is an exempt supply, the ITC involved in setting up of related solar energy infrastructure is not eligible by virtue of section 17(2) read with rule 42 (restriction on ITC).

Q66. Whether ITC can be availed on freight paid for transportation of exempt supply (e.g., charcoal)?

Ans. As per section 17(2), ITC is restricted to so much of the input tax as is attributable to the exempt supplies. This implies that the ITC attributable to exempt supplies will not be available.

In the present case, freight service is attributable to supply of exempt goods. The tax paid on freight for transportation of exempt supply, will not be eligible as ITC in view of above-mentioned provisions of section 17(2)

This is also confirmed in rule 42(1)(c) where the term T_2 is specified as input tax, attributable to inputs and input services intended to be used exclusively for effecting exempt supplies and this amount is reduced from total ITC [T].

Q67. A business entity purchases a vehicle for the purpose of carriage of goods. Whether ITC can be claimed on purchase of such vehicle?

Ans. The question is silent on the nature of activity of the business entity, which may be relevant for responding. The answer is given below considering two situations as to the nature of its activities:

(a) The business entity has purchased the vehicle for carriage of goods – a goods transport vehicle, to use the same for carriage of goods for the purpose of its own business, for example, by a manufacturer for movement of raw material to factory, a dealer in furniture or white goods for delivery to customers or a service provider for moving material for work at site. Since the use of the vehicle is in the course or furtherance of business, as per section 16(1), the business entity will be entitled to take ITC of the tax paid on purchase thereof as ITC on motor vehicles for transportation of goods is not blocked under section 17(5), either on its amendment w.e.f. 01.02.2019 or under its provisions prior to amendment - motor vehicles for transport of goods are clearly out of the categories of vehicles for which ITC is restricted thereunder. However, as per section 17(2), if the business entity is engaged in effecting exempt supplies as well, ITC on vehicle will be restricted to so much of input tax as is attributable to taxable supplies of the entity.

(b) The business entity is in the business of GTA service in relation to transport of goods. In this case the position as to basic entitlement to ITC would be the same as under (a). However, *Notification No. 11/ 2017- Central Tax (Rate) dated 28-06-2017* as amended, under its S.No. 9 (iii) provides for rate of tax of 5% (2.5% CGST + 2.5% SGST) - similar Notification under IGST - in respect goods transport agency services for transportation of goods subject to condition that the ITC on goods and services used in supplying the service has not been taken. If the business entity opts for this, it will not be entitled to ITC on purchase of the vehicle for carriage of goods. Also, if the business entity has opted to pay tax @12% (6%CGST+6SGST) or 12% IGST on its services of

transportation of goods, under the above Notifications, with ITC eligibility, as per section 17(2), ITC will be restricted to so much of input tax as is attributable to taxable supplies and ITC will not be eligible on input tax attributable to its transportation and other services exempt from tax under *Notification No. 12/2017 -Central Tax (Rate) dated 28-06-2017* as amended – similar Notification under IGST, for example, transportation of agricultural produce, milk, food grains, consignments for consideration below specified amounts, hiring to another GTA etc.

Q68. Whether–GST is payable on parking space fees paid to the co-operative society and whether ITC is blocked on any services availed by the society for such parking space?

Ans. *TRU vide F.No.332/04/2017* -TRU released FAQs on the levy of GST on supply of services in the context of the Co-operative housing society and has clarified as under.

Sinking fund, repairs & maintenance fund, car parking charges, non-occupancy charges or simple interest for late payment, attract GST, as these charges are collected by the RWA/ Co-operative Society for supply of services meant for its members.

The exemption provided under *Notification No.12/2017- Central Tax (Rate) dated 28-06-2017*, at S. No. 77, available to a housing society up to specified amount, is towards reimbursement of charges or share of contribution collected from members for sourcing of goods or services from a third person for the common use of members in a housing society.

The parking space fees are not such reimbursement or share of contribution of expenses for common use of members. Parking space fees is collected from only those members who avail of the paid parking facility and hence it is supply of service by the Society to such members. Therefore, GST is payable on parking space fees paid by such members to co-operative society (of course, subject to threshold exemption to the Society).

Since GST is payable by Housing Society on parking space fees collected from the members, the society would be eligible to ITC on services like manning, mechanical parking etc. availed by it for the

parking. Considering the complex arrangements, the larger societies / RWA typically have free / paid parking for their members. ITC may be proportionately available to the extent of car parking space fee is paid, as per section 17(2) and rule 42.

Q69. A person is engaged in export of exempt goods. Can he avail credit of input and input services utilized for export of such goods? If yes, then, can he also utilize credit of input and input services for discharge his liability towards taxable supply?

Ans. As per section 2(23) of the IGST Act, 2017 read with section 16 thereof, "*zero rated supply*" means any of the following supplies of the goods or services or both, namely – (a) export of goods or services or both; or (b) supply of goods or services or both to SEZ developer or a SEZ unit.

As per section 2(47), "*exempt supply*" means supply of any goods or services or both which attracts nil rate of tax or which may be wholly exempt from tax under section 11 or under section 6 of the IGST Act, 2017 and includes non -taxable supply (supply of goods or services like petroleum products which is not leviable to tax under this Act).

"Zero rated supply" is not included within the meaning of "exempt supply" although no GST would be leviable on export of goods.

As per section 2(108), *taxable supply* means a supply of goods or services or both which is liable to tax under CGST Act, 2017.

Section 17(2) read with rule 42 provides for apportionment of ITC where the goods or services or both are used partly for effecting exempt supplies and partly for effecting taxable supplies including zero rated supplies. ITC would be available only to the extent of the amount of ITC as is attributable to the said taxable supplies including zero rated supplies. Thus, there is no bar on ITC in respect of goods or services used for effecting zero rated supplies which are in fact treated at par with taxable supplies for ITC eligibility. ITC would be ineligible only in respect of goods or services to the extent used for effecting exempt supplies.

The aforesaid provision for eligibility of ITC on zero rated supplies does not make any distinction between export of goods which are otherwise taxable and the goods which are exempt. Moreover, section 16(2) of the IGST Act, 2017 specifically provides that ITC may

be availed for making zero rated supplies, notwithstanding that such supply may be an exempt supply.

Thus, a person engaged in export of exempt goods can avail ITC on inputs and input services utilized for such goods exported by him. He can also utilize the ITC for discharge of his liability towards supply of taxable goods as there is no restriction under the Act or Rules for such utilization of ITC.

Q70. Clubs sell liquor, which is an exempt supply. They also supply taxable goods as well as services. Thus, they have capital goods used commonly for both exempt and taxable activity. It is very tough to maintain asset-wise records for a period of 60 months.

How should the club take the ITC on such common capital goods in Form GSTR-3B and how should it reverse the same? Whether entire ITC should first be claimed in Form GSTR- 3B and then the same should be reversed in 60 instalments by applying ratio of exempt turnover to total turnover?

Ans. In the instant case, clubs sell alcoholic liquor for human consumption which is a non-taxable supply as per section 2(78). Non-taxable supply means a supply of goods or services or both which is not liable to tax under the CGST/ IGST Act. Exempt supply as per section 2(47) includes non-taxable supply and thereby alcoholic liquor for human consumption is an exempt supply.

Thus, as per section 17(2), if the goods or services are used by the registered person partly for effecting taxable supply including zero rated supply and partly for effecting exempt supply, then ITC shall be restricted only to so much of the input tax as is attributable to the said taxable supply including zero-rated supplies.

In the given case, as the club is using the common capital goods for both taxable supply of goods or services and also for the supply of alcoholic liquor for human consumption, which is an exempt supply, the club is eligible to avail ITC only on the taxable supply of goods or services. The machinery provision for determination of ITC on common capital goods attributable to exempt supply is provided in rule 43 and also the modus operandi for reversing such ITC is also provided in the said rule.

Thus, club can take ITC on such common capital goods used for both taxable supply of goods or services and supply of alcoholic liquor for consumptions, being an exempt supply, in Form GSTR-3B in the tax period in which it has received such capital goods and after that the ITC on such common capital goods will need to be reversed in the Form GSTR-3B for every tax period along with interest for the next 60 tax periods in the ratio of exempt turnover to total turnover. Further, the club cannot escape from the responsibility of maintaining the assets-wise records for the period of 60 months, as it is statutorily warranted under section 35 read with rule 43. As per section 35, the club has to maintain records of ITC availed in a particular financial year for the period of 72 months from the due date of filing the annual return.

Q71. Subsidy / Grant-in-aid received from Central / State Government as incentive under a scheme against the purchase of fixed assets. The registered person has incurred some expenditure in respect of the said scheme / arrangement. Whether ITC on any of the expenditure attributable to subsidy / grant need to be reversed or full ITC can be taken against outward supply?

Ans. To decide whether ITC on any of the expenditure attributable to subsidy / grant need to be reversed or full ITC can be taken, we have to ascertain whether such subsidy / grant received from the Central Government or State Government as incentive is supply or not.

Subsidy or grant-in-aid received from the Central Government or State Government is a form of financial aid or support extended to an economic sector generally with the aim of promoting economic and social policy. The registered person has received the subsidy or grant from the Central Government or State Government either as compensation or as an incentive for purchase of fixed assets under a scheme or arrangement. Compensation or incentive received in the form of subsidy is not a supply as it is not covered under any of the activity specified in section 7(1). Further, subsidy or grant-in-aid received from the Central Government or State Government will not form part of consideration [relevant excerpts given below] as per section 2(31) and consequentially will not form part of the turnover.

> *(31) "consideration" in relation to the supply of goods or services or both includes—*

(a) *any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person* ***but shall not include any subsidy given by the Central Government or a State Government****;*

(b) *the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person* ***but shall not include any subsidy given by the Central Government or a State Government:***

……..";

Though, the subsidy received by the registered person is not treated as consideration, it has to be determined whether the registered person has done any of the activities or transactions specified in Schedule I, which may make such activity a supply as per the said Schedule. But based on the facts given in the question, no such activity or transaction has been done to classify such activity as supply as per Schedule I.

Therefore, the receipt of subsidy from Central Government or State Government will not be considered as supply, as it is not covered under any of the limbs of scope of supply as provided in section 7(1) of the CGST Act, 2017 and consequentially such subsidy amount will also not fall under any of the following categories of supply:

- Taxable supply as per section 2(108)
- Exempt supply as per section 2(47)
- Non-taxable supply as per section 2(78)

The subsidy or grant received from Central Government or State Government is not a supply *per se* and also not an exempt supply. Further, it is also not an exempt supply in terms of section 17(3). Therefore, the registered person need not reverse ITC on the expenditure attributable to receipt of such subsidy / grant as per section 17(2) and section 17(3) read with rule 42.

Section 17(2) and 17(3) are reproduced below for ready reference and understanding:

> "***17.*** *(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.*
>
> *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."*

Further, expenditure incurred in the form of receipt of any inward supply of service for the purpose of getting such subsidy or grant from the Central Government or State Government for purchase of fixed assets can be classified as an activity done in the course or furtherance of business and hence ITC can be availed as per section 16(1). Further, ITC on such services is also not subject to any of the restrictions specified in section 17(5).

Q72. In case of a restaurant charging GST @ 5%, where will the ineligible ITC be shown in Form GSTR-3B - under blocked credit [section 17(5)] or under rule 42/43 or under Other?

Ans. Explanation No. (iv) to *Notification No. 11/2017-Central Tax (Rate) dated 28-06-June 2017* provides as follows:

> *"(iv) Wherever a rate has been prescribed in this notification subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that, -*
>
> *(a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and*

(b) *credit of input tax charged on goods or services used partly for supplying such service and partly for effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of* ***sub-section (2) of section 17*** *of the Central Goods and Services Tax Act, 2017 and the Rules made thereunder."*

In view of the above explanation in the principal notification, it is clear that such ITC reversal with respect to restaurant services shall be reported under "ITC reversal under rule 42/43" row *[Table 4. Eligible ITC (B)ITC Reversed (1) As per rules 42 &43 of CGST Rules]* [relevant rules to section 17(2)] in Form GSTR-3B.

Q73. Can ITC be claimed on the goods purchased for being supplied to SEZ units?

Ans. The eligibility and conditions for taking ITC are contained in section 16.

If goods are purchased complying with the requirements of section 16, ITC involved in such purchases is claimable. Supplies made to SEZ are zero-rated supply in terms of section 16(1)(b) of the IGST Act, 2017. Section17(2) does not place any restriction on availing ITC on inputs/input services used for effecting zero-rated supplies. In view of this, ITC can be claimed on the goods purchased for being supplied to SEZ units.

Q74. Tax on services provided by a direct selling agent (DSA) to the banks is payable under reverse charge. Whether he is eligible to take ITC on the supply received by him to provide the service to the banks and can he claim refund of such ITC?

Ans. If the DSA is providing only such services, tax on which is payable under reverse charge by the banks, he is not required to obtain registration and thus, there does not arise any question of availing ITC by him.

If the DSA is engaged in other activities also on which tax is payable by him under forward charge, he will be required to obtain registration (after crossing the prescribed turnover threshold) and can thus, claim ITC. However, it is to be noted that supplies on which tax is payable under reverse charge by the recipient are considered as exempt supplies in terms of section 17(2). Thus, the DSA will be required to

reverse the ITC attributable to the reverse charge supplies made by him in accordance with the provisions of rule 42 and can claim the balance ITC which is attributable to taxable supplies made by him.

Q75. Whether a registered person engaged in goods transport agency service is required to reverse ITC availed on capital goods on shifting from forward charge to reverse charge in the middle of the financial year?

Ans. S No.9 of *Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017*, has been amended *vide Notification No. 20/2017-Central Tax (Rate) dated 22-08-2017* allowing a GTA to opt for forward charge @ 12% along with the ITC benefit. Further, as per the decision taken at the 20th GST Council Meeting on 05-08-2017, the said option shall be exercised at the beginning of the financial year.

If the GTA intends to shift to reverse charge from forward charge, there are conflicting views on exercising the same in the middle of the financial year, as it may be contrary to the decision of the GST Council.

In relation to the reversal of ITC, it is to be noted that as per section 17(3), the supplies on which tax is payable under reverse charge are considered as exempt supplies for the purpose of reversal of ITC under section 17(2). Therefore, ITC shall not be allowed towards inward supplies used exclusively in supplying GTA services. Further, ITC towards the common inward supplies used for goods transport agency services and other outward supplies (with ITC benefit) shall be reversed as per the procedure prescribed in rule 42. The same has also been provided in explanation (iv) of the *Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017.*

Q76. Where the supplies attract GST on reverse charge by the recipient of services like sponsorship services or brokerage services for insurance, is the service provider eligible to claim refund of ITC on input services or goods used for providing the services.

Ans. As per section 17(2) of the Act, a supplier cannot take ITC of GST paid on goods or services used to make supplies on which the recipient is liable to pay tax. Since no ITC is eligible, the question of refund does not arise.

Q77. Is ITC available on two-wheeler with engine capacity of more than 40cc? Explain with reference to the definition of motor vehicles.

Ans. As per Section 17(5)(a) ITC is blocked on—

(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

As per section 2(76), motor vehicle shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicles Act, 1988.

As per clause (28) of section 2 of the Motor ***Vehicles Act, 1988****:- "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 centimeters***

Hence, as per the definition, motor vehicle includes a two-wheeler having engine capacity more than 25CC (cubic centimeters meaning CC engine capacity). Accordingly, any two-wheeler or three-wheeler including bikes, scooters, auto, etc. having engine capacity more than 25CC will be covered within motor vehicle and thus ITC will be not eligible as per section 17(5)(a). However***, if the two-wheeler is used for transportation of goods (other than for transportation of persons) or is being used for the three exceptions listed out in clause (a) of section 17(5), then ITC can be availed on purchase of such two-wheelers.***

It is also pertinent to note that, the above analysis has been made with reference to the specific provisions laid down for motor vehicle and if the ITC on such two-wheeler used for business purpose is availed based on exemptions provided in clause (a) of section 17(5), one may have to perform further test to ensure that such ITC is not blocked under any other provisions specified in the law. For e.g., if the said two-wheeler is used for transportation of exempted supply of goods, then ITC on the same shall be ineligible as per section 17(2) read along with rule 42 and rule 43.

Q78. Renting of vehicle on hire by the owner to GTA (logistics) company is exempt by virtue of S.No.22 of *Notification No. 12/2017 - Central Tax (Rate) dated 28-06-2017.* However, when all the repairs and maintenance expenses of such vehicle is met by the logistics company, can they claim ITC on the same?

Ans. The hire charges of a vehicle falls within the scope of the term "supply" and is taxable by any measure agreed upon by the parties concerned including the transport on per tonne basis.

The provisions of section 17(5) are to be looked into, to clinch the issue involved and the relevant portion of this section is reproduced hereunder:

> *"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) …*
>
> *(aa) …*
>
> *(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:"*

The restriction of blocking of credit mentioned in section 17(5)(a) or (aa) is not applicable to a vehicle taken on hire for transportation of goods.

In the light of above, the logistic company, if it is paying tax under forward charge, is entitled to take credit of input tax charged on repairs and maintenance of vehicle and on any inward supply of goods or services or both which are used or intended to be used in the course or furtherance of his business, which is not specifically blocked under section 17(5).

Q79. XYZ Pvt. Ltd. is in the business of monitoring telecommunication network in different areas. Their employees need to monitor network strength by moving into nearby area where telecommunication tower is installed keeping portable monitoring machine with them. For that, they need to hire cab / book taxi on daily basis for their employee as they need to move from one area to another area to check network strength.

Can ITC on rent-a-cab / hiring of motor vehicle be availed in this case?

Ans. Blocking of ITC under section 17(5)(a) & (ab) in relation to motor vehicles is dependent on the seating capacity and only in specified circumstances ITC is allowed.

Section 17(5)(a) & (b)(i) reads as:

"(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) 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;

……..

(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;

……

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.

Therefore, ITC on renting or hiring of motor vehicles (seating capacity upto 13 including driver) is available only when the motor vehicle is used for (i) further supply of such motor vehicles, (ii) making further supply of transportation of passengers, (iii) imparting training on driving such motor vehicles. Further, ITC on renting or hiring of motor vehicles can be availed by a registered person if he is in the same line of business or where the service is being provided to the employees out of a statutory obligation. The situation in question is not covered within the exceptional circumstances, so specified, for eligibility. Hence, ITC cannot be availed in this case.

Q80. Whether ITC can be availed on insurance charges paid for light vehicle, if recipient entity is not engaged in the same line of business (i.e., in buying or selling of light vehicles)?

Ans. Section 17(5) (ab) restricts ITC on general insurance for motor vehicles, but proviso thereto allows ITC, if the motor vehicles are used for purposes specified in section 17(5)(a) i.e., where the motor vehicle is used for (i) further supply of such motor vehicles,

(ii) making further supply of transportation of passengers,
(iii) imparting training on driving such motor vehicles.

Further, ITC on general insurance of motor vehicles is not blocked if the said service is received by *a taxable person engaged in the manufacture of such motor vehicles or in the supply of general insurance services in respect of such motor vehicles.*

In the given case, the registered person is not engaged in any of the activities specified above and hence, ITC on general insurance on motor vehicles cannot be claimed by him.

Q81. A car is used in a tea estate for carrying cash from bank to the garden for wage payment to tea garden workers, exclusively for business.

Whether ITC on insurance and repairs in respect of such car is eligible or it is blocked?

Ans. Section 17(5)(a) and (ab) provide conditions for blocked credit for motor vehicle.

As per section 17(5),

"(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.

(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):"*

As per section 17(5)(a), ITC on motor car is allowed only when the car is used for making listed taxable supplies viz., further supply of motor vehicles, transportation of passengers, imparting training on driving such motor vehicles. In the given case, the car is used for transporting cash to tea gardens which is not covered in any of above three purposes above. As per section 17(5) (ab), if credit on motor

car is blocked in section 17(5)(a), ITC on insurance, servicing, repairs of such motor vehicle is also not allowed. Hence, in the given case ITC on the insurance and repairs services is not admissible.

Q82. Mr. P have a proprietary firm engaged in retail business. He has bought a car which is used for business and personal purpose. Whether ITC is available on purchase of such car?

Ans. As per section 17(5)(a), ITC on a motor vehicle (having seating capacity of upto 13 persons) is blocked except when it is 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.

As per the definition of motor vehicle under section 2(76), car is a motor vehicle. In this case, the car (motor vehicle) is not used for any of the specified purposes mentioned in sub-clauses (A), (B) and (C) and hence the ITC thereon will be blocked.

Therefore, ITC is ineligible on the car regardless of whether the car is used for business or personal purpose.

Q83. Mr. X sells concrete slabs and delivers the same by using his own truck. Whether he can claim ITC on truck repair, insurance etc.?

Ans. As per section 17(5)(a), ITC on a motor vehicle (having seating capacity of upto 13 persons) is blocked except when it is 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.

Further, ITC on services of general insurance, servicing, repair and maintenance related to motor vehicles, which are not used for the purposes specified in clauses (A), (B) and (C) mentioned above, is also blocked.

A truck falls under the definition of motor vehicle and are generally meant for carrying goods and not passengers. And motor vehicles for

transport of goods are clearly out of the categories of vehicles for which ITC is restricted. Hence, ITC thereon is not blocked and thus, ITC on services of general insurance, servicing, repair and maintenance related to a truck will also not be blocked.

Q84. M/s XYZ Ltd. is engaged in the business of buying and selling of motor vehicles and providing car repair services. ITC is available in case of buying and selling of cars. The company intends to use one of its cars for picking and dropping customers. ITC has been taken on such car at the time of purchase as initially the company intended to treat it as trading item. However, now company wants to capitalize such car as it will use it for picking and dropping customers and thus, ITC on the same will get blocked. XYZ Ltd. in the near future will sell such car.

XYZ Ltd. wants to know whether it should reverse the ITC on such car and whether it can re-avail the ITC when ultimately it sells such car? Whether any interest will be payable on reversal of ITC as the entity has not taken any excess credit and the same was not blocked initially?

Ans. (i) As per section 17(5)(a), where the car is used for any purpose other than the following purposes, ITC is blocked

a. Further supply of motor cars

b. Transportation of passengers

c. Imparting training on driving such car

(ii) In the given case, the motor car has not been used for any of the above three purposes and hence, ITC becomes ineligible.

(iii) At the time of purchase of the car, XYZ Ltd. intended to resell it. However, subsequently it was decided to use it for pick and drop of customers. Hence, in the absence of any relevant provisions in law, the appropriate date for reversal of credit would be the date on which entry is passed in the books of accounts i.e., car as an inventory is transferred to fixed assets account, in other words, the date from which the car has been used for pick and drop.

(iv) XYZ Ltd. has to reverse the credit in the month from which car has been used for pick and drop i.e., for the purpose other than the purpose of resale. In case the reversal of credit taken earlier is made subsequent to the month of transfer from stock in trade to fixed asset, interest as per section 50 would be payable.

(v) At the time of re-sale of such car, *Notification No 8/2018-Central Tax (Rate), dated 25-01-2018* needs to be followed for ascertaining whether tax is payable on the sale of such car or not. In case the car is sold below the written down value (WDV), no tax is payable since, margin is negative and if the car is sold above WDV, tax is payable on the margin at the rate specified in notification (12% or 18% based on description of motor car specified in the notification).

Q85. Whether ITC can be availed on motor vehicles having seating capacity more than 13 persons when the taxpayer is also recovering the rentals from the employees and paying GST on the same at 5%?

Ans. Section 17(5)(a) blocks ITC on 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;"

Section 16 provides that every registered person shall 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.

From the said question it is evident that vehicle is used for and in the course of business and has seating capacity of more than 13 persons. Hence, the ITC thereon is not blocked under section 17(5).

However, *Notification No. 11/2017-Central Tax (Rate), dated 28-06-2017* states that if the supplier is charging GST @ 5%, ITC for inward supplies will not be available to him.

Therefore, if the taxpayer is paying GST @ 5% on rentals recovered from employees, ITC will not be available.

Q86. Can ITC be availed on expenditure incurred for repairing of motor vehicles?

Ans. The relevant extract of the provisions under section 17(5) which blocks ITC on motor vehicle and services related thereto is given hereunder:

> *"(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) 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;*
>
> *(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)."*

Clause (ab) clearly states that ITC on general insurance, servicing, repairing & maintenance will also be blocked, if these expenses relate to the motor vehicles, ITC on which is blocked under clause (a). Therefore, ITC on repair of motor vehicles cannot be availed if ITC on such motor vehicle is blocked under clause (a).

However, if the motor vehicle is used for the purposes specified under sub-clauses (A), (B) and (C) of section 17(5)(a), ITC on such motor vehicles does not get blocked. Therefore, ITC on related services of general insurance, servicing, repairing & maintenance for such motor vehicles would also be available.

Q87. Is ITC available two-wheeler scooter purchased for factory staff?

Ans. Section 17(5)(a) and (ab) provide conditions for blocked credit for motor vehicle.

As per section 17(5),

(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

In section 17(5)(a) as mentioned above, the ITC has been restricted specifically for motor vehicle. It is important first to determine whether scooter is a motor vehicle as per the definition in the CGST Act, 2017.

As per section 2(76), "motor vehicle" shall have the same meaning as assigned to it in clause (28) of section 2 of the Motor Vehicle Act, 1988 (59 of 1988)

As per section 2(28) of the Motor Vehicles Act, 1988, "motor vehicles" 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.***

As per above definition any two-wheeler with more than 25 cubic capacity would be covered under "motor vehicle" as per section 2(28) of the Motor Vehicle Act, 1988. Since two-wheeler scooter is a motor vehicle used for transportation of staff and not for the specified purposed listed in sub-clauses (A), (B) and (C), no ITC would be allowed thereon due to the restriction imposed under section 17(5)(a). Another important point needs attention in case of E-bikes and E-scooters. These kinds of electronic vehicles do not fall under the definition of "motor vehicles" since the engine capacity of these vehicles is not specified in cubic centimetres as they do not have any combustion engines. Hence, credit is available for these e-vehicles.

Q88. What is the applicable rate of interest on reversal of ITC under rule 42 of the CGST Rules?

Ans. As per rule 42(2)(a) interest is to be levied under section 50(1) of the Act. Section 50(1) read with *Notification No. 13/2017-Central Tax dated 28-06-2017* provides the rate of interest as 18%.

Q89. Whether ITC can be availed on insurance taken for an immovable property?

Ans. Clauses (c) and (d) of section 17(5) block ITC in relation to immovable property in respect of following inward supplies:

(i) works contract services when supplied for construction of an immovable property except where it is an input service for further supply of works contract service

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

Therefore, since in this case, general insurance services are not availed for construction, ITC will be available thereon.

Q90. M/s. Ajay and Sons, a partnership firm, is engaged in trading business and registered under GST. They desire to construct a building for commercial purposes. Hence, they avail the services of a Civil Engineer, who provides them the necessary blueprint as desired by the partners as well as technical support for completing the construction. Besides the above, the firm decides to purchase all the materials required for construction from registered vendors and hires the locals (i.e., masons and helpers) for the construction of the said building. The engineer is registered under GST and charges GST in his invoice for the services provided by him.

The firm wants to understand, whether GST charged by the engineer and the supplier of the construction materials is available as ITC?

Ans. Section 16(1) provides that every registered person, subject to prescribed conditions and restrictions, is entitled to take credit of

input tax charged on any supply of goods or services or both used or intended to be used in the course or furtherance of his business.

Sub-section (5) of section 17 has a non-obstante clause which overrides the benefits extended in section 16(1). Accordingly, no ITC of the taxes attributed to the purchases or cost listed under the sub-section is permitted even where the registered person successfully demonstrates that the ITC taken by them is part of expenses used or intended to be used in his business and forms part of further supply. It is pertinent to note that clauses (c) and (d) have been incorporated in sub-section (5) of section 17 to cover the transactions relating to construction.

As per clause (d), ITC on the taxes paid, against procurement of goods or services or both for construction of immovable property, is not allowed. Further, the explanation appended to the clause clarifies that "*construction*" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property. Accordingly, ITC of the taxes paid against the invoice issued by the engineer and the supplier of the construction materials cannot be availed as the same is blocked.

Q91. Radhe Pvt. Ltd. is into the manufacturing business. The board of directors decided to install renewable solar energy generator within the factory premises. The electricity generated will be captively consumed for manufacturing activity.

The board of directors wants to know the eligibility of ITC of the taxes paid on the installation of the said power plant.

Ans. A generalized interpretation of section 16(1) of the Act, implies that the applicant is entitled to credit of input tax charged on any supply of goods or services or both made to the applicant and used by the applicant in furtherance of his business. Here, electricity is produced by the solar power plant. Therefore, the supplies of goods or services or both that go into the setting up of the solar power plant can rightly be construed as supplies made and used by the applicant in furtherance of his business. However, this is subject to the conditions and restrictions as specified in section 16(2) and section 17.

Solar power generating system is either supplied under two or three separate contracts say - the supply of parts, supply of services, or

combination thereof. The applicability of the tax rate on supplies of equipment and services supplied under engineering, procurement, and construction contracts has led to a large number of disputes (due to different decisions on the matter by the Advance Ruling Authorities of various States).

At the 31st GST Council Meeting held on 22nd December 2018, the Council agreed to assign value to the supplies falling under *S. No. 234 of Schedule I in* Notification *No. 1/2017 Central Tax (Rate) dated 28-06-2017[NN 1/2017-CTR]*, when supplied along with other supplies like services under engineering, procurement, and construction contracts and goods not covered under the said entry. They recommended considering the deemed value of goods falling under *S no. 234* as 70% of the total amount charged and the remaining 30% value may be deemed as value of supply of services. Accordingly, notification to give effect to the above amendment was issued to resolve the issue that cropped up in the area of classification of supply. Accordingly, the receiver can demonstrate that they have received both goods as well as services. 70% of the contract value will be treated as solar power generating system and the balance 30% as a works contract (since it involves services under engineering, procurement, and construction contracts and goods not covered under *S No. 234 of the NN 1/2017-CTR*).

Sub-section (5) to section 17 has a non-obstante clause that overrides the benefits extended in section 16(1). Accordingly, no ITC of the taxes attributed to those purchases or costs listed under the said sub-section is permitted even where the registered person had demonstrated that the input supply is a part of expenses used or intended to be used in his business and forms part of further supply. It is pertinent to note that clauses (c) and (d) of sub-section (5) of section 17 cover transactions relating to construction.

As per clause (d), ITC of the taxes paid, against procurement of goods or services or both for construction of an immovable property (other than plant or machinery), is not allowed. Further, the explanation appended to the clause clarifies that "*construction*" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property. The expression “plant and machinery” in the clause 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.

In the given scenario, the solar power generating system is a plant and machinery on which ITC is available along with 30% of the works contract services, since the activity was provided in connection with the solar power plant.

Q92. Whether ITC can be availed for construction of roads in a factory? Such roads are used for transportation of goods and also for routine movement of employees.

Ans. A registered person is eligible to avail ITC, when the inward supply of goods or services or both are used by him for business or furtherance of his business and qualifies the conditions prescribed in the Act. In the given scenario, ITC on the construction of the road inside the factory premises will be permitted when the registered person can establish the following assertions:

a. construction service is for the business or furtherance of business.

b. the inward supply is not blocked under section 17 (5).

The registered person can satisfy the first assertion i.e., inward supply of construction activity is used for the business or furtherance of business, by placing a reliance on the following pronouncement, where the Bombay High Court allowed CENVAT on inward supply classifying it as integral part of the factory and necessary to run the factory:

CCE Nagpur v. Ultratech Cement Ltd. [2010 (20) STR 577 (Bom.)], where the Hon'ble High Court held the following:

> *"The processing of goods was in relation to manufacture implies not only production but the various stages through which the raw material is subjected to change by different operations. It is the cumulative effect of the various processes through which the raw material is subjected, the manufactured product emerges. Therefore, each step towards such production would be a process in relation to the manufacture.*

> *Whether any particular process is so integrally connected with the ultimate production of goods but for that, process, manufacture or processing of goods would be impossible or commercially inexpedient, that process is the one in relation to the manufacture. There is no warrant for limiting the meaning of expression "in the manufacture of goods' through the process of production of goods. In the instant case, I find that the construction of compound wall, rest room, toilet, security room, overhead tank, road laying activity project work or CC work, painting work, annealing sheds, pickling sheds, EB room, wire drawing room are all necessary to run the factory or not depends on the activity undertaken by the manufacture or as per the requirement of their manufacturing activity. In this case, from the facts, it emerges that all the constructions are integral part of the factory and hence credit taken over the input services by the respondents is eligible."*

From the above case law, one can conclude that construction of the road within factory premises, for transportation of goods and also for the routine movement of employees, is for the furtherance of business.

However, the eligibility of ITC further depends on the satisfaction of second assertion i.e., the credit on inward supply must not be blocked. As per section 17(5), ITC is *blocked* and not permitted even if the inward supply is used for the furtherance of business. It is pertinent to note that clauses (c) and (d) of section 17(5) cover transactions relating to construction. As per clause (c), ITC on inward supply of works contract services (construction of immovable property i.e., road) is not permitted, except where it is an input service for further supply of works contract service.

Further, the explanation appended to the clause clarifies that *"construction*" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation to the said immovable property. Consequently, ITC on the taxes paid to the works contractor for laying the road inside the factory is not allowed, since the cost needs to be capitalised as per the generally accepted accounting principles.

Q93. A housing society [Resident Welfare Association (RWA)] which is responsible for providing maintenance services, electricity back up through DG set etc. is collecting electricity dues based on sub-meter readings and paying to electricity authority which in turn supplies the electricity to a common point and raises electricity bill based on meter reading.

While computing proportionate credit under rule 42, whether the society needs to add the amount of electricity bill collected from residents in total turnover in the State to calculate admissible/ eligible ITC?

Ans. Supply of service by RWA (unincorporated body or a registered non- profit entity) to its own members by way of reimbursement of charges or share of contribution upto an amount of Rs. 7,500 per month per member *vide* N*otification No. 2/2018- Central Tax (Rate) dated 25-01-2018* for providing services and goods for the common use of its members in a housing society or a residential complex, is exempt from GST.

The term "turnover in State" as per section 2(112) and the term "aggregate turnover" as per section 2(6) includes exempt supplies also.

If the activity of collecting electricity dues based on sub-meter readings and paying to electricity authority is structured as a pure agent supply, such amount collected and remitted will not form part of turnover. However, if the activity is not a pure agent supply, it will form part of the turnover.

Q94. Whether ITC is available on purchase of base oil used in industry as fuel?

Ans. ITC paid on purchase of base oil is an eligible input provided the base oil is used in providing taxable supplies under GST.

, even though it is used in the course or furtherance of the business.

Q95. As per rule 42, ITC reversal is required on monthly basis and at year end final working is done. The difference is either reclaimed or excess is written off. ITC can be availed as per Form GSTR 2A/2B. Hence at the end of the year there are situations that many invoices are not reflected in Forms GSTR 2A/2B and

therefore ITC may not have been claimed. But in the account books, all the invoices have been booked. For example, for financial year 2020-21 related ITC was not reflected in Form GSTR 2A/2B of 2020-21 and reflected in say April 21. Thus, while computing the amount to be reversed as per rule 42 for financial year 2020-21, ITC which was availed in Form GSTR 3B of financial year 2020-21 will be considered. Therefore, for an ITC which was availed in April 21, outward supply in relation to that was made in financial year 2020-21. Thus, reversal working will give incorrect result. How to deal with such situation?

Ans. Please note that there is no provision of revised return under the CGST Act, 2017. The unclaimed ITC of any year can be claimed in Form GSTR-3B till the return filed for September in next year.

Rule 42 prescribes the revised working of entire ITC for the whole year 2020-21, whether claimed in 2020-21 or claimed in returns filed for April to September 2021. The rule provides for the additional claim / reversal restricted to D_1 and D_2 only.

'D_1'= ITC attributable towards exempt supplies out of common credit

'D_2' = ITC attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes shall be equal to 5% of common credit.

The effect of the D_1 and D_2 difference is only required to be reduced / paid back or claimed as ITC.

Since the reversal / reclaim is to be made before September 2021, there is sufficient time in the hands of the taxable person to calculate the values of T, T_1, T_2, T_3, T_4, C_1, C_2, D_1, D_2 etc., after the end of year. The ITC reflected in Forms GSTR 2A/2B till September 2021 can be considered for the revised working. Rule 42 does not provide for reversal / re-availing of ITC in respect of credit which is not common credit.

Thus, ITC claimed in April 2021 till September 2021 for the year 2020-21 can be considered for working for the purpose or Rule 42 and accordingly D_1 / D_2 can be calculated correctly.

Q96. In case of a health care company located in several States, ITC is not claimed on machinery due to exemption. However, when machine is transferred to another State, is it necessary to levy IGST? If the branch in the other State closes after 2 years and returns the machinery, whether IGST has to be levied again? The company loses tax many times as its output activity is exempt.

Ans. In healthcare sector, as per S No. 74 of *Notification No. 12/2017 - Central Tax (Rate) dated 28-06-2017* output services provided by clinical establishment to patients is exempt, but a similar exemption has not been provided in respect of inputs. Since it is an exempt supply (and not zero rated), tax charged on the inputs, input services and capital goods add to the cost of this sector.

As per the issue in question, the branch of company located in other State is a distinct person as per section 25. When machinery is transferred to another State, it will be treated as supply as per the provisions of entry No. 2 of Schedule I, thereby giving rise to liability of IGST in the transaction on the value as per rule 28. The fact that ITC had not been claimed on its purchase is irrelevant. The recipient being engaged in the provision of health care services is not eligible to claim ITC for the same as per section 17 read with rule 43(1)(a) and is thus, not even entitled to benefit of valuation provided in second proviso to rule 28. Furthermore, if the Centre in other State closes after 2 years and returns the machinery, the same procedure will be undertaken.

Q97. Under rule 42, a taxpayer is required to maintain detailed records for availing ITC at invoice level. A taxpayer is providing both taxable and exempt supply. For supply of goods, he is availing ITC directly attributable to the said supply. He may be procuring supplies in one invoice and segregating at his end for availing ITC. e.g., out of 100 items of that invoice, he has utilized 10 items as taxable and 90 items as exempt. He has all the records pertaining to the same. Whether it is allowed?

Is it mandatory that one particular invoice should be utilized exclusively either for taxable or for exempt supply?

Whether the taxable person can apportion the ITC by applying sub-rules (a) to (e) of rule 42(1) or is it mandatory to apply all sub-rules viz. (a) to (m) of rule 42(1) in every case?

Ans. Rule 42 prescribes the manner of determination of ITC in respect of inputs or input services and reversal thereof. It is amply clear that the object of the rule is to ensure appropriate reversal of ITC on inputs or input services which are utilised commonly for taxable supplies and exempt supplies as well as for non-business purposes.

The procedure given in rule 42 for reversal of ITC is to be applied in specified order. At the first stage, rule asks registered person to attribute respective ITC between taxable supplies, exempt supplies and other than business purpose supplies. If it is possible from the records maintained by registered person to segregate inputs and/or input services and corresponding ITC on consumption basis, registered person can segregate ITC between taxable supplies, exempt supplies and other than business purpose supplies on individual material and/or service consumption basis as provided in sub-rules (a) to (e) of rule 42(1). Post-segregation of ITC at first stage, if any balance ITC remains which is availed out of common input / input services, that needs to be apportioned and reversed as per the procedure laid down in sub-rules (f) to (m) of rule 42(1).

In the given case, since the taxpayer has maintained records for consumption of each item of inputs and/or input services, it is appropriate for him to reverse ITC as per sub-rules (a) to (e) of rule 42. Only if there is any common ITC that remains after such apportionment, he should reverse the same as per the procedure laid down in sub-rules (f) to (m) of rule 42. Thus, it is not mandatory to apply all sub-rules viz. (a) to (m) in every case.

Further, rule 42 requires the taxpayer to maintain detailed records for availing ITC at invoice level. However, if the taxpayer is able to maintain record at item level / consumption basis, it is well accepted. Accordingly, the registered person can attribute and reverse ITC on more accurate basis.

Q98. While rule 42 has a specific provision for reversal of 5% where inputs/input services are partially utilised for personal purposes and partially for business purposes, rule 43 does not provide any mechanism for reversal of ITC when the capital goods are used commonly for business and personal purposes. Does this

mean that in case of common use of capital goods for business and personal purposes, no reversal is required?

Ans. Yes, since the rule does not provide for the reversal of any ITC attributable to personal use, no such credit is required to be reversed from the ITC in respect of such common capital goods. However, the Rule clearly provides that whole of the ITC for the tax period is required to be reversed in cases where such capital goods is used or intended to be used exclusively for non-business purposes.

Q99. Whether ITC can be taken on LFR charges billed by a petroleum company to a dealer?

Ans. Licence fee recovery (LFR) charges are billed by the petroleum company to petrol pumps for petroleum.

As per section 9(2), petroleum products such as petroleum crude, motor spirit (petrol), high speed diesel, natural gas and aviation turbine fuel etc. are kept outside the purview of GST and hence these are not subjected to GST. A "non-taxable supply" is defined in section 2(78) as *"a supply of goods or services or both which is not leviable to tax under this Act or under the Integrated Goods and Services Tax Act".* Since these supplies are not leviable to GST, they become non-taxable supply.

As per rule 42(1)(c), the amount of ITC attributable to input and input services exclusively used for effecting exempt supplies shall not be credited to electronic credit ledger. It is to be noted that a non-taxable supply is included in the definition of exempt supply as given in section 2(47).

Hence, in the given case no ITC will be available on LFR because this input service belongs to the category of non-GST supply.

Q100. When camera and other things become old and are sold at cheaper rates, whether full ITC is available?

Ans. There is no necessity to reverse the entire ITC taken. The sale of old assets when ITC has been availed on such assets at the time of purchase is treated as supply even if made without consideration in terms of Schedule I to section 7.

Section 18(6) states method for reversal of ITC in respect of capital goods or plant and machinery on which ITC has already been taken.

The said section covers the situation wherein capital goods are being sold after use and it stipulates that in such cases amount payable by the supplier has to be either:

- ITC as reduced by percentage points as per the method specified in the relevant rule, or
- tax on transaction value,

whichever is higher.

Transaction value at the time of sale has to be determined as per section 15.

Q101. In rule 42, is it mandatory to calculate D2, i.e., 5% as non-business purpose, even if the company has not entered into any non-business transactions?

OR

If inputs are used solely for business purpose (both exempt and taxable) is the reversal of 5% (non-business purpose) of common credit required?

Ans. Section 17(1) provides that if goods or services are used for both business and non-business purpose, ITC shall be available for that part which is associated with business purpose.

Rule 42 provides the method for reversal of ITC on inputs/inputs services which attract the provisions of sub-section (1) or sub-section (2) of section 17, being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies.

Rule 42(1)(j) provides that the amount of credit attributable to non-business purposes if common inputs and input services are used partly for business and partly for non-business purposes, be denoted as 'D_2', and shall be equal to 5% of C_2'. Where C_2 is the common credit.

Section 17 provides that ITC is restricted to the input tax that is attributable to the business purpose and rule 42 prescribes the method for calculating ITC that needs to be reversed related to non-business purpose on an *ad hoc* basis even though usage of

common credit is not to the tune of 5%. As per the various judicial decisions, it is a settled principle that the Act will prevail over rules. Hence, there is no requirement to apportion D_2 as 5% for non-business purpose where the registered person is able to establish the fact that common credit is not used for non-business purposes.

Q102. How is the amount of ITC to be reversed computed for flats remaining to be sold after obtaining occupancy certificate?

Ans.

(i) The taxpayer shall draw reference to rule 42(3) for computation of reversal of credit pertaining to flats sold after obtaining occupancy certificate.

(ii) As per the aforesaid rule, ITC reversed in terms of section 17 has to be finally computed on a project basis from the date of commencement of the project or 01st July, 2017, whichever is later, till the date of completion of the project or first occupation of the project, whichever is earlier.

(iii) This computation has to be made on the basis of carpet area of project (flats) sold before and after receiving occupancy certificate before the due date of furnishing return for the month of September of the following financial year.

Q103. An entity makes both taxable and exempt supplies. It availed the entire ITC for financial year 2017-18 in the month of August 2018. For the purpose of reversal of ITC on common inputs/input services, turnover of taxable and exempt supplies of which period should be taken into account - financial year 2017-18 or August 2018?

Ans.

(i) As per section 2(106), tax period means the period for which the return is required to be furnished. Therefore, the details of credit were required to be updated in monthly Form GSTR-3B returns during financial year 2017-18. However, the taxpayer has the option to avail credit pertaining to a financial year till the due date of furnishing the return for the month of September of next financial year.

(ii) Rule 42 requires reversals to be made where the credit is utilized partly for non-business purposes or for partly carrying out exempt supply. The aforementioned rule specifies reversals to be computed on tax period basis i.e., the tax period for which credit pertains to (financial year 2017-18 in present case). Hence, the taxpayer will be required to compute reversal based on turnover of financial year 2017-18.

Q104. X Pvt. Ltd. is a GST registered entity providing hotel/ lodging services along with restaurant service. It charges GST on restaurant sales @ 5% and on lodging turnover (with declared tariff of more than Rs. 1,000 per unit) @ 12%.

Whether any ITC needs to be reversed in this case? If yes, then, how should the reversal amount be computed?

Ans.

(i) As per *Notification 11/2017-Central Tax (Rate) dated 28-06-2017* as amended by *Notification 20/2019 – Central Tax (Rate) dated 30-09-2019*, the rate of tax for restaurant services shall be 5% (without benefit of ITC) where it is not provided at a specified premise. Such a reduced rate prescribed by the Central Government is in line with the powers conferred by section 11(1). "*Specified premises*" means premises providing "hotel accommodation" services having declared tariff of any unit of accommodation above Rs. 7,500 per unit per day or equivalent.".

(ii) As per clause (iv) of Explanation to *Notification 11/2017-Central Tax (Rate) dated 28-06-2017, w*herever a rate has been prescribed subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that, -

(a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and

(b) credit of input tax charged on goods or services used partly for supplying such service and partly for

effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of sub-section (2) of section 17 of the CGST, 2017 and the rules made thereunder.

(iii) The credit pertaining to restaurant services is restricted and credit pertaining to the accommodation services can be availed. However, the credit common for both supplies (for example. professional charges, statutory audit fee etc.) will be liable for reversal in the ratio of the exempt turnover to the total turnover as prescribed in rule 42.

Q105. Whether ITC is available on medical reimbursement?

Ans. ITC on health services, life insurance and health insurance is blocked *vide* sub-clause (i) of clause (b) of section 17(5). Therefore, the employer shall not be entitled to take credit of input tax charged on the inward supply of health insurance etc, which are used to provide medical facilities to the employees, pensioners and dependants.

It is also to be noted that in proviso to section 17(5)(b), ITC 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

In the given pandemic scenario, if the health insurance or any health services or reimbursement thereof is extended to the employees in accordance with the Ministry of Health and Family Welfare Guidelines, if any, the same will be regarded as a statutory obligation and thus, the input tax involved can be claimed as ITC.

Q106. As per section 17(5), ITC is not allowed on Group Medical Insurance policy taken by the employers for their employees. In various service industries, where the employees of the service providers are deployed for the client business, there is an agreement with the client that the vendor will take group medical insurance policy for the deployed resources. Whether ITC can be taken on such group medical insurance policy?

Ans. As per section 17(5)(b)(i), ITC of life insurance and health insurance is covered under blocked ITC unless it is obligatory for the employer

to provide such insurance service to its employees under any law for the time being in force.

In the given case, if providing the group medical insurance to the employees is obligatory under any law for the time being in force, ITC on such health insurance will be eligible. However, if there is no statutory obligation, ITC will not be eligible.

Q107. Can ITC be taken on premium paid for life insurance and health insurance policies obtained by company for its employees?

Ans. As per section 17(5)(b)(i) of the Act, ITC is not allowable on life insurance and health insurance services received by any registered person. However, where such services are obligatory for an employer to provide to its employees under any law for the time being in force, then such ITC shall be allowable.

Q108. ITC on health insurance is blocked under section 17(5) but is available for making outward supply of the same category. A company which is not in the business of insurance has taken a group insurance of its employees at Head office level, and in turn raises a cross charge invoice on its branches for recovery of insurance expenses.

Can the company avail ITC on the health insurance in relation to which it has raised cross charge invoice on its branches?

Ans. When the head office recovers expenses of insurance from the other branch under the aegis of cross charge, it cannot be said to be providing services of insurance to the branch; it is merely in the nature of business support services. Hence, the blockage of ITC under section 17(5)(b)(i) on receipt of insurance services by the head office cannot be avoided.

Q109. Whether ITC is available on sweets purchased for being served in business meetings or employee get togethers organised by the taxpayer?

Ans. As per section 17(5)(b)(i), ITC is not allowable on inward supply of food and beverages or outdoor catering services by any registered person. However, where such outward supply of the entity is also of the same nature or where supplies are obligatory for an employer to provide to its employees under any law for the time being in force, such ITC will be allowable.

Q110. Whether ITC can be availed on staff welfare expenses?

Ans. Generally, the GST paid on staff welfare expenses is not an eligible claim. However, with effect from 01-02-2019, a proviso has been inserted in section 17(5)(b), which entitles an entity to claim GST paid on procurement of goods or services included in sub-clauses (i), (ii) and (iii), on the condition that it is obligatory for an employer to provide the same to its employees under any law for the time being in force. The relevant extract of section 17(5)(b) is given below-

"(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."

Hence, an entity will be eligible to claim GST paid on procurement of such goods or services to comply with an obligation under any law for the time being in force e.g., Employee Deposit Linked Insurance Scheme Act, 1976 applies to all employees to whom the provisions of The Employees Provident Funds and Miscellaneous Provisions Act, 1952 are applicable. This requires contribution only from the employer. GST paid on such scheme would also be eligible for the ITC.

However, it may be seen that the proviso is placed after clause (iii) and hence it seems to apply to the said clause alone. However, clause (iii) which deals with services of travel benefits extended to employees on vacation such as leave, or travel concession is predominantly in the nature of "*personal consumption"*. Hence, ITC is not permitted by any stretch of the imagination on them. Even in the CENVAT Credit regime, no credit was permitted on such expenses. Further, the proviso refers to 'goods' as well which are included only in sub-clause (i) [food and beverages]. Thus, a harmonious view can be taken that the Proviso is applicable for all the three sub-clauses.

Further in the *Agenda for the 28th GST Council Meeting (Volume - 1) dated 21st July, 2018* the Council rationalizes the amendment by clarifying that "*Presently, in accordance with the provisions of section 17(5)(b), ITC is not available in respect of food and beverages, health services, travel benefits to employees etc. This sub-section is being amended to allow ITC in respect of such goods or services or both where the provision of such goods or services or both is obligatory for an employer to provide to its employees under any law for the time being in force. This is a taxpayer-friendly amendment.*"

From the above Agenda also, one can conclude that the proviso is applicable to all three clauses.

Q111. Usually partners of a firm / directors of a company use club membership for convening meetings at the club with potential clients in the course of networking, etc. The meeting may or may not result in 100% conversion of the client to customer.

Whether ITC can be availed in such a case?

Ans. The GST paid on membership of a club cannot be availed as ITC as the same is specifically blocked under section 17(5)(b)(ii).

Q112. A registered person engages a canteen contractor. The material required for provision of the service are procured by the registered person and provided to the contractor. The contractor bills the registered person for his services and charges GST on the same. The registered person is not statutorily required to operate a canteen.

Can the registered person claim ITC on such expenses incurred by him?

Ans. As per section 17(5)(b)(i), ITC has been specifically blocked on food and beverages and outdoor catering supplies, when it is not being provided under any statutory obligation. Hence, ITC will not be allowed in the instant case.

Q113. A company runs a canteen in its premises. It has given the contract to run the canteen to a service provider. The canteen sells food items to both its staff and visitors. The income and expenses of the canteen is shown in the Profit and Loss of the company as separate item.

Whether ITC can be availed on goods used in the canteen?

Ans. As per section 17(5)(b), credit is blocked *inter alia* for food and beverages. However, credit is not blocked in the following situations:-

(i) 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) where it is obligatory for an employer to provide such goods and/or services to the same to its employees under any law for the time being in force.

As per the query under consideration, the company is selling food items to both staff and visitors. Since, the company has been making outward taxable supply of same category of goods or services or both, the credit will not be blocked. However, if the outward supply is taxed at a rate of 5%, ITC cannot be availed due to restriction in rate notification.

Q114. Whether a company is eligible for ITC on vehicle hiring if the same is mandatory / obligatory as per any law?

Ans. As per section 17(5)(b), credit is blocked on, *inter alia,* renting/hiring of vehicle. However, the ITC on such activities is available where an inward supply of such services 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.

Further, ITC in respect of such services is available, where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

Thus, if it is obligatory on the part of company to provide such services to its employees, ITC can be availed on the same.

Q115. Taxpayer is discharging tax on recovery made from employees towards food served to them in the canteen.

Whether ITC on inputs/input services used in the provision of canteen services be availed?

Ans. The activity of serving food by the employer to the employee for a consideration is construed to be supply as all the elements specified in section 7(1)(a) in terms of "duality", "consideration" and "in the course or furtherance of business" are present in the transaction. Further, the activity of the employer serving food to the employee is supply of services in terms of entry no. 6(b) of Schedule II.

Next, we have to determine whether the same can be classified as "restaurant service" under *Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017.* As per the Explanation (xxxii) of *Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017*, -

> *'**Restaurant service'** 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.*

Thus, it is clear from the above definition, that if food is being served from a place where the facility of eating joint exists, and the location is termed as canteen, then supply of food from such canteen shall be classified as restaurant service.

It may be noted that if any service is classified as restaurant service, the applicable rate of GST is 5% as per *S. No. 7(ii) of Notification No. 11/2017-Central Tax (Rate) dated 28-06-2017*, subject to the condition that ITC is not taken on goods and services used in supplying such restaurant services. Thus, the employer is not eligible to avail ITC on input goods and input services used for the canteen

services, as the employer has to charge GST at 5% on the value of the recovery made from employees towards food served to them.

Q116. Whether ITC on membership fee paid by a textile mill to Association of Mills is blocked by virtue of section 17(5)?

Ans. As per section 17(5)(b)(ii), ITC is blocked on membership of a club, health and fitness centre.

The membership fee paid by a textile mill to the Mills Association is not covered under section 17(5)(b)(ii) as it is distinct from membership of a club. Hence, ITC thereon is not blocked.

Q117. Is ITC available on rent a cab service taken for a fixed distance, the charges for which are not fixed in advance e.g., hiring a cab operated by cab aggregators for a certain distance within a State?

Ans. Section 17(5)(b)(i) blocks ITC on "*renting or hiring of motor vehicles*". In case of a cab operated by cab aggregators, the passenger receives two invoices, one of "*Rent a Cab (HSN:996412)*" @ 5% GST which is issued by Ola/Uber on behalf of the driver, & another of "*Business Auxiliary Service (HSN:999799)*" @18% GST for the convenience fee which is charged and collected by such cab aggregators. Since the said section restricts only the rent a cab service, and not any other services ancillary to it, one can avail ITC w.r.t business auxiliary service only. However, if the service receiver is also a cab services provider, ITC shall be available.

Q118. Whether ITC can be claimed in case of purchase of under construction commercial flat for business / office purpose?

Ans. Section 17(5)(c) restricts ITC on 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.* The term "*construction*" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property.

Since, the purchase of under-construction property is to be used for functioning of own office and not as an input service for further supply of works contract service, ITC thereon will not be available.

Q119. As per section 17(5)(c), ITC cannot be availed on works contract services related to immovable property (like if a building is being constructed then it comes under immovable property); what will be the criteria for deciding what in a building will be eligible for ITC and what not?

For example - construction of building includes other activities also like plumbing work, electrical work, luminary work, installation of doors, putting movable furniture and make it ready for use. Can ITC be taken for all the above expenses as well as movable furniture?

Continuing with above example, if control rooms at production plants and a lab for testing of production is being constructed, whether the expenses on construction for control room and lab, other work of electrical fitting, plumbing, purchasing lab equipment's etc. will be eligible for ITC?

Ans. Before replying to the above queries, it is pertinent to mention that "*immovable property*" has not been defined in the CGST Act, 2017 and hence its meaning has to be borrowed from other relevant statutes.

As per section 3(26) of the General Clauses Act, 1897, *immovable property includes "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth".*

In the backdrop of such provisions, the question is answered as under:

Pursuant to section 17(5)(c), ITC on works contract service is not eligible except where the works contract service is an input service for further supply of works contract. For example, if "A" is providing works contract service to Government Department all his input including input of works contract service on inward supplies shall be eligible for credit since "A" is using the same for providing further supply of works contract service.

The supply of plumbing work, electrical work, luminary work, installation of doors, which are forming part of building (immovable property) are eligible for ITC provided the same are used for further supply of works contract service.

In the case of movable furniture, ITC is available as it does not fall within the meaning of immovable property.

Construction of control room and lab, including other works of electrical fitting & plumbing, falls within the definition of immovable property and the same is being used for own purpose and not for further supply of works contract service. Therefore, ITC on goods and services used for construction of the same will be ineligible as per section 17(5)(c). However, tax paid on purchase of lab equipment shall qualify as eligible ITC.

Q120. Can ITC be availed on-

- **non-civil constructions like shed prepared with PUF materials?**
- **PUF materials purchased for construction of shed?**

Ans. Presuming that the shed is constructed or fabricated for long-term usage as a closed premise either for storage or assembly unit or any other purpose, then in order to ascertain the availability of ITC, we need to know the following:

Section 17(5) blocks ITC in respect of certain goods and services. One such service is works contract service as per section 17(5)(c).

Section 2(119) defines the term "works contract" as follows:

> *"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 provisions of section 17(5)(c) & (d) are relevant here and are reproduced hereunder:

> *(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.

Further, as per the explanation to the above clauses, the term "*construction*" *includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;*

If is further explained that 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.

Based on the above premised legal provisions, the following parameters are decided:

- Construction of shed, though a non-civil construction, will get covered as "works contract service" under the term "fabrication".
- As per the explanations provided above, ITC will be ineligible to the extent of capitalisation.
- Construction of the shed will not get covered within the ambit of the term "plant and machinery".

On combined reading of the above provisions, it is clear that ITC on works contract service will be blocked unless it is used for further provision of works contract service. Since, in this case, the same is used for self-consumption, ITC will be ineligible. Moreover, since the expenditure incurred may be capitalised, ITC will not be eligible on this account also.

Further, the ITC on purchase of PUF materials for the purpose of construction is also blocked under section 17(5)(d).

Q121. Whether ITC can be availed on furniture and fittings by a hotel?

Ans. Yes, in the absence of any restriction under section 17(5) on availability of ITC on furniture and fittings installed by a hotel, ITC thereon is available. The same would not fall under section 17(5)(c) and 17(5) (d) as the same does not amount to ***construction*** of immovable property. They are separately identified as furniture and fixture and not considered as part of construction of immovable property.

Q122. Whether ITC will be allowed on repairs of building given on rent (GST is being paid on rent)?

Ans. Section 17(5)(c) blocks ITC on 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.

And section 17(5)(d) blocks ITC on 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.

Further, explanation to 17(5)(c) & (d) stipulates that *"construction" includes reconstruction, renovation, addition or alterations or repairs, to the extent of Capitalization to the said immovable property.* Please note that 'alteration' and 'repairs' are also included in this definition if capitalized.

On the basis of the restriction imposed under section 17(5)(c) & (d) no ITC can be claimed in case of repairs of building when capitalised.

However, the Orissa High Court has allowed ITC on input and input services used for construction of a shopping mall, to be availed against GST payable on rent income receivable form tenants of the constructed shopping mall in the case of M/s *Safari Retreats Private Limited and Another v Chief Commissioner of Central Goods & Service Tax & Others* No. - *W.P. (C) No.20463 OF 2018.* However, one must take caution in applying the above case because the Department has filed an appeal against this judgement before Hon'ble Supreme Court.

The Supreme Court, in the case *of Union of India v West Coast Paper Mills Ltd*., [*2004 (164) ELT 375 (SC)]* has held that *once a special leave to appeal is granted and appeal is admitted, correctness or otherwise of judgement of Tribunal becomes wide open and, in such appeal, Court is entitled to go into both questions of fact and as well as law and correctness of judgement is in jeopardy. Appeal is considered to be a continuation of suit and a decree becomes executable only when the same is disposed by the final Court of Appeal.*

Q123. Whether ITC on factory renovation expenses is available or it is to be capitalised?

Ans. Section 17(5)(c) blocks ITC on 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.

And section 17(5)(d) blocks ITC on 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.

Immovable property is well understood to be land & building, but it also includes everything that is attached to or forming part of the land and rights in land. Credit is blocked on all inward supply of service from real estate agent, architect, interior decorator and contractor as these are involved in the establishment of the immovable property.

As per the Explanation to 17(5)(c) & (d) *"construction" includes reconstruction, renovation, addition or alterations or repairs, to the extent of capitalization to the said immovable property.* Please note that 'alteration' and 'repairs' are also included in this definition if capitalized.

Hence, ITC on factory renovation is available if the renovation expenses are treated as revenue expense in the books of accounts. ITC is restricted to the extent it is capitalised in the books.

However, plant & machinery is excluded from the said restriction on ITC imposed by section 17(5)(c) & (5)(d). Moreover, GST law does

not prescribe as to when an expense is to be capitalised or treated as revenue. The same is based on the audited books of accounts and generally accepted accounting practices.

Section 2(19) defines capital goods as follows:

> *"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 definition, it is clear that when goods are capitalised in books of accounts it is treated as capital goods. Hence, when factory renovation expenses are capitalised in the books of accounts and it falls within the scope of section 17(5)(c) &(d), ITC on such expenses gets blocked.

Q124. Whether ITC can be availed on lifts installed in the factory?

Ans. Before answering the question directly, it is essential to analyse from the legal and commercial perspective, whether the lift forms part of the plant and machinery as defined in explanation to section 17(5) [extract given below] or it is an integral part of building.

> *"****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 definition, it is understood that 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).

For this purpose, reference may be taken from other Laws to arrive at a solution:

a. *Lift* as per section 2(j) of the Karnataka Lifts, Escalators and Passenger Conveyors Act*, means elevator or a hoisting mechanism equipped with a car which moves in a substantially vertical direction, is worked by power and is designed to carry passengers or goods or both.*

b. *Lift Car* as per section 2(k) of the Karnataka Lifts, Escalators and Passenger Conveyors Act*, means the cage or car of a lift used whether for the conveyance of passengers or goods or both and includes the floor or platform car frame, sling and enclosing body work but shall not include a hoist or lift to which the Factories Act, 1948 applies.*

c. *Lift* Installation as per section 2(l) of the Karnataka Lifts, Escalators and Passenger Conveyors Act*, means installation of any lift including the operating mechanism of the lift, the lift car, the lift way, the way enclosure and all ropes, cables, wires and plant, directly connected with the operation of the lift.*

d. *Hon'ble Madras High Court in V.D. Swami & Co. Ltd Vs. Commissioner of Income Tax [(1997) 142 CTR Mad 279]* has held on 19th March 1996 that the lift is eligible for special rate of depreciation at 15% under "rope-way structures-carriers" under the main head of plant & machinery.

The above definitions and judicial pronouncement validate the view that the lift is a machine run by electrical energy which is capable to carry 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, but still ITC on such lift is available as plant and machinery is specifically excluded from section 17(5)(c) and (d).

However, it may be noted that some contrary rulings have been given by Authority for Advance Ruling adopting a strict interpretation that lift is an integral part of building, and thereby it falls under the exclusion part of the definition of "plant and machinery" and thus, ITC on such lift will be blocked under section 17(5(c) and (d). Thus, the issue is prone to dispute.

Q125. Whether a real estate builder (charging GST @ 18%) can avail ITC on services of work contractors who are constructing the commercial building along with material & labour?

Ans. Yes, the real estate builder can avail ITC on services of works contractors who are constructing the commercial building along with material and labour, subject to the fact that such services are used in the course or furtherance of business and all conditions specified in section 16 are fulfilled. Further, ITC on such services is also not specifically blocked under section 17(5).

As far as the GST law is concerned, works contract as defined in section 2(119) has been restricted to any work undertaken for an "*Immovable Property*".

Thus, in the given case, if the real estate builder is engaged either in supply of service in the form of construction of commercial building or composite supply of service in the form of works contract for construction of commercial building, then such person can avail ITC on goods or services used in the construction of such commercial building, being an immovable property. Since the inward supply and outward supply are in the same category of works contract service or construction service, such persons are not barred from taking ITC as per section 17(5)(c).

Similarly, the real estate builder who receives any goods or services for construction of immovable property not on his own account but for his customer, can avail ITC on supply of goods or services including works contract services received from his sub-contractor as in this case the ITC is not blocked under section 17(5)(d).

Q126. Whether ITC can be availed on building material / works contract services used in the construction of an immovable property when the same are charged to profit and loss account as repairs and maintenance of immovable property?

Ans. Generally, based on the accounting prudence and guidelines laid down by the Institute of Chartered Accountants of India and also as per the provisions of the Income Tax Act, 1961 and the Companies Act, 2013, no person will be treating the expenses in the form of purchase of building material or receipt of works contract services used in the original construction of an immovable property, as revenue expenses and will be charging the same to the profit and

loss accounts as repairs and maintenance of immovable property, unless it is in the nature of revenue expenses. But still, if some person is stretching to treat such expenses incurred in construction of an immovable property as revenue expenses and charging the same to profit and loss account that ratio will not help such person to avail the ITC on the goods or services used in the construction of immovable property as it is specifically barred in section 17(5)(c) and (d). However, the justification for the same is explained through legal provisions in detail in the ensuing paragraph.

Relevant excerpts of section 17(5)(c) and (d) are given for easy understanding:

> *(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.

On an analysis of the above provisions, it is clear that ITC on the goods or services or both used by a registered person in the construction of an immovable property, **as original works,** whether or not capitalised in the books of accounts is not to be availed, unless such expenses are used only for re-construction, renovation, additions or alterations or repairs to the said immovable property and that too charged to profit and loss account as revenue expenses. Thus, just by charging the entire expenses attributable to the original construction of an immovable property to the profit and loss account, one cannot claim ITC on such inward supply of goods or services. The intent of law under section 17(5)(c) and (d) is not so.

However, if such registered person happens to be a works contractor *per se* or a builder who is engaged in outward supply of construction service, then, such persons can avail ITC on the building material or works contract services used by them in the construction of immovable property, as inward supply and outward supply for them are in the same category and they are not barred by section 17(5)(c) or (d) and also naturally they will be charging such expenses only in the profit and loss account. Moreover, they shall also be subjected to the other conditions applicable to the construction industry.

Q127. Whether ITC can be availed on repairs of a building treated as revenue in books of account?

Ans. Yes, ITC can be availed on repairs of a building treated as revenue in the books of account subject to the fact that supply of such goods or services or both attributable to repairs of building are used in the course or furtherance of business and all conditions specified in section 16 are fulfilled. Further, ITC on such supply of goods or services or both are also not subject to the restrictions specified in section 17(5).

It is presumed that the building specified in the question refers to the 'place of business' from where the taxable person is ordinarily carrying on the business and also includes other places as referred in section 2(85). If it is so, then the services availed by such registered person is deemed to have been used in the course or furtherance of his business and ITC on such repairs of building can be availed, if it is not blocked under section 17(5).

Now, let us see whether the ITC on repair expenses is blocked under section 17(5). On a conjoint reading of the provisions of section 17(5)(c) and (d), the registered person is restrained from availing the ITC on goods or services used only in the construction of immovable property, being the original works. But if, such services are in the nature of repairs of building and the expenses attributable to the same are not capitalised in books of account and treated as revenue and charged to profit and loss account, ITC on such repair services are available.

Further as per Explanation to section 17(5)(c) and (d), ***construction*** *includes re-construction, renovation, additions or alterations or*

repairs, ***to the extent of capitalisation****, to the said immovable property.*

Q128. How can power distribution companies get ITC on the work executed for and on behalf of another PSU through third party contractor, since GST is exempt on power distribution i.e., on main product?

OR

A power distribution utility company say ABC Ltd are engaged in business of shifting of lines road sites work for an on behalf of State / Centre PSU and is executing this shifting work through third party contractor at a cost which is inclusive of GST. However, upon completion of the work, ABC Ltd. are charging GST on the overall cost incurred i.e., Total payment made to contractor). Value of Work awarded by ABC Ltd. to contractor Rs.100, GST 18, Total Rs. 118. ABC Ltd. billing to Central / State PSU Rs. 118 (18% GST on 118). Now, how this double GST implication can be avoided?

Ans. There is no restriction on availing ITC under section 17(5)(c) where works contract services are inputs for further supply of works contract services. Thus, ITC would be available to ABC Ltd.

However, in case of power distribution companies executing work on behalf of PSUs, the exemption notification should be evaluated for applicability of exemption from GST on such works.

Q129. A taxpayer registered under GST rents out commercial properties and collects GST on such rent.

Whether such taxpayer is eligible for ITC on inputs, input services and capital assets?

Ans. (i) As per the provisions of section 16, a registered person is entitled to take credit of input tax involved in any supply of goods or services which are used or intended to be used in the course or furtherance of his business subject to conditions mentioned in section 16(2). Also, section 17(5) blocks input credits involved in inputs, inputs services and capital goods even though they are used in the course or furtherance of business.

(ii) In the light of the above, subject to the ITC not blocked under section 17(5), a registered person renting out commercial properties can avail ITC in respect of any input, input services and capital goods used in the course or furtherance of his rental business.

(iii) One debatable issue involved in this regard is whether a person who runs a business of renting of commercial properties can avail ITC in respect of the following:

a. Construction of buildings capitalised in books.

b. Repairs and maintenance of buildings which are debited to his profit and loss account.

Implications involved in each of the above situations are discussed hereunder:

a. ITC involved in the construction of buildings capitalised in the books of accounts

As per section 17(5)(c) and (d), a registered person when he constructs a building even if the same is going to be used in the course or furtherance of his business, he is not entitled to avail ITC on goods or services used in such constructions. When he entirely or partly outsources the construction work to a builder or contractor as a works contract also, ITC is not available to him.

In this context, decision of the Orissa High Court in the case of *M/s. Safari Retreats Private Limited and another v. Chief Commissioner of Central Goods & Service tax & Others [2019 (5) TMI 1278] - W.P.(C) No.20463 of 2018 - Orissa High Court"* is relevant. The decision, in this matter, is given with respect to allowing of ITC on goods and services used for construction of malls which are meant to be used in the business of renting. From the above ruling, it is understood that in case of renting of malls the Court has held that ITC on construction materials and services is eligible for credit since section 17(5)(d)

uses the term "*on his own account including when such goods or services or both are used in the course or furtherance of business".* The Court took an interpretation that renting of malls will not fall under this category. That is to say, when ITC is paid on goods or services which are directly going to fetch revenue to the Government in the form of output tax said, the restriction under section 17(5)(d) would not be applicable.

In the case of construction of malls ITC is incurred on buildings and the same is not used for own purpose but rented out, output tax is going to be paid on such rent, ITC must be available to the registered person, otherwise the very purpose of GST law would be defeated. One of the primary objectives of GST law is to remove the cascading effect in tax chain and this restriction in section 17(5)(d) hinders the same. Also, it is to be noted that the Court has distinguished between immovable property constructed and retained for self-use (business use) and immovable property let out. In the latter case the Court interprets that ITC would be available and in the former case there is restriction in taking ITC as per the wordings of section 17(5)(d).

However, it is to be noted that the Department has filed an appeal against this judgement before the Hon'ble Supreme Court. The Hon'ble Supreme Court, in the case of *Union of India v. West Coast Paper Mills Ltd., [2004 (164) ELT375 (SC)],* has held that once a special leave to appeal is granted and appeal is admitted, correctness or otherwise of judgement of Tribunal becomes wide open and, in such appeal, the Court is entitled to go into both questions of fact and as well as law and correctness of judgement is in jeopardy. Appeal is considered to be a continuation of suit and a decree becomes executable only when the same is disposed by the final Court of Appeal.

b. ITC involved in respect of repairs and maintenance charges *on* buildings debited to profit and loss account:

ITC is eligible in respect of goods or services used for repairs and maintenance of immovable property when the said expenses are debited to the P&L account *vide* explanation to clauses (c) and (d) of section 17(5).

ITC on repairs and maintenance expenses would not be available when such expenses are capitalised in the books of accounts. If such expenses are not capitalised and debited to profit and loss account, then ITC is available. It is also to be noted that original construction or capital expansions, if for any reason(s), is debited to profit and loss account, the ITC involved would not be covered by the benefit of explanation and would be covered by the restriction contained in section 17(5)(c) &(d).

Q130. Whether ITC is available on paint purchased for painting the office?

Ans. Section 17(5)(d) blocks the ITC paid on goods or services which are received for construction of an immovable property on own account. Further, the Explanation thereunder provides that the expression "*construction*" includes re-construction, renovation, additions or alterations or repairs, **to the extent of capitalisation,** to the said immovable property. The availability of ITC relating to purchase of paint for painting office is dependent upon the usage of paint and its accounting treatment in the books of accounts i.e., whether capitalised or charged to revenue (revenue expenditure).

Hence, where the paint purchased for painting office is on account of regular maintenance of the office and is a revenue expenditure, ITC will be available to the taxpayer. Similarly, where the paint is used for movable furniture etc., ITC on purchase of paint will be available to the taxpayer. However, where the paint is a capital expenditure incurred for construction of immovable property, ITC on paint will be blocked under section 17 (5)(d).

Q131. A textile manufacturing company has given a service order to one consulting engineering company for design engineering consultancy services, for design and procurement assistance, design coordination for a project consisting of plant, building & machinery.

Whether ITC is admissible on this service when the scope of the order is:

1. **Building layout and master planning.**
2. **Basic data fixation for utility services- design basis report**
3. **Building design and architectural drawings for regulatory purpose and execution.**
4. **Structural design and detailed drawings.**
5. **Utility design and basic layout drawings for utilities - except boiler.**
6. **Procurement assistance, occasional expert visit and design co -ordination.**

Ans. Section 17(5)(d) places restriction in availing ITC for 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.

All the services (mentioned in Points 1 to 6) which are undertaken for construction will fall within the purview of composite supply and will be considered as construction activities.

The service order is used for project consisting of plant & machinery and building.

(i) In case of building, credit of services used for construction of such building is disallowed as per section 17(5)(d).

(ii) In case of plant and machinery, there is exception for disallowance of credit as mentioned in section 17(5)(d).

In this connection, the Board has also clarified in *C.B.E&C Flyer No. 28, dated 1-1-2018 page 229 – 4th para.* as to taking of ITC on plant and machinery affixed to earth as follows:

"Plant and Machinery in certain cases when affixed permanently to the earth would constitute immovable property. When a works contract is for the construction of plant and machinery, the ITC of the tax paid to the works contractor would be available to the recipient, whatever is the business of the recipient. This is because works contract in respect of plant and machinery comes within the exclusion clause of the negative list and ITC would be available when used in the course or furtherance of business"

Q132. Whether ITC is available for any sort of civil constructions, renovations, interiors/office furnishings, etc. where work is awarded for a consolidated price?

Ans. 1. Here the goods / services procured are for use in the course or furtherance of business and as such eligible for ITC as provided in section 16(1). However, it is quite possible that in the stated activities, ITC may be blocked under section 17(5) depending on the facts of each case. The question is broadly answered below:

2. Civil Constructions:

(a) As per clause (d) of section 17(5) and explanations therein, ITC is blocked and cannot be availed in respect of civil constructions which are "capital" in nature, that is, they are by way of addition to existing capacity. Examples are new premises, extension of factory block, addition of rooms in office, new civil structures, major alterations in premises, reconstruction etc. These will also be capitalised in books of account.

(b) However, we have the civil work / construction for the repairs & maintenances – items of revenue nature in accounting terminology. They do not lead to any addition to existing capacity but are incurred for its maintenance or for small alterations etc. to improve the working efficiency. They are not capitalised but are treated as expense in the books of account. Examples are, attending to damages to structure, replacing damaged items, re-painting, modifications for re-layout etc. ITC can be claimed thereon because the bar on ITC under section

17(5)(d) is to the extent of capitalisation. However, one may go into the nature of items to verify if the same need to be capitalised.

3. Office furnishing and interiors:

   (a) Furniture and interior items bought as such, involving no further fixing etc. for example, chairs, tables, sofa set, show pieces – no bar on ITC under section 17(5).

   (b) Furniture and interior items which are either bought from outside or fabricated within office itself and fixed to the floor or walls such as workstations, detachable wooden or glass partitions, detachable storage units, floor covering, curtains etc. Since these are not permanently fastened to building and can be dismantled and refixed without much of damage, the "principal supply" will be furniture or the respective item. It would not be case of a works contract, and therefore, ITC will be available as it is not blocked under section 17(5).

4. Renovations: The renovation as an activity typically comprises of civil construction and office furnishing/ interiors but the activity is taken up as one time activity over a number of years for total requirements. The position as to eligibility to ITC discussed earlier will apply to work done under renovation activity also. The contract may have to be split item wise keeping in consideration different tax implications for items involved in work.

Q133. In case of renting of non-residential properties, whether ITC can be claimed on the following expenses:

1. Security services

2. Maintenance of buildings and lifts.

3. Construction of new buildings

4. GST filing fees and other fees paid to professionals

5. Rent collection agency charges etc.

Ans. (A) Renting of non-residential properties is a taxable service and

the expenses referred to in the question are services used or intended to be used in the course or furtherance of business of renting immovable properties. Therefore, as provided in section 16(1) the registered person running the business will be entitled to take ITC of the tax charged to him on supply of these services.

However, section 17(5) provides for blocking of ITC otherwise available under the situations specified therein and hence these provisions need to be referred to decide whether ITC can be claimed on these expenses.

(B) In section 17(5), there is no provision for blocking ITC in respect of security services, GST filing fees and other fees paid to professionals and rent collection agency charges etc. ITC can, therefore, be claimed in respect of these expenses.

(C) ITC can also be claimed in respect of maintenance of buildings and lifts assuming such maintenance is of routine nature and expenditure is charged off in books of account as expense such as repairs of damages, replacement of any damaged items, re-painting, cleaning, pest control & similar services, periodic servicing of lift etc. There is no bar under section 17(5) to claim ITC on such expenses. Section17(5) bars ITC on works contract services by way of repairs as well but that is to the extent of capitalisation thereof in the books of account and hence the repairs etc. of routine nature will not be affected by this provision.

(D) (a) As regards construction of new building, ITC in respect of goods, works contract and other services received for construction of immovable property, is blocked under clause (d) of Section 17(5) (in the hands of owner of the immovable property), including when used in the course or furtherance of business. As such, going by this provision, ITC will not be available on goods and services used in the construction of new buildings although rental income will also be subjected to GST.

(b) The issue of applicability of section 17(5)(d) in similar situation -case pertaining to a mall with shops let out by

mall owner - was considered by the Hon'ble Orissa High Court in *Safari Retreats Private Limited v. Chief Commissioner of CGST (2019 – TIOL – 1088 - HC – Orissa – GST).* The Court agreed to read down the provision and allowed the prayer for ITC on goods and services used in construction since the rental income is also subjected to GST and restricting ITC would lead to double taxation. The Court however declined to hold the provision as *ultra vires*.

(c) The Department has filed an SLP against the above ruling which has been admitted and is pending before the Hon'ble Supreme Court. *(2019 -TIOL- 489-SC-GST)*. As such the matter has not reached finality and is sub-judice.

(d) Availing ITC on goods and services used in construction of non-residential buildings based on the aforesaid Orissa Court judgment may be prone to litigation and implication thereof should be kept in consideration while taking decision.

Q134. Can we claim ITC on structures used for temporary purposes, say, temporary office which is movable from one site to another site (made with material other than cement and steel)?

Ans. As per section 17(5)(d), ITC shall not be available in respect of 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.

In short, section 17(5)(d) very specifically puts a bar on ITC in respect of goods or services used for construction of immovable property (other than plant and machinery).

It would be observed that there is no such bar in respect of moveable assets. It means that ITC against movable construction/ material is available.

The availability of ITC on goods and services used for structures for temporary purpose would totally depend on the facts of the case. Normally, a structure which is fastened or attached to earth and not

removed under ordinary circumstances, may be considered as permanently fastened to something attached to the earth and hence immovable property. However, if it can be shown that the structure can be dismantled and there are plans /intentions to dismantle and move the structure to some other place, after being at a place for some defined time or purpose, like pandal or circus, it would be a good case to submit that provisions of section 17(5)(d) are not attracted.

In the instant case, it appears that we are referring to some wooden or fiberglass cabin or to some tent like structure (made with material other than steel and cement), and therefore, it can be argued that ITC can be claimed.

Q135. Whether tax paid on assignment of leasehold rights for a land is eligible for ITC?

Land would be used for construction of an immovable property to be used as business asset by a registered person.

Ans. As per section 16(1), a registered person is 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 subject to conditions and restrictions as may be prescribed. Section 17(5)(d) provides that notwithstanding the provisions in section 16(1), ITC shall not be available in respect of goods or services or both received by taxable person for construction of immovable property (other than plant and machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.

It may be noted that the aforesaid bar on ITC under section17(5)(d) is also on any services where they are used under specified circumstances. Since the leasehold land is used for constructing immovable property, irrespective of the classification under which the original lessee has paid the tax on assignment of his leasehold rights, ITC on assignment of such rights will get blocked under this provision irrespective of use in the course or furtherance of business.

However, it is important to take note of the following judicial rulings on the matter: -

In Safari Retreats Private Limited *[2019-Tiol-1088 HC -Orissa GST]* – case pertains to mall with shops let out by the owner the Hon'ble

Orissa High Court, while declining to hold the provision as ultra vires, agreed to read down the provision of Section 17(5)(d) and allowed credit on goods and services used in construction in peculiar circumstances that rental income is also subjected to GST and restricting ITC would lead to double taxation. However, the matter is still sub-judice and not reached finality as Departmental SLP against this judgment has been admitted by the Hon'ble Supreme Court and is pending there *[2019 -TIOL -489-SC- GST].*

The vires of blocked credit under Section 17(5) (d) has also been challenged before the Hon'ble Rajasthan High Court in Kamal Cogent Energy Private Limited *[TS – 965- HC – 2019(RAJ)-NT]* and before the Hon'ble Delhi High Court in Bamboo Hotel and Global Centre (Delhi) Private Limited *[TS -963- HC-2019 (DEL)-NT]*, in both the cases the issue being related to construction of hotel, resort etc. where the rental income is again subjected to GST. The final Rulings are awaited.

Thus, the issue is prone to litigation and implication thereof needs to be kept in consideration while deciding about ITC.

Q136. Can a company claim ITC on building constructed as a part of CSR activity?

Ans. ITC on *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,* is blocked under section 17(5)(d). Further, ITC is also blocked on 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. Assuming that the company is not a works contractor, ITC will not be available to it on construction of building irrespective of whether the same is constructed for CSR activity or otherwise. It may be noted that there are conflicting rulings given by the Advance Ruling Authorities with regard to eligibility of ITC on CSR activities thus, making the matter prone to disputes and litigation.

Q137. Define the scope of plant and machinery in detail. As many a times, ITC on immovable property in the nature of plant and machinery gets blocked due to non-availability of clarity in

this provision. e.g., whether ITC on fire-fighting system is available?

Ans. Plant and machinery for the purpose of Chapter V and Chapter VI is exclusively defined in Explanation to section 17(5) as under:

> *"Explanation- For the purposes of this Chapter V 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"*

As per section 17(5)(c) ITC is blocked on 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. As per section 17(5)(d), ITC is blocked on 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.

Further, explanation to the section 17(5) clarifies that the expression construction includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property.

Bare analysis of the above provisions makes it clear that though the plant and machinery are fixed to earth either by foundation or structural support, for the purpose of their smooth functioning or operations, still it will be considered as plant and machinery including such foundation and structural supports.

Therefore, though, the firefighting equipment, 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, still ITC on such firefighting

equipment is available as it is specifically excluded in section 17(5)(c) and (d).

As per section 17(5)(c) and (d) read with the Explanation, ITC gets blocked only where there is construction of immovable property. Hence, in case of any goods or services used in construction of a movable property there is no restriction on ITC.

Further, in case of works contract and construction services, if it is in the nature of renovation, alteration, repairs and reconstruction, the question of ineligibility of ITC arises only when such expense is capitalized. If it is in the nature of revenue expenses and charged to the Profit and Loss Account, then ITC on such works contract and construction services with respect to renovation, alteration, repairs and reconstruction will be considered as eligible.

For plant and machinery, regardless of whether the expenditure thereon has been capitalized or not and the resultant plant and machinery is immovable, ITC will not be blocked as there is specific exclusion regarding plant and machinery in section 17(5)(c) & (d).

This is also evident from the Board's clarification in *C.B.E&C Flyer No. 28, dated 1-1-2018* that plant and machinery in certain cases when affixed permanently to the earth would constitute immovable property. When a works contract is for the construction of plant and machinery, the ITC of the tax paid to the works contractor would be available to the recipient, whatever is the business of the recipient. This is because works contract in respect of plant and machinery comes within the exclusion clause of the negative list and ITC would be available when used in the course or furtherance of business.

From above, we can summaries as:

Sr.	***Type of Inward supply***	***Type of Property***	***Use of the Property for***	***Type of Expenditure***	***Credit Eligibility***
1	Works Contract Services	Immovable Property	Own use	Capital	**No**
				Revenue	**Yes**
			Further supply of Works Contract service	Capital	**Yes**
				Revenue	**Yes**

			Further supply of other service (e.g., Renting, etc.)	Capital	**No**
				Revenue	**Yes**
		Plant & Machinery	In the course or furtherance of business	-	**Yes**
2	Goods or services	Immovable Property	Own use	Capital	**No**
				Revenue	**Yes**
			Further supply in course or furtherance of business	Revenue	**Yes**
				Capital	**No**
		Plant & Machinery	In the course or furtherance of business	-	**Yes**

Further in section 17(5)(c) & (d), the term "for" is used. In the Hon'ble Supreme Court judgement of *"Mansukh Lal Dhanraj Jain and Ors. V. Eknath Vithal Ogale Etc decided on 8 February, 1995",* reference to term "in relation to" and "for" is made wherein it is said that the term "in relation to" has a wider scope.

An observation that can be made based on the judgement is that the term 'relating' to has wider scope which can be used in direct and indirect context; however, the term "for" is very specific and can be used in direct context. In clause (c) & (d) above, the term "for" is used and hence ITC can be blocked when goods or services are used directly for construction of immovable property, other than plant and machinery.

It is generally understood that anything that is attached to the earth and cannot be dismantled or moved shall be considered as immovable. However, anything that can be dismantled or moved shall be considered as movable.

From the above analysis, following observations can be made:

1. Fire-fighting system is not directly connected "for" construction of immovable property.

2. Fire-fighting system includes fire alarm, fire extinguisher, automatic sprinkler systems, fire house reels etc.

3. These equipment's can be dismantled and moved without making substantial damages to it. Hence, it is movable and ITC on such firefighting equipment is available if it is used in the course or furtherance of business.

4. However, if, the firefighting equipment is classified as "plant and machinery" as per the Explanation to section 17(5) and it happens to be immovable, ITC on such firefighting equipment is still available if it is used for making outward supply of goods or services or both.

Hence, based on our above discussion, ITC on fire-fighting system shall be allowed.

Q138. Whether ITC is eligible on bathroom or electrical items which are used in the office of a registered taxpayer?

Ans. Section 17(5)(d) blocks ITC on *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.

Further, section 3(26) of the General Clause Act, 1847 defines immovable property as *"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.*

The meaning of "*attached to earth"* is found in section 3 of the Transfer of Property Act, 1882 where it is defined to mean-

- *Rooted in the earth, as in the case of trees and shrubs.*
- *Embedded in the earth as in the case of walls or buildings.*
- *Attached to what is embedded for the permanent beneficial enjoyment of that to which it is attached.*

As per Explanation to 17(5)(c) and (d) *"construction" includes reconstruction, renovation, addition or alterations or repairs, to the extent of capitalization to the said immovable property.* Please note that '*alteration*' and '*repairs*' are also included in this definition, if capitalized.

Since bathroom or electrical items are permanently fastened to the walls which are attached to the earth, it will fall under the definition of immovable property and no ITC would be allowed in this case due to restriction imposed under section 17(5)(c) & (d) only in the case of original works or other substantial renovation that are capitalized in accordance with AS-10. However, where repairs and replacement involving electrical items and bathroom items incurred as revenue expenses and charged to profit and loss account, credit of taxes paid on them will be allowed.

Q139. Whether output tax on rental income from property A can be set off against tax paid on inward supplies for construction of property B of the taxpayer?

Ans. According to section 17(5)(d), taxes paid in respect of goods or services or both received by a taxable person for construction of an immovable property on his own account shall not be available as ITC.

Hence, taxes paid on such inward supplies cannot be used to set off the output tax liability.

However, it is relevant for us to take note of the ruling of the Hon'ble Orissa High Court in the case of *RE Safari Retreats v. Chief Commissioner of Central Goods and Services Tax Act and Ors, [2019-TIOL-1088-HC-ORISSA-GST]*, wherein credit has been allowed against construction of immovable property. The matter is currently sub-judice and is pending before the Apex Court to attain finality.

Q140. Whether ITC is available on face mask and hand sanitizer made available to the employees at the workplace?

Ans. Due to the pandemic situation, the face mask and the hand sanitiser are required to be made available to the persons attending any workplace. The provision of hand sanitizer and face mask is necessary for proper work atmosphere. Hence, it can very well be treated as used or intended to be used in the course or furtherance of his business. However, pursuant to the provisions of section 17(5)(g), ITC on such goods will get blocked as these goods or services are used for personal consumption.

Q141. Section 17(5)(g) blocks credit on goods or services or both used for 'personal' consumption. When a registered person is a

person other than a natural person, how will the term 'personal' be construed; whether it will mean goods or services used for personal consumption of the directors of the company/partners of the firm/employees of the company/firm or this clause is meant only for a natural person?

Ans. The term 'personal' consumption as mentioned in section 17(5)(g) is not restricted to the bodily consumption of such goods or services by registered person who is availing such ITC. The section provides that ITC shall not be available in respect of goods or services or both ***used for personal consumption***. Thus, it has to be read as 'personal consumption' by anyone who consumes such goods or services for or on behalf of such registered person. Accordingly, if such goods are made available for personal consumption of the employees, or directors or for any other person and which satisfies the personal need of any person and not the official purpose of the company, the same would fall within the ambit of this blocked credit. For e.g., a company gives LED TV for family viewing of the employee. In this case, the TV is used in the personal space of the employee and thus, is part of personal consumption. However, if the same TV is being given to attend virtual calls, the TV is not for personal enjoyment (consumption) but for meeting the ends of his official duty.

Q142. Whether ITC can be availed on motor of automatic sanitiser machine?

Ans. One of the basic conditions for any registered person to avail ITC on the input tax charged on supply of goods or services as per section 16(1) is that such goods or services have to be used or intended to be used in the course or furtherance of business. The term "business" as per section 2(17) includes not only the main business activities but all activities or transaction in connection with or incidental or ancillary to the main business activity. Thus, in this background, in the present pandemic period due to COVID 19, automatic sanitizer machine is very much essential in the place of business of any registered person to ensure the safety of the workers, staff, consumers and general public at large.

It is also stated that as per the guidelines issued by the Ministry of Home Affairs vide *Order No. 40-3/2020-DM-I(A) dated 15-04-2020*, all

workplaces should have provision for hand wash and sanitizer, preferably with touch free mechanism, and the same will be made available at all entry and exit points and common areas in sufficient quantities. Thus, it is mandatory for the registered person to provide such facilities to ensure the safety of all the stakeholders. Further, the motor of automatic sanitiser machine, being a spare part, is essential for running the machine. Hence, ITC on GST paid on purchase of motor of automatic sanitizer machine by any registered person can be availed as it is having nexus and deemed to be used in the course or furtherance of business. Further ITC on such supply of motor of automatic sanitizer machine is also not specifically blocked-in section 17(5).

However, the ITC on supply of motor of automatic sanitizer machine may get rejected on the ground that the same is being used for the personal consumption of employees and hence ITC may be blocked as per section 17(5)(g). However, there is a school of thought which states that, any supply of goods or services received by an employee for the purpose of rendering his official duties cannot be construed as for 'personal consumption'. Sanitisation in today's pandemic situation due to COVID 19 is mandatory to protect the employees, consumers and public at large. It cannot be said that the sanitizer is for the personal consumption of the person who consumes it, but in today's scenario it is very much essential for the smooth functioning of the business with utmost safety.

However, one has to ensure that such automatic sanitizer machine should be used only in the place of business and not in the residence of the entrepreneur. If it is so, ITC on purchase of motor for such sanitiser machine used in the residence of the entrepreneur will be blocked as in that case it would be used for the personal consumption as per section 17(5)(g).

Q143. Can I take ITC on solar panel installed in the factory for providing electricity to the Staff quarters?

Ans. Solar plants can be classified as "*plant and machinery*" which 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.

As regards the **provision of electricity to the staff quarters of employees,** even if it is governed by any specific terms of employment, ITC cannot be claimed in respect of solar panel, due to the specific restriction on items of personal consumption contained in section 17(5)(g).

Q144. Will a registered person get ITC on purchase of employee uniforms?

Ans. One of the basic conditions for any registered person to avail ITC on the input tax charged on supply of goods or services as per section 16(1) is that such goods or services has to be used or intended to be used in the course or furtherance of business. However, section 17(5)(g) blocks ITC on goods or services or both used for personal consumption notwithstanding anything contained in section 16(1).

If the uniforms are such which are necessary to ensure the safety of the employees while carrying out the business activity, the same would not be construed as being used for personal consumption as provided under section 17(5)(g) and thus, ITC thereon would be available. Many a times, various laws require the employer to provide the necessary safety measures to employees which may include safety gear, special uniforms etc. ITC on such kind of uniforms may not be blocked. However, in other cases i.e., where uniforms are not provided for any safety purpose, the same may be construed as being used for personal consumption and thus, ITC thereon will not be available.

Q145. Whether ITC is available on drinking water purchased for being consumed in the office of a Chartered Accountant?

Ans. Section 17(5)(b)(i) blocks ITC, *inter alia*, on food and beverages. The term beverage means any kind of drink. Though water is also a beverage, commercially, the meaning of the word beverages excludes water. Also, under rate schedule, water is covered under Chapter Heading 2201 and beverage is covered under Chapter Heading 2202. For the purpose of taxation, the term beverage does

not include water. Hence, the disallowance of ITC is not covered under section 17(5)(b)(i).

However, it may be noted that section 17(5)(g) blocks ITC on goods and/or services used for personal consumption. Thus, ITC on water will be blocked and cannot be claimed.

Q146. Can ITC be availed on medical expenses incurred on labour and staff (medicines etc.) which is mandated under the Factories Act, 1948?

Ans. Health care services are categorized as exempt supplies under GST and hence, no GST is charged on such supply of health services and thus, the question of availing ITC cannot arise.

However, in case of medicines purchased, even though it is a mandate under Factories Act, 1948, it would not fall within the ambit of the exclusion provided under second proviso to section 17(5)(b) as ITC is blocked on health services and not on goods used for provision of health services.

Further, in the absence of any specific provision, the credit would also get blocked under section 17(5)(g) – *goods or services used for personal consumption,* which does not enjoy similar proviso as that of section 17(5)(b).

Q147. Can an enterprise claim ITC on revenue expenditure of repair & maintenance of building taken on rent for providing rent free accommodation to its directors?

Ans. As per section 17(5)(c), ITC on works contract service (which includes repairs and maintenance) is blocked to the extent the same is capitalised. However, the same may be contend as ineligible credit on account of personal consumption by an employee which is blocked under section17(5)(g).

Q148. Whether ITC is available on goods (such as oxygen concentrator, oxygen ventilators, oxygen cylinders) purchased by a company which are given temporarily to its employees free of cost for their welfare during the Corona pandemic?

Ans. There are two school of thoughts regarding eligibility of ITC on temporary supply of goods by the company to its employees, free of cost, for their welfare.

Firstly, as mentioned in the query pertaining to ITC on purchase of goods like oxygen concentrator, oxygen ventilators, oxygen cylinders, etc. **purchased by the company for its employees**, the following provisions are worth considering:

As per section 16(1), the taxpayer may claim ITC on all supplies which are used or intended to be used in the course or furtherance of business.

Further, the term business has been defined under section 2(17) to mean and include:

- *any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit.*
- *any activity or transaction in connection with or incidental or ancillary to sub-clause (a).*

…..

…….'

Considering that COVID-19 situation is an unprecedented one and **providing of such essential facilities to the beneficiaries (both employees and their dependents) would only help the taxpayer in continuance of its business operations**, one may take a view that incurring of the said expenses was necessary in order to ensure the continuance of the business and therefore, **the ITC on these supplies shall be allowed, being in the course or furtherance of business**. It may not be out of place to mention in this regard that as per General *Circular 5/2021 dated 22-04-2021* issued by the Ministry of Corporate Affairs, the above activities stand covered by CSR, thereby giving it a backing of legal obligation and stimulus for availing ITC.

However, the tax authorities might take an alternative view and treat the ITC as blocked credit under section 17(5). The goods given to employee will be either in the nature of **health care or personal consumption**. As per clause 5(f) of the Schedule II, the activity of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration), shall be treated as **supply of service**. Hence, the

temporary provision of goods to employees for their welfare will be treated as a supply of health service.

Health care service has been defined under para 2(zg) of the *Notification No. 12/2017 - Central Tax (Rate) dated 28-06-2017* , "*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.*

Hence, the temporary provision of goods like oxygen concentrators, oxygen ventilators, oxygen cylinders, etc. for welfare of employees will either fall under health services or will be treated as being used for personal consumption.

The ITC of GST paid on health services is blocked under section 17(5)(b)(i) and the ITC on goods used for personal consumption is also blocked under section 17(5)(g).

Therefore, as per another school of thought, ITC on goods (such as oxygen concentrator, **oxygen ventilators, oxygen cylinders**) purchased for temporary supply by the company to its employees will not be available to the company.

Q149. Partially damaged goods are disposed off at a discounted price. The amount of output tax collected is much less than the ITC availed on the goods (pre-damage).

Whether full ITC can be availed on such goods?

Ans. Sub-section (1) of section 15 states as follows:

> *"The value of a supply of goods or services or both shall be the transaction value, which is the price actually paid or payable for the said supply of goods or services or both where the supplier and the recipient of the supply are not related and the price is the sole consideration for the supply."*

In the said case, since the supplier & the recipient are not related to each other, price charged after discount is the sole consideration and will be treated as the transaction value.

Further section 17(5)(h) blocks ITC only on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Thus, it is evident that ITC gets blocked when there is a complete loss or reduction of value of the goods. Clause (h) does not cover any partially damaged goods which are sold at much lower price than their usual market price. Hence, full ITC can be availed on such partially damaged goods.

Q150. In case of pharma industry, samples of material are required to be drawn for quality check as per Drugs and Cosmetics Act. The material may be raw material, packing material, semi-finished goods or finished goods. The said materials are destroyed during the quality check.

Whether the pharma company needs to reverse ITC on inputs used in materials so destroyed during quality check?

Ans. Section 17(5)(h) provides that ITC shall not be available in respect of *"goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples"*.

On a plain reading of the aforesaid provision, a registered person who has purchased goods and availed ITC thereon, would be required to reverse the same if the goods are destroyed. In *Circular No. 72/46/2018-GST dated .26-10-2018* as well as in the FAQs on Drugs & Pharmaceuticals, it has been clarified that the manufacturer is required to reverse ITC on destruction of expired medicines. However, there is no specific rule, circular or FAQ as to reversal of ITC on any goods that get destroyed in the quality check testing.

In the instant case, the material in different forms is destroyed during the quality check as per requirement of Drugs and Cosmetics Act. The quality check is integral part of the manufacturing process and manufacturing cannot take place without the process of testing. In fact, in the instant case, the checks are required to be carried out as per legal requirements and the company will not be allowed to carry on its operations if it fails to meet this requirement of quality checks.

The destruction of some goods in quality check, which is, in fact, an integral part of manufacturing process, cannot be equated to destruction due to extraneous factors such as fire, accident, mis-handling, expiry of product life etc. Where some goods get consumed

in manufacturing process, cease to exist thereafter and consequently do not physically form part of output product, can they be said to be destroyed within the meaning of section 17(5)(h)?

Reliance can be placed on case laws under central excise to submit that such goods which are consumed in the process of quality checks can be said to be used in the course or furtherance of business and hence eligible for ITC. They cannot be simply treated as destroyed goods only because they cease to exist physically after the process of quality check. In *Tata Engineering and Locomotive Company Limited v. Commissioner of Central Excise Pune [(2010) 256 E.L.T. 56 (Bom)]*, the Bombay High Court while dealing with the issue of whether the inputs – auto parts – used in the in house lab testing wherein they are subjected to stresses and strains and in the process get scrapped, are used in relation to manufacture, held that such inputs are used in relation to manufacture of finished goods, irrespective of whether the same are physically present in final finished product and that the assessee was entitled to credit of duty paid thereon.

In *Flex Engineering Limited v. Commissioner of Central Excise U.P. – [(2012) 276 E.L.T. 153(SC)]*, the Hon'ble Supreme Court while dealing with the issue of credit of duty on goods - flexible plastic films – used for pre- delivery testing of packing machines manufactured by the assessee (which obviously did not form part of the machine), held that the process of testing is inextricably connected with manufacturing process, in as much, until the process is carried out, the manufacturing process is not complete. Goods used in testing are inputs in relation to manufacture and eligible for MODVAT credit.

These decisions pronounced by the higher judicial forums, though under the erstwhile law, are on the same subject namely eligibility of credit of taxes on the goods which got consumed in the process of testing for quality check. They have a very strong persuasive value. They can certainly be relied upon by the company to submit that, in fact, the goods are not destroyed but consumed in the manufacturing process and hence used in the course or furtherance of business and therefore eligible for ITC. Moreover, the quality checks are being done as per statutory requirements.

Thus, it can fairly be said that the pharma company need not reverse ITC on the inputs in materials consumed during the quality check. The company, as a matter of precaution, may consider keeping its tax authorities formally informed of this stand taken by it to avoid any issue of allegations of fraud, suppression, etc, at a later date.

Q151. In case of import of goods, whether ITC can be availed on goods short received at the factory premises due to change in temperature and weather conditions? Is there any reasonable cut off period within which such reversal is required?

Ans. GST paid on purchases is eligible for ITC to the extent of natural loss, as occurring regularly in a particular commodity. ITC on only abnormal loss i.e., loss in excess of the natural loss, is blocked under section 17(5)(h). The blocking of ITC under section 17(5)(h) on goods destroyed will cover the circumstances where the goods are destroyed due to any disaster like fire, flood, etc. The expression 'destroyed' is not used to refer to normal wear and tear or normal ageing deterioration. Hence, the normal loss due to change in temperature and weather conditions, will not require any reversal of ITC.

The quantum of normal loss is a subjective term depending upon the location and nature of product. There is no reasonable cut off within which such reversal is required. The reversal is required only where there is abnormal loss or destruction of goods i.e., loss in excess of what normally occurs in usage / transportation of such commodity. This view is also upheld by the *Rajasthan High Court in the case of Union of India v. Hindustan Zinc Ltd. and Another [2013 (3) TMI 114]*, wherein it was held that disallowance of credit could not be considered justified, where the factors for shortage as indicated by the assessee are the difference in the weighing scale or human error and of the loss in transit due to drying of moisture contents.

Q152. Can ITC be claimed on inputs or input services used for making supply of goods and/or services under warranty?

Ans. Section 17(5)(h) blocks ITC when any goods are distributed as gift or free samples. However, it may be noted that while selling any product, the cost of warranty for a certain time period is already embedded within the price of the said product. Against such price,

the seller incurs a contractual obligation to repair / replace the product in case of any defect.

The word 'gift' entails absence of any contractual obligation and is devoid of consideration in money or money's worth. Therefore, input or input services used for supply under warranty cannot be termed as a gift. Thus, ITC on such goods and / or services for supply under warranty can be availed.

Q153. Is ITC available on normal or abnormal process loss / wastage of inputs in the course of production?

Ans. Section 17(5)(h) blocks ITC, *inter alia, on* goods lost, stolen, destroyed or written off. The relevant extract of section17(5) is given below:

> *"17(5) Notwithstanding anything contained in section 16(1) and section 18(1), ITC shall not be available* ***in respect of*** *the following,* ***namely-***
>
> *(h) goods* ***lost****, stolen,* ***destroyed****, written off or disposed of by way of gift or free samples"*

When the list precedes with the word "Namely", the list is exhaustive, and nothing can be added or included in that list. The term "*in respect of*" has been explained by the Hon'ble Supreme Court in the case of *State of Madras v. M/s. Swastik Tobacco Factory [AIR-1966-SC-1000]*. The Court has observed that Indian tax laws use the expression "*in respect of*" as synonymous with the expression "*on*".

In case of normal process loss, it cannot be said that the goods are lost. It is used in processing and the goods get consumed. The inputs which get consumed in process cannot be said to be lost. Part of the goods are utilised in process and balance may result in scrap. In some cases, part of the consumables gets evaporated. Thus, a distinction is required to be made between what is consumed / scrapped [not written off] and what is lost. There is no reduction in ITC in respect of scrap.

There is distinction between the words 'loss' and 'lost'. The normal process results in loss of some consumables. However, the same cannot be treated as goods lost.

In case of abnormal process loss, it is likely that the goods are either lost or destroyed. In such situation, ITC cannot be claimed.

Q154. PQR & Co. is dealing in cold drinks. The agreement came to an end at the instance of the cold drink company on 30-04-2020. PQR & Co. has expired products worth Rs 30 lakhs as stock which cannot be sold in the market and the company has refused to accept the stock.

Whether PQR Co. needs to reverse the ITC on the purchase since the value of the stock is almost zero as per section 17(5)?

Ans. Section 17(5)(h) specifies certain cases in which ITC is disallowed. The provision covers following instances when the ITC is blocked:

- goods lost,
- goods stolen,
- goods destroyed,
- goods written off
- goods disposed of by way of gift
- goods disposed of by way of free samples

It is stated in the question that the stock is expired and cannot be sold in the market. Hence, PQR Co. will have to write off the entire stock in its books and thus, in terms of the above provisions of section 17(5)(h), ITC will have to be reversed.

Q155. Is ITC allowable on gold coins given to distributors on achieving the pre-set target defined by the company?

Ans. As per provisions of section 17(5)(h), ITC shall not be available in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

Further, CBIC in its *Circular No. 92/11/2019 -GST dated 07-03-2019* has also clarified that in view of the aforesaid section 17(5)(h), ITC shall not be available to supplier on inputs, input services and capital goods to the extent they are used in relation to gifts distributed without any consideration, except where gift falls within scope of 'supply' on account of provisions contained in Schedule I, for example, gifts to related persons.

One may argue that gold coins are given to distributors only on achieving pre- set targets, as such, are not gifts but they are sales promotion expenses in the course or furtherance of business and hence ITC should be allowed. However, such stand may not be accepted in view of the aforesaid provisions under section 17(5)(h). It must be noted that the provisions under section 17(5) are applicable notwithstanding section 16(1), that is, notwithstanding eligibility to ITC otherwise in terms of section 16(1).

Q156. A supplier buys or manufactures products and distributes a small portion as samples (for no consideration) within as well as outside India. The sample is distributed for furtherance of business.

Is he required to reverse any ITC?

Ans. Section 17(5)(h) restricts ITC on goods disposed of by way of gift or free samples. Thus section 17(5)(h) does not make any distinction between samples sent within India and outside India. Further, entry no.1 of Schedule I, states that permanent transfer or disposal of business assets where ITC has been availed on such assets, even without consideration shall be treated as supply. Also, supply of goods between related persons without any consideration is deemed as supply in terms of entry no. 2 of Schedule -I. Therefore, going with a strict reading of the law, a supplier distributing free samples without consideration, either needs to reverse ITC, or treat it as supply, and pay GST accordingly.

Another school of thought also exists, interpreting the essence of implementation of GST as consumption/destination-based tax, which states that as the supplier is distributing the said free samples for furtherance of the business, ITC w.r.t the said sample shall be made available to him. If he does not distribute the samples free, his customers will not be able to appreciate and understand his product. And as a common business practice, the cost of this samples is calculated in the costing of overall production.

Q157. Whether ITC is available on goods distributed as Diwali gift or otherwise? Is it necessary to prove nexus between the goods distributed as gift and revenue generated from such distribution? Can such distribution be justified as being a

routine business practice and done with the intent of business and maintaining long term relations with business stakeholders?

Ans. (i) As per section 16(1), a registered person is entitled to take ITC in respect of goods or services used or intended to be used in the course or furtherance of business. However, some of the credits as given in section 17(5) are disallowed though they are used in the course or furtherance of business.

One such item is contained in section 17(5)(h) which blocks ITC on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

(ii) Therefore, on a plain reading of clause (h) of section 17(5), ITC on Diwali gifts is not allowable. It may be an argument that it is easy to prove that gifts are distributed in the course of business and should be allowed as per section 16. This shall not hold good since section 17(5) starts with non obstante clause and also it is to be noted that the stipulation in section 17(5) is a specific requirement that prevails over general provisions of section 16.

(iii) One may take a view that nothing in this world is given as free and so is the gift. Gift given to customers has extra commercial considerations, though worded as gift, and consideration is hidden in it. Hence, ITC should be allowed, since the same does not partake the characteristics of gift. If this stand holds good and ITC is availed, the same should be classified as supply as per Schedule I and tax on such supply must be paid on the value determined as per rule 27.

(iv) This view is also supported by CBIC *vide* its *Circular No 92/11/2019-GST dated 7-03-2019,* the relevant excerpts of which are as under:

"A. Free samples and gifts:

i. It is a common practice among certain sections of trade and industry, such as, pharmaceutical companies which often provide drug samples to their stockists, dealers, medical practitioners, etc. without charging any consideration. As per sub-clause (a) of sub-section (1) of

section 7 of the said Act, the expression "supply" includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease, or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. Therefore, the goods or services or both which are supplied free of cost (without any consideration) shall not be treated as 'supply' under GST (except in case of activities mentioned in Schedule I of the said Act). Accordingly, it is clarified that samples which are supplied free of cost, without any consideration, do not qualify as 'supply' under GST, except where the activity falls within the ambit of Schedule I of the said Act.

ii. *Further, clause (h) of sub-section (5) of section 17 of the said Act provides that ITC shall not be available in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples. Thus, it is clarified that* ***ITC 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 said Act, the supplier would be eligible to avail of the ITC."***

Q158. How is the ITC on inputs reversed when final products are subsequently destroyed or lost or stolen and thus ITC thereon gets blocked in terms of section 17(5)(h)?

Ans. Manner of reversal of ITC as required under section 17(5)(h) is not prescribed under any rule. However, it is suggested that ITC availed on inputs and input services used in such goods (other than capital goods) which are lost, stolen or destroyed may be reversed as per Generally Accepted Accounting Principles. In case of loss or destruction of capital goods, ITC may be reversed as provided under rule 44.

Q159. Whether ITC availed on inputs viz., raw materials should be reversed in the case of destruction of finished goods not sold, but expired (like expired medicines in case of pharmaceutical industry)?

Ans. Section 17(5)(h) blocks ITC in respect of goods lost or destroyed.

The goods specified in section 17(5)(h) include raw materials, work-in-progress, semi-finished goods and finished goods. There cannot be a narrow interpretation that goods specified in section 17(5)(h) are only the raw materials and not the finished goods, because the definition of inputs and capital goods is very wide to cover almost all imaginable goods that are directly or indirectly used in the course of furtherance of business.

Hence, ITC can be availed on all such goods as per section 16(1) if the same are used in the course or furtherance of business. Thus, the raw materials consumed in the manufacturing process of finished goods which get destroyed needs to be reversed as it is specifically blocked under section 17(5)(h).

In line with the above view, the Board *vide Circular No. 72/46/2018-GST dated 26-10-2018*, clarified the procedure to be complied with by the manufacturer / wholesaler / retailer in respect of return of time expired drugs or medicines. Since in the given case, the treatment of ITC in case of destruction of finished goods has to be ascertained, from the viewpoint of manufacturer, we shall refer that portion of the clarification given in the Circular as applicable to the manufacturer. As per Para No. 3(A)(d) [extract below] of the Circular, it is clarified that the manufacturer has to reverse the ITC availed on the return supply from the retailer / wholesaler.

> "*d) Where the time expired goods which have been returned by the retailer/wholesaler are destroyed by the manufacturer,* ***he/she is required to reverse the ITC availed on the return supply*** *in terms of the provisions of clause (h) of sub-section (5) of section 17. It is pertinent to mention here that the* ***ITC which is required to be reversed in such scenario is the ITC availed on the return supply and not the ITC that is attributable to the manufacture of such time expired goods."***

On analysis of the above clarifications, it is perceived that the Board wants the manufacturer to reverse only the ITC attributable to return supply of time expired drugs, because they would have paid GST at the time of getting back the time expired drugs from the retailer / wholesaler, if the latter has opted to treat the sales return as fresh supply. Further, the Board does not insist the manufacturer to reverse the ITC attributable to the manufacture of such time expired goods and the legislative intention behind this clarification would be that in the first leg of transaction with respect to the supply between manufacturer and wholesaler / retailer, the manufacturer would have availed ITC as they have done the outward supply and the chain would be complete. As far as the sales return of time expired drugs is concerned, where the wholesaler / retailer if opted it as a fresh supply, then it is a separate leg of transaction, hence the manufacturer is advised to reverse the credit of input tax paid to wholesaler / retailer at the time of return supply, because of section 17(5)(h), as the time expired goods are destroyed by the manufacturer at his end.

Further, in this connection, it is stated that if the ITC is not reversed at the time of destruction / expiry of finished goods under section 17(5)(h), then at the time of disposal of such destroyed or expired goods, the manufacturer is covered by entry no.1 of Schedule I. Accordingly, the permanent transfer or disposal of business assets on which ITC is availed is deemed to be supply and the manufacturer is liable to pay GST, by adopting the value specified in rule 27 or rule 30, at the time of disposal of such destroyed or expired finished goods.

Based on the foregoing discussions, it is suggested that the manufacturer has to reverse the ITC availed on inputs in case of destruction / expiry of finished goods which is not sold.

Q160. A taxpayer avails ITC on inputs and input services during a financial year. He reverses a portion of the ITC attributable to exempt services on monthly basis.

If excess ITC has been reversed during the year by the taxpayer, is there any remedy for the same?

Ans. Rule 42(2) makes it mandatory to re-calculate the reversal for a financial year, after the end of financial year between April to

September of the following financial year. During this calculation, which is on a yearly basis, if it is identified that ITC has been reversed in excess on account of monthly calculation, such ITC can be re-availed before the due date of the return for the month of September of the following financial year.

Q161. A company reverses ITC on capital goods in terms of the provisions of rule 43. The ITC reversed is debited to the fixed asset account and depreciation is claimed on the same - full depreciation on ITC reversed till 30th September and half depreciation on ITC reversed thereafter.

Is this treatment correct because section 43(1) of Income-tax Act, 1961 provides that depreciation cannot be claimed on ITC portion once availed? Whether such ITC can be charged to profit and loss account as the same is more or less in the nature of depreciation?

Ans. The ITC availed normally is a 'current asset'. When ITC is credited from 'current asset' naturally, the debit has to be given in 'Profit & Loss Account' as ITC reversed, and this is the correct procedure.

Adding of reversed ITC to the fixed asset and claiming depreciation is not the correct procedure as there is no addition to the fixed asset. Further, as pointed out in the question itself, once ITC is availed, one cannot claim depreciation on the same.

Q162. ITC has been claimed wrongly or claimed in excess in Form GSTR-3B during financial year 2019-20. The taxpayer did not identify the mistake on time and therefore, could not reverse or pay the excess amount *vide* DRC-03 in September 2020 i.e., it is still unpaid.

How to handle this situation and what can be the consequences, where the taxpayer turnover is (i) less than Rs. 5 Cr and (ii) more than Rs. 5 crore and the Department has not issued the show cause notice as yet?

Ans. Availing ineligible ITC in Form GSTR-3B leads to issue of notice under section 74. The registered person can reverse the said ineligible ITC through Form DRC-03 and report compliance in Form GSTR-9 (presuming Form GSTR-9 for financial year 2019-20 is not filed yet) for the financial year 2019-20 [irrespective of the turnover].

In case, Form GSTR - 9 has also been filed, then Form DRC-03 may be filed and the same should be intimated to the Department *via a* covering letter.

Q163. Where excess ITC was claimed, say in financial year 2020-21 and such excess is detected in the same financial year, whether such reversal is to be carried out through Form GST DRC-03 or Form GSTR-3B of subsequent month? What will be the method of reversal if the same is detected in the next Financial Year but before filing of September month's return?

Ans.

Particulars	***Reversal through Form GSTR-3B***	***Reversal through Form GST DRC-03***
Over reporting of ITC detected in same financial year or next financial year but before filing the Form GSTR-3B of September month return of the next financial year	As per the clarification given in Annexure to *Circular No. 26/26/2017-GST dated 29-12-2017s*, over reporting of ITC can be reversed through FormGSTR-3B of subsequent month (s) by disclosing the same in Table 4B (2). Interest computed as per section 50(1) should also be paid.	Form GST DRC-03 should be used for payment of GST / reversal of ITC in the following cases: • *Rule 42 and Rule 43* - Reversal of ITC on account of common credits may be either through Form GSTR-3B of the same month / subsequent month or through Form GST DRC-03. • *Rule 142(2)* Any voluntary payment made before serving of notice under section 73(5) or 74(5). • *Rule 142(3)* - Any payment made

		within 30 days of serving of notice under section 73(8) or 74(8) or 129(1).

Form GST DRC-03 is meant for intimation to the proper officer of payment of tax, interest or penalty **made voluntarily** or made against the show cause notice or statement. Moreover, Form GST DRC-03 is also referred to in rule 142(2) and rule 142(3) as mentioned in the above table.

Besides above, the *C.B.I. & C. Press Release Nos. 105 & 106/2019* dated 3-07-2019 has clarified that in cases where some information has not been furnished in the statement of outward supplies in Form GSTR-1 or in the regular returns in Form GSTR-3B, such taxpayers may pay the tax with interest through Form GST DRC-03 at any time. Further, if the taxpayers find themselves liable for reversing any ITC, they may do the same through Form GST DRC-03 separately.

Hence, the reversal of excess ITC taken may be through Form GSTR-3B/ GST DRC-03 of the same financial year, along with interest, when it is detected before the completion of the said year. However, where the excess credit has been noticed after the completion of the financial year, the same can be reversed through Form GST DRC-03 for ease in reconciliation. This reversal is voluntary along with interest. Further such payment will justify reporting in Form GSTR-9.

Q164. Explain computation of common credit for capital goods?

Ans. Rule 43 provides manner of determination of ITC in respect of capital goods and reversal thereof when capital goods are being partly used for the purposes of business and partly for other purposes, or partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies.

ITC attributable on capital goods partly used for taxable supplies and partly used for effecting exempt supplies or for non-business use shall be calculated as under:

- Step:1 Determine Common ITC

  i.e., used for business purpose and other purpose or for

taxable supplies including zero-rated supplies and exempted supplies.

- Step-2 Determine Ineligible ITC to be reversed. *i.e.,* common credit attributable towards exempted supplies
- Step-3 Calculation of Ineligible ITC

	Particulars	**Amount (Rs.)**
	Total ITC during the relevant year	XXXX
Less:	ITC in respect of capital goods which are used exclusively for "non-business purposes" **(a)**	XXXX
Less:	ITC in respect of capital goods which are used exclusively for effecting "Exempt Supplies" **(b)**	XXXX
Less:	ITC in respect of capital goods which are used exclusively for effecting "Supplies other than exempted but including Zero-rated Supplies" **(c)**	XXXX
	*Balance Credit **(A)**	XXXX

Balance Credit shall be credited to the e-credit ledger and useful life of such goods shall be taken as 5 years from the date of invoice

- Step-4 Ineligible ITC for a Tax Period (i.e., one month)
- **T_m=ITC attributable to a tax period on common capital goods during their useful life**

  — Amount credited to Electronic Credit Ledger ÷ 60

  It is clarified that useful life of any capital goods shall be considered as five years from the date of invoice and the said formula shall be applicable during the useful life of the said capital goods.

- **T_e= Common ITC attributable towards exempted supplies**
  - $T_e = (E \div F) \times T_m$

Where-

Note-1:

"E" denotes aggregate value of **Exempt Supplies** during the tax period; and

"F" denotes **"Total Turnover"** of the registered person during the tax period.

Clarifications-

- It is clarified that in case turnover is not available for the tax period, value of "E" and "F" shall be taken for the last tax period in which details of turnover are available.
- Here, exempt supplies include **reverse charge supplies, transactions in securities, sale of land and sale of building when entire consideration is received either after issuance of completion certificate by the competent authority or its first occupation, whichever is earlier**. Thus, ITC attributable to such supplies will need to be reversed.
- Here, exempt supplies exclude-

  (a) transactions/activities specified in Schedule III except sale of land and sale of building as specified in point (ii) above.

  (b) supply of services by way of accepting deposits, extending loans or advances where the consideration is either interest or discount. However, value of such services is included in the exempt supply when the same are provided by a banking company or a financial institution including a NBFC.

  (c) transportation of goods by a vessel from the customs station of clearance in India to a place outside India

  Thus, ITC attributable to such supplies need not be reversed.

- It is further clarified those values of "E" (Aggregate value of Exempt Supplies) and "F" (Total Turnover) shall be exclusive of any duty or tax levied under:
  - ✓ Entry 84 and Entry 92A of List I of the Seventh Schedule to the Constitution and
  - ✓ Entry 51 and 54 of List II of the Seventh Schedule to the Constitution
- Amount of T_e has to be computed separately for CGST, SGST/UTGST and IGST **and declared in GSTR 3B**.
- The value of exempt supply in respect of land and building is the value adopted for paying stamp duty and for security is 1% of the sale value of such security.

Note-2: The amount of 'T_e' along with applicable interest shall be added to the output tax liability of the person making claim of such credit.

Example: Information of M/s AB Traders for the month of September, 2020:

Outwards Supply: -

Particulars	Value	Tax Amount @ 18%
Supply of Taxable Services- Domestic as well as zero rated supply	Rs. 25,00,000	450,000
Supply of Exempt Services	Rs. 10,00,000	Nil
Total Supply of Services	Rs. 35,00,000	450,000

Inwards Supply of Capital Goods: -

Total inward supplies of capital goods for the month	**Rs. 45,00,000**	**8,10,000**
Purchase of capital goods to be used exclusively for taxable supply	Rs. 20,00,000	320,000

Purchase of capital goods to be used exclusively for exempt supply	Rs. 10,00,000	180,000
Purchase of capital goods for non-business purpose	Rs. 1,00,000	18,000

	Particulars	**Amount (Rs.)**
	Total ITC in respect of capital goods for the month	810,000
Less:	ITC in respect of capital goods exclusively used for "Purposes other than business"	(18,000)
Less:	ITC in respect of capital goods exclusively used for effecting "Exempt supplies"	(1,80,000)
Less:	ITC exclusively used for effecting "Supplies other than exempted but including Zero-rated supplies"	(320,000)
Step-1	**Common Credit(A)**	**2,92,000**
Step-2	ITC pertaining to capital goods partly used for Exempt supplies and personal use (A*B/C)	83,429
	Exempt Supplies(B)-10,00,000	
	Total Turnover (C)-35,00,000	
Step-3	**Reversal of ITC in a month**	
	Amount as per Step 2/60(months) = (83,429/60)	**Rs. 1390**

The ITC to be reversed of Rs. 1,390 has to be added to output liability every month.

3
ITC in Special Circumstances

Q165. A taxpayer contravened the provisions of section 10 on 31-03-2018. Suppose proper officer issued Form CMP-07 on 01-04-2021 withdrawing the option to levy tax under section 10 from 31-03-2018, whether taxpayer has option to claim ITC of stock available as on 31-03-2018?

Also, how the taxpayer will be able to take ITC on purchases made during financial years 2018-19, 2019-20 and 2020-21 as the time to avail ITC has elapsed?

Ans. The conditions to avail ITC in case of withdrawal from composition scheme under section 10 is provided in section 18(1) (c) which reads as follows:

> *"Where any registered person ceases to pay tax under section 10, he shall be* ***entitled to take credit of input tax*** *in respect of inputs held in stock, inputs contained in semi-finished or finished goods held in stock and on capital goods* ***on the day immediately preceding the date from which he becomes liable to pay tax under section 9****:*
>
> *Provided that the credit on capital goods shall be reduced by such percentage points as may be prescribed"*

Further the manner of claiming ITC under 18(1) (c) is given in rule 6(6) which reads as under:

> "*Every person who has furnished an intimation under sub-rule (2) or filed an application for withdrawal under sub-rule (3) or a person in respect of whom an order of withdrawal of option has been passed in FORM GST CMP-07 under sub-rule (5), may electronically furnish at the common portal, either directly or through a Facilitation Centre notified by the Commissioner, a statement in FORM GST ITC-01 containing details of the stock of inputs and inputs contained in semi-finished or finished goods held in stock by him on the date*

on which the option is withdrawn or denied, within a period of thirty days from the date from which the option is withdrawn or from the date of the order passed in FORM GST CMP-07, as the case may be.

Further, *Circular No. 77/51/2018-GST dated 31-12-2018* was also issued to clarify doubts in relation to conditions and manner for claiming ITC under section 18(1)(c) read with rule 6 and to ensure uniformity in the implementation.

According to the above provisions, the taxpayer shall be eligible to claim ITC, by filling Form GST ITC-01 within 30 days from the date of the order passed in Form GST CMP-07, on the stock held as on 31st March 2018 subject to the proviso to section 18(1)(c) relating to capital goods.

The taxpayer shall not be eligible to claim ITC on purchases made during the year 2018-19 & 2019-20 as the time limit for claiming ITC as provided under section 16(4) has elapsed. However, ITC on purchases during the year 2020-21 can be claimed subject to fulfilment of the conditions prescribed *supra*, as well as other conditions under section 16.

Q166. In case of death of a taxpayer it is provided that,

(i) his/her legal heir may continue the business activities by obtaining a new registration within 30 days.

(ii) balance of ITC in electronic credit ledger can be transferred by filing ITC-02.

If the deceased taxpayer's registration was *suo-motu* cancelled or suspended by the authority, will the legal heir be able to transfer ITC balance to the new registration?

Ans. As per clause 3(c) of the *Circular No. 96/15/2019 – dated 28-3-2019*, in case of death of sole proprietor, if the business is continued by successor [legal heir], it shall be construed as transfer of business. Hence, the provisions of section 18(3) read with rule 41 which allow the registered person to transfer the unutilized ITC, would be applicable in case the business is transferred to the legal heir. In such case, the application of cancellation is also required to be made by legal hair.

In clause 3(d), it is clarified that such person [legal heir] can file Form GST ITC-02 *before filing the application for cancellation.*

Further, rule 41(1) provides that the registered person can file Form GST ITC -02 for transfer of unutilized ITC lying in his electronic credit ledger to the transferee. Hence, the person whose registration is cancelled, is required to first apply for revocation of cancellation of registration as provided in section 30 / rule 23. The application in Form GST ITC-02 can be filed only after revocation of cancellation, when the status becomes registered person.

Further, section 29(5) lays down that the ITC in respect of stock is required to be reversed / paid back. Considering the provision of section 29(5), ITC in respect of stock/ assets will be treated as reversed in case of cancellation of registration. If there is unutilised ITC which does not relate to stock, the same cannot be transferred since the person has lost his status as registered person.

In case of suspension of registration, the status remains as registered and hence Form GST ITC-02 can be filed.

As per rule 21A, the proper officer can revoke the suspension during cancellation proceedings. It is advisable to get the cancellation of registration revoked for filing Form GST ITC-02.

Otherwise also, rule 21A (4) provides that the suspension of registration shall be deemed to be revoked upon completion of the proceedings by the proper officer under rule 22 [cancellation] and such revocation shall be effective from the date on which the suspension had come into effect. This means that in the meantime, the person will be deemed to be registered and hence can file Form GST ITC-02.

Q167. Mr. X is registered with GST Authorities in the State of Tamil Nadu. He does business across India. He maintains proper records and files returns on time. During May 2020, Mr. X planned to sell his business to Mr. Y of Tamil Nadu. All discussions between Mr. X and Mr. Y are over by 15th June, 2020. Mr. Z, accountant of Mr. X, raises sales invoice of all inventories available in the godown on 20th June 2020 as sale to Mr.Y Accordingly, payment is received, and GST return is filed by Mr. X On the other hand, Mr. Y files GST return and claims ITC on the product purchased.

Now Mr. A gives an idea to Mr. X and Mr. Y that there is a provision in GST law by which business can be transferred along with ITC. Same is done by Mr. X and details are updated in GST portal and Mr. Y accepts them too.

1. **Whether ITC available with Mr. X can be claimed by Mr. Y?**
2. **What will happen to the ITC availed on fixed asset and whether Mr. Y can use the ITC for unutilised period?**
3. **If Mr. Y sells any of the fixed asset, how is he going to reverse ITC?**
4. **Is it correct on the part of Mr. Y in claiming ITC on the inventory purchased because later on the business itself was transferred to Mr. Y?**

Ans. The question deals with two types of transactions, which are as follows:

→ The supply of goods under the cover of a tax invoice.

→ Transfer of business (we will assume on going concern basis).

Supply of Goods

As far as the first transaction is concerned, the recipient Mr. Y can take the credit as soon as the invoice is reported by Mr. X in Form GSTR-1 and appears in his Forms GSTR 2A / 2B.

Transfer of Business

For answering the ITC on the transfer of business, we first need to understand what will be construed as a transfer of business on going concern basis. The Education Guide issued under the erstwhile Service Tax regime explained the term 'transfer of a going concern' in para 7.11.15 as under:

> *"Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill., etc. Since the transfer in title is*

not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted."

If the transfer is in line with the above clarification rendered by CBIC, then the supplier Mr. X can pass on the balances in electronic credit ledger after considering the clarification issued *vide Circular No. 133/03/2020 - GST dated 23-03-2020,* to Mr. Y.

Against the backdrop of the above submission the query connected to this part is replied as under:

What will happen to the ITC availed on a fixed asset and whether Mr. Y can use the ITC for the unutilized period?

Yes, after the transfer of business it is the asset of Mr. Y and he can avail ITC which has been transferred to him through Form GST ITC-02.

If Mr. Y sells any of the fixed assets, how is he going to reverse the ITC?

ITC needs to be reversed as per the provisions under section 18(4) read with rule 44.

Is it correct on the part of Mr. Y in claiming ITC on the inventory purchased because later on the business itself was transferred to Mr. Y?

The transactions in question are independent and hence ITC cannot be challenged.

Q168. In case of application for voluntary registration, whether ITC on input services can be claimed for the period between the date of application for voluntary registration and date of approval of registration?

Example: The application for voluntary registration is filed on 02-04-2021, registration is granted w.e.f. 15-04-2021, whether ITC on bill (input service) dated 12-04-2021 can be claimed?

Ans. As per section 18(1)(b), "*Subject to such conditions and restrictions as may be prescribed—*

(b) *a person who takes registration under sub-section (3) of section 25 shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock* ***on the day immediately preceding the date of grant of registration;***

From an analysis of the above provisions, it can be concluded that in case of voluntary registration under section 25(3), the person is eligible for claiming ITC on inputs, inputs held in stock and inputs contained in semi-finished or finished goods held in stock *on the day immediately preceding the date of grant of registration*. Hence, ITC on bill dated 12-04-2021 pertaining to input service, is not allowed.

Q169. Whether a registered person will be entitled to claim ITC in respect of inputs held in stock, inputs contained in semi-finished goods or finished goods, if an exempt supply becomes a taxable supply? If eligible, are there any conditions involved in claiming such ITC?

Ans. Section 18(1)(d) specifically covers this case. Accordingly, where an exempt supply of goods or services or both by a registered person becomes a taxable supply, such person shall be entitled to take credit of input tax in respect of inputs held in stock and inputs contained in semi-finished or finished goods held in stock relatable to such exempt supply and on capital goods exclusively used for such exempt supply on the day immediately preceding the date from which such supply becomes taxable.

Further, as per rule 40(1)(b), the registered person shall, within a period of 30 days from the date of becoming eligible to avail the ITC or within such further period as may be extended by the Commissioner by a notification in this behalf, shall make a declaration, electronically, on the common portal in FORM GST ITC-01.

Q170. Can ITC on inward supplies available in stock be claimed for the period before the date of registration?

Ans. Yes, ITC on the stock in hand before the date of registration can be availed as provided under section 18(1). The said provision

prescribes the following scenarios where the ITC prior to registration can be availed subject to certain conditions:

Section	*Condition*	*ITC allowed for*	*As on*
18(1)(a)	Apply within 30 days of becoming liable for registration	Inputs held in stock and inputs contained in semi-finished or finished goods held in stock	Day preceding the date of becoming liable to pay tax
18(1)(b)	Voluntary registration under section 25(3)	Inputs held in stock and inputs contained in semi-finished or finished goods held in stock	Day preceding the date of grant of registration

Moreover, in either of the scenarios filing of the Form ITC-01 is mandatory within 30 days of becoming eligible to avail the credit or within such extended period.

Correspondingly, it is also interesting to note that section 18(2) bars eligibility of ITC under section 18(1), if the date of issue of tax invoice relates to inward supplies older than one year.

Furthermore, it is worth noting that GST law does not have any provision for availing ITC on input services and capital goods used during transition from unregistered to being registered.

Q171. Manisha, proprietor of a trading firm, dies due to COVID in April 2021. What will happen to the unutilised ITC lying in e-credit ledger?

Ans. As per the provisions of section 18(3) read with rule 41, where there is a change in the constitution of the registered person on account of transfer or change in the ownership of the business for any reason, with the specific provisions of transfer of liabilities, the unutilised ITC lying in the e-credit ledger of the transferor can be transferred *vide* Form ITC-02.

In the instant case the change of ownership is due to death of the proprietor of the firm. The Board *vide Circular no. 96/15/2019-GST dated 28-03-2019* has clarified that "*transfer or change in the ownership of business will include transfer or change in the ownership of business due to death of the sole proprietor*." The said circular has also prescribed the manner in which the various compliances i.e., registration liability of successor, cancellation of registration of transferor, transfer of ITC etc., shall be performed. Also, Form GST ITC-02 shall be filed before the filing of the application for cancellation of the registration of the transferor.

Q172. ABC & Co. is a partnership firm engaged in trading activity having GST registration at its Mumbai unit and Hyderabad unit. Due to business restructuring, they have decided to transfer the entire Mumbai operations to Hyderabad (inventory including all capital goods is also transferred to Hyderabad Unit).

Can ITC lying in electronic credit ledger of Mumbai unit be transferred to Hyderabad unit as per section 18(3)?

OR

A company exclusively engaged in software development (with no inventory of goods) decided to close down its operation in one State and shift to another neighbouring State having the required and efficient infrastructure. They have GST registration in both the States. In the given scenario, how can they transfer its accumulated ITC from the previous GSTIN to the new State's GSTIN?

Can it use ITC-02 for the said purpose considering such transfer to be as per section 18(3) read with rule 41 as the liabilities associated with the said GSTIN are also getting shifted?

Ans. The GST law recognises multiple units of an entity (under same PAN) separately registered whether in same State or other State/ Union territory as 'distinct persons' as per provisions of section 25(4) or section 25(5). Further, entry no. 2 of the Schedule I, identifies supplies between distinct persons even without consideration as deemed supplies. On perusal of the provisions of section 18(3) read with rule 41, it is understood that the unutilised ITC lying in electronic credit ledger of the

transferor can be transferred to the transferee *vide* Form ITC-02 in case of change in the constitution of the registered person due to sale, merger, demerger, amalgamation, lease or transfer of the business with the specific provisions of transfer of the liabilities.

Though the word "change in constitution" is not defined in the Act or the Rules made thereunder. However, from the circular cited above as well as the words following the phrase "*change in constitution (having included the word transfer of business)*" it appears change in constitution means change in GST No./change in control. Thus, unutilized ITC can be transferred from Mumbai to Hyderabad.

Q173. A Company was merged with another company. As per GST procedure, ITC up to the date of merger was transferred by transferor entity to transferee entity through ITC-02. There are certain bank guarantees and lease agreements in which GSTIN of old company was mentioned. Service providers continued to raise invoice with previous GSTIN (of transferor company) which is not in use and no returns are being filed thereunder. Thereby, Form GSTR-2A of transferee company is not reflecting those inward supplies and thus, ITC cannot be claimed thereon.

Can such ITC be availed by the transferee company after the filing of Form GST ITC-02?

Ans. In case of merger of two entities, the unutilised ITC can be transferred using Form GST ITC-02 as provided under section 18(3) read with rule 41. Further, the said provisions provide only a one-time opportunity to transfer the credit remaining unutilised in electronic credit ledger. The credit which is not part of the electronic credit ledger before such date of transfer cannot be transferred subsequently. Therefore, for the question in hand, based on strict interpretation of law, the availing of ITC after filing of Form GST ITC-02 due to non-reflection of ITC in Form GSTR-2A of the transferee company shall not be possible.

Q174. In case of merger in compliance of section 18(3), the transferor company has certain inputs availed at the Head Office which is

registered as an ISD. The ITC has already been transferred *vide* Form GST ITC-02.

How can ITC be claimed on these inputs since ITC-02 cannot be filed for ISD inputs which require distribution to other locations?

Ans. ITC on inputs lying at the ISD location should be distributed in the same month in which the ITC is availed as provided under section 20 read with rule 39(1)(a).

Further, in case of merger, the unutilised ITC can be transferred using Form GST ITC-02 as provided under section 18(3) read with rule 41. There is no time-limit under rule 41 for filing of Form GST ITC-02. For the question in hand, the question of transferring ITC *vide* Form GST ITC-02 does not arise as the same was required to be distributed in the same month itself and as mentioned in question Form GST ITC-02 is already filed.

Q175. Whether for availing ITC, Form ITC-01 is to be submitted compulsorily by all the newly registered persons within 30 days of registration?

Ans. Yes, as per rule 40(1)(b), a registered person shall file Form ITC-01 within 30 days from date of becoming eligible to claim ITC under section 18(1). However, the said time period may be extended by the Commissioner.

Q176. In case of transfer of capital goods to another branch (distinct person), whether rule 40(2) read with section 18(6) need to be applied to ascertain the amount of ITC reversal?

Ans. In case of transfer of capital goods to a different business entity, reversal of ITC shall be applied as per section 18(6) read with rule 40(2) which states that in case of supply of capital goods or plant and machinery, on which ITC has been taken, the registered person shall pay an amount equal to the ITC taken on the said capital goods or plant and machinery reduced by 5% point for every quarter or part thereof from the date of issue of invoice or the tax on the transaction value of such capital goods or plant and machinery determined under section 15, whichever is higher.

Further, where refractory bricks, moulds and dies, jigs and fixtures are supplied as scrap, the taxable person may pay tax on the transaction value of such goods determined under section 15.

Usually, where goods are transferred to a distinct business entity, the same is usually transferred at depreciated value. Hence, the tax payment on transfer of capital goods/plant and machinery can be made equal to the amount required for reversal by making the transfer at such depreciated value.

Q177. Is a Memorandum of Understanding enough for transfer of ITC in case of merger of a partnership firm with a company?

Ans. 1. No. This is a case of merger. MOU is not enough for transfer of ITC and the process as laid down in rule 41 will have to be followed for transfer of ITC from the partnership firm to the company. The process is as follows.

2. (a) The partnership firm shall furnish the details of merger in Form GST ITC- 02, electronically on the common portal along with request for transfer of unutilised ITC lying in its electronic credit ledger to the transferee company. Matched ITC can only be transferred.

(b) The partnership firm will also electronically submit copy of a certificate issued by a practicing Chartered Accountant or Cost Accountant certifying that the merger of the business has been done with a specific provision for the transfer of liabilities.

(c) The transferee i.e., the company in this case, shall, on common portal, accept the details so furnished by the transferor – partnership firm in this case. Upon such acceptance, the unutilised ITC specified in Form GST ITC-02 shall be credited to electronic credit ledger of the transferee company.

(d) The inputs and capital goods transferred by the partnership firm shall be duly accounted for by the transferee company in its books of account.

Q178. Whether ITC is allowed if the date of registration and date of commencement of business are different?

Ans. (i) The above question consists of the following two parts:

(a) Where the date of commencement of business precedes the date of registration

(b) Where the date of commencement of business is after the date of registration

(ii) Where the date of commencement of business is before the date of registration, sub-sections (1) and (3) of section 18 allow ITC in respect of inputs held in stock and inputs contained in semi-finished goods or finished goods held in stock before the date of registration when *a person applies for registration within 30 days from the date on which he becomes liable to registration and has been granted such registration*. However, credit in respect of capital goods and input services are not allowed. Availing ITC, under this special circumstance is subject to conditions and procedures laid down in rule 40(1)(b).

(iii) Date of commencement of business is after the date of registration:

The term "commencement of business" is not defined in GST law. However, as per section 2(17)(d) *supply or acquisition of goods including capital goods and services in connection with commencement or closure of business* is included in the definition of the term business.

(iv) From the above clause, it is clear that any purchase of goods or services in connection with the commencement of business shall be treated as "*business*". Hence, once a person procures goods or capital goods or avails services in connection with commencement of business, it can be concluded that the business has commenced. ITC is allowed in the above situation, where the date of commencement of business is after the date of registration,

(v) This view is also supported by section 16(1). However, when a person applies for registration, he has to declare the date of commencement of business in the application form for registration i.e., Form GST REG-01 and the portal does not allow any person to choose the future date of commencement of business under both situations viz., when registration is taken on voluntary basis or on crossing the threshold limit of registration.

However, it can be said that preliminary activities of commencing the business like, applying for PAN, bank account opening for the business, hiring a place for office etc., itself indicate that business has commenced. After commencement of business, if registration is obtained, any ITC, subject to conditions laid down in section 16 to 18, is allowable.

Q179. A dealer is paying tax under composition scheme. His turnover crosses the composition threshold, and he becomes a regular taxable person.

Is he eligible for ITC?

Ans. (i) As per section 18(1)(c), the dealer is eligible to claim ITC on the stock of inputs, stock of inputs contained in semi-finished goods and finished goods and on capital goods on the day immediately preceding the date from which his turnover has crossed the composition threshold. However, no ITC is available on input services availed prior to such date.

(ii) As per rule 40(1), following are the relevant requirements in this regard:

a. ITC on capital goods will be reduced by 5% per quarter of a year or part thereof from the date of purchase invoice.

b. ITC claimed shall be verified with the corresponding details furnished by the corresponding suppliers.

c. ITC shall be availed within one year from the date of issue of tax invoice by the suppliers.

d. The registered person has to make a declaration in Form GST ITC-01 within a period of 30 days from the date of becoming eligible to avail the ITC.

Q180. Under rule 41, a taxpayer can "request for transfer of unutilized ITC lying in his electronic credit ledger to the transferee" in certain cases.

Whether the relevant date to determine the balance in electronic credit ledger is the date of demerger / slump sale / transfer / etc. or the date on which transfer is being requested by filing Form

GST ITC-02 (considering demerger will have different appointed and effective dates)?

Ans. The CBIC has clarified in *Circular No.133 03/2020-GST dated the 23-03-2020* the question raised here.

Para 3 (Serial No. d of the table appended thereon), has clarified as follows:

> *"A conjoint reading of sub-section (3) of section 18 of the CGST Act along with sub-rule (1) of rule 41 of the CGST Rules would imply that the apportionment formula shall be applied on the* ***ITC balance of the transferor as available in electronic credit ledger on the date of filing of FORM GST ITC – 02 by the transferor".***

Further, in case of demerger also, it has been clarified that, for the purpose of apportionment of ITC under sub-rule (1) of rule 41, while the ratio of the value of assets should be taken as on the "*appointed date of demerger*", the said ratio is to be applied on the ITC balance of the transferor on the date of filing FORM GST ITC-02 to calculate the amount to transferable ITC.

Based on the above CBIC clarifications, it can be stated that*, the relevant date for the transfer of the balance in electronic credit ledger to be considered is the date of filing Form ITC-02.*

Q181. Company A and Company B got merged in Company C in the financial year 2020-21. ITC-02 was filed and GST compliance was done accordingly. ITC was reversed due to non-payment to vendors within 180 days under rule 37 during financial years 2017-18 and 2018-19. Payment to all such vendors has been made in Financial Year 2021-22.

Can ITC which was reversed in financial years 2017-18 and 2018-19 be claimed again? If yes, whether matching status needs to be checked for such invoices on which ITC is re-availed?

Ans. As per proviso to section 16, 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 180 days from the date of issue of invoice by the supplier, an amount equal to ITC

availed by the recipient shall be added to his output tax liability, along with interest. However, the recipient shall be entitled to avail ITC when payment is made by him.

Further, section 18(3) stipulates that where there is a change in the constitution of a registered person on account of sale, merger, de-merger, amalgamation, lease, or transfer of the business with the specific provisions for transfer of liabilities, the said registered person shall be allowed to transfer ITC which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed.

From a conjoint reading of the proviso to section 16 and section 18(3), it can be inferred that-

- The transferor unit must file ITC declaration for transfer of ITC in Form GST ITC-02.
- If the ITC transfer request of the transferor, filed through Form GST ITC-02 is *accepted* by the transferee, the ITC will be transferred to the transferee, and the electronic credit ledger of the transferee will get updated. Therefore, the merged unit can claim ITC which remains unutilised in the electronic credit ledger.

Re-availing of ITC reversed as per provisions of section 16(2) read with rule 37 is allowed only to the recipient of inward supplies.

In the above case, Company "C" is not the recipient of the inward supplies against which ITC was reversed. Therefore, Company "C" is not eligible to reclaim the ITC, However, if any amount remained unutilised in the electronic credit ledger of Company "A" & "B", the same can be claimed by Company "C" by filling Form GST ITC-02.

Q182. Whether ITC lying in electronic credit ledger of the deceased registered person can be transferred to legal heirs who wish to have different line of business?

Ans. As per section 18(3), where **there is a change in the constitution** of a registered person on account of sale, merger, demerger, amalgamation, lease or **transfer of business with the specific provisions of transfer of liabilities**, the said registered person shall

be allowed to transfer the ITC which remains unutilised in his electronic credit ledger to such sold, merged, demerged, amalgamated, leased or transferred business in such manner as may be prescribed. Further, rule 41 prescribes filing of Form GST ITC – 02 electronically on the common portal along with the request for transfer of unutilized ITC lying in his electronic credit ledger to the transferee.

As per clause 3(c) of the *Circular No. 96/15/2019 dated 28-3-2019*, in case of death of sole proprietor, if the business is continued by successor [legal heir], it shall be construed as transfer of business. Hence, the provisions of section 18(3) and rule 41 which allow the registered person to transfer the unutilized ITC, will be applicable in case the business is transferred to a legal heir. Therefore, if the business is transferred along with liabilities to the legal heir and the conditions set out in rule 41 are complied with, ITC will be transferred to the legal heir.

Q183. While computing reversal of ITC towards exempt supplies under rule 42, whether the value of financial credit notes (appearing only in books of account) should be considered in the computation of total turnover?

Ans. The term "*turnover in State*" is defined in section 2(112) as the aggregate value of all taxable and exempt supplies made within a State, exports and inter-State supplies made from the State but excludes taxes.

Rule 42 considers total turnover in the State for the purpose of calculation of reduction in ITC.

Therefore, the turnover in a State takes into account the 'value' and value of a taxable supply is determined as per section 15. Sub-section (3) of section 15 provides that value will not include *inter alia* post-supply discount if specified conditions are met. Where such specified conditions are met, post-supply discount is deducted from the value of supply and a credit note under section 34 is issued by the supplier. However, a financial credit note (which appears only in books of account) does not impact the value of supply and hence, would not be considered while computing the turnover under rules 42 and 43 for the purpose of reversal of credit.

Further, it has also been clarified by the CBIC *vide Circular no. 92/11/2019 – GST dated 7-3-2019 that value of supply shall not include any discount by way of issuance of financial/commercial credit note(s). The financial credit notes appearing in books of accounts only should not be considered for computation of ITC reversal towards exempt supplies under section 15(3)(b) of the CGST Act, 2017.*

Q184. There has been a merger of two companies. The supplier of the erstwhile transferor company provides goods/services to the transferee company and raises GST invoice correctly in the name and GSTIN of the transferor company but in his returns mentions GSTIN of the transferee company.

Can the transferee company avail ITC without modifying the invoice?

Ans. 1. As per section 31, a registered person supplying taxable goods or services is required to issue a tax invoice within specified time, showing therein the specified particulars and such other particulars as may be prescribed. The particulars that the tax invoice should contain, are prescribed in Rule 46.

2. As per section 16 (1), the entitlement to ITC is subject to conditions and restrictions as may be prescribed. Further, one of the conditions for the recipient registered person to be entitled to ITC, as provided under section 16(1), is that he is in possession of a tax invoice or debit note issued by a registered supplier. Rule 36 contains documentary requirements for claiming ITC.

3. Rule 46, *inter alia,* requires a tax invoice to contain the name, address and GSTIN of the recipient, if registered.

4. Rule 36(1) & (2) provide that ITC can be availed on the basis of tax invoice issued by the supplier of goods or services, in accordance with the provisions of section 31 and that ITC can be availed only if all the applicable particulars as specified in the provisions of Chapter VI (which covers the aforesaid rule 46), are contained in the tax invoice.

5. Further, a proviso inserted in the said rule 36(2) *vide Notification No. 39/2018 – Central Tax dated.04-09-2018* gives some relaxation and provides that if the document, tax invoice in the instant case, based on which ITC is availed, does not contain all the specified particulars but contains the details mentioned in the said proviso – which include GSTIN of the recipient -, ITC may be availed by the recipient registered person.

6. Guided by the aforesaid provisions, the requirement as to the contents of tax invoice is independent of the details that are required to be updated in the returns (Form GSTR-1) and it is imperative that the tax invoice contains at least the details mentioned in the aforesaid Proviso to rule 31(2) to avail ITC thereon.

7. It follows that in the instant case the transferee company which is the recipient of goods/services cannot avail ITC without getting the invoice modified from the supplier – correcting atleast to give the GSTIN of transferee company and preferably the name of transferee company.

Q185. A business is transferred in a slump sale as per section 50B of Income Tax Act on 01.04.2021. Can a credit note be raised by the transferee for the sale by the transferor in the month of March 2021 before the transfer of business, as the original sale invoice is raised by transferor? If credit note is raised by the transferee, then ITC will be taken by the buyer on the GSTIN of transferor, but ITC reversal will be based on the GSTIN of the transferee. How to reverse the ITC in this situation?

Ans. Let us understand the above with an illustration. A sold goods to X, and subsequently transferred the entire business to B. X took ITC on the invoice of A during purchase. Now, when the goods are to be returned, the GSTIN/ person to whom the goods will be returned is B.

The phrase used in section 34(1) is *"who has supplied such goods or services or both, may issue to the recipient".* Thus, credit note can be issued only by a person who has supplied the goods/services. In the above-mentioned case, A supplied the goods and therefore only A can issue the credit note.

Further, the provisions say that the supplier 'MAY' issue a credit note, implying it is not r a mandate. Therefore, instead of GST credit note, a supplier can always issue an accounting/financial credit note.

Therefore, in the said case, B can always issue a financial credit note to X without GST so that GST impact remains neutral.

Q186. Whether refund of ITC is allowed in case of closure of business due to pandemic?

Ans. A registered person can claim refund of unutilised ITC only in two scenarios as provided in the proviso to section 54(3). As per the said section, refund of unutilised ITC can be availed –

a) when there is zero-rated supplies made without payment of tax and

b) where the credit is accumulated on account of rate of tax on being inputs being higher than the rate of tax on output supplies. (Inverted duty structure)

In the given situation, refund of accumulated ITC is not allowed.

Q187. Upon sale of capital goods on which ITC is availed, section 18(6) read with rule 44 requires taxpayer to compute depreciated amount and remit GST on higher of such depreciated amount or sale value. Rule 44(6) requires separate computation for CGST/SGST/IGST.

A capital goods was purchased with IGST but is now being sold (after use) within the State. Thus, IGST output on transaction value is nil but whether the requirement to reverse IGST under rule 44(6) persists? This will result in payment of all 3 types of taxes.

Ans. Rule 44(6) provides for the reduction in ITC in specified percentage points (5%) to determine the ITC attributable to remaining useful life which is to be calculated as per rule 44(1)(b). ITC determined as per rule 44(1)(b) or the tax on the transaction value, whichever is higher, is to be paid whenever there is supply of capital goods in respect of which ITC has been taken.

When the taxable event of supply takes place within a State, the tax is due and payable as per the applicable CGST and SGST/UTGST laws only.

The manner of calculation of the amount of tax involved under each of the head namely, IGST/CGST/SGST is spelled out in rule 44(6). The **amount** arrived at by following the prescription in this rule is to be compared with the **output tax** on the transaction value.

On a plain reading of section 18(6), the higher of the amounts of tax is due and payable, though various interpretations are possible. Also, for a transaction of supply of capital goods there cannot be two levies, one as local intra-state supply and another under the IGST simultaneously. Also, a rule cannot travel beyond the provisions of the Act.

Hence, the higher of tax worked out as per section 18(6) read with rule 44(6) or tax on transaction value, is payable whenever capital goods is supplied in respect of which ITC is taken.

4
ITC and Job Work

Q188. When the goods of the principal are directly sent to the premises of the job worker, whether ITC can be taken by the said principal?

Ans. Yes, in accordance with sub-section (2) of section 19 of the Act, the principal shall be entitled to take credit of input tax on inputs, even if the inputs are directly sent to a job worker for job work without being first brought to his place of business. The principal should avail the ITC based on proper tax invoice as issued under section 31 of the Act when the goods are delivered at the premises of the job worker by the supplier.

Q189. What is the time limit for claiming ITC on capital goods sent from the principal's place of business to job worker for job work?

Ans. As per section 19(4), *"the principal shall, subject to such conditions and restrictions as may be prescribed* (Rule 45)*, be allowed input tax credit on capital goods sent to a job worker for job work."*

As per section 19(5), *"Notwithstanding anything contained in clause (b) of sub-section (2) of section 16, the principal shall be entitled to take credit of input tax on capital goods even if the capital goods are directly sent to a job worker for job work without being first brought to his place of business."*

As per section 19(6)*, "Where the capital goods sent for job work are not received back by the principal within a period of three years of being sent out, it shall be deemed that such capital goods had been supplied by the principal to the job worker on the day when the said capital goods were sent out:*

Provided that where the capital goods are sent directly to a job worker, the period of three years shall be counted from the date of receipt of capital goods by the job worker.

From an analysis of the above provisions, it can be concluded that for claiming the ITC in respect of capital goods, the time limit and conditions as provided in section 16 except section 16(2)(b) i.e., receipt of goods, are applicable, subject to which credit can be taken at the time of purchase. Capital goods sent to the job worker must be received back within 3 years of being sent out; otherwise, it will be considered as supply by principal to job worker on the day when the said capital goods were sent out.

Q190. The premises of a job worker have been added as additional place of business by a registered person. Can ITC be availed on machines installed at the premises of such job worker?

Ans. Since, the principal in the given query has registered the premises as additional place of business, ITC can be availed by the principal on machines installed at the premises of a job worker.

Q191. ***Circular No. 38/12/2018, dated 26-3-2018 inter alia*** **clarified that if the goods sent *by* the principal are returned by the job worker after the stipulated time period (i.e., 1/3 years), the same would be treated as a supply by the job worker to the principal and the job worker would be liable to pay GST if he is liable for registration in accordance with the provisions contained in the Act. Further, as per the second proviso to section 16(2)(d) of the Act, the recipient is required to make payment to the supplier within 180 days from the date of invoice.**

Whether in such case the principal would be able to claim ITC on the basis of invoice issued by the job worker when it appears that the above condition of payment enumerated in the second proviso to section 16(2)(d) does not seem to get fulfilled as in such situations there would be no liability of the principal to make such payment to the job worker?

Ans. In cases where the goods are returned by the job worker after stipulated time period, two supplies are deemed to have occurred: from the principal to job worker and from the job worker to the principal. Both the parties shall raise invoices and GST shall be paid on the same. ITC can be availed on such GST paid.

Section 16(2)(d) of the CGST Act, 2017 mandates payment to the supplier within 180 days. Supply between principal and job worker

are deemed supplies involving no actual flow of money. Since 'consideration' under GST law is defined in a wide manner, payment can be said to have been made even by way of set-off. However, this is a lacuna in the GST Law, which needs to be specifically addressed.

5
Distribution of ITC by Input Service Distributor

Q192. Where ITC on common service is received by a registered person having multiple registrations, whether such ITC can be claimed by a single registration (Head Office), or it has to be compulsorily distributed through the input service distributor (ISD)?

Ans. Section 16(1) states: '*Every **registered person** shall 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*'

Section 25(4) reads: '*A person who has obtained or is required to obtain more than one registration, whether in one State or Union territory or more than one State or Union territory shall, in respect of each such registration, be treated as distinct persons for the purposes of this Act.*'

Section 20(2)(c) and (d), relating to distribution of ITC by the ISD provides certain conditions as under:

> *"(c) the credit of tax paid on input services attributable to a recipient of credit, shall be distributed only to that recipient;*
>
> *(d) the credit of tax paid on input services attributable to more than one recipient of credit shall be distributed amongst such recipients to whom the input service is attributable……."*

In the backdrop of the above provisions, following can be inferred:

1. In the light of the definition of 'distinct person' as provided in section 25(4), the words 'him' and 'his' referring to a registered person u/s 16(1) cannot be interpreted as relating to an entity, rather would be relating to a distinct person.

2. Entitlement to ITC to every registered person is only in respect of the credit of input tax charged on supplies made to him and used for his business.

3. Mere receipt of invoice as a recipient will not entitle such registered person unless it is with respect to supplies made to him and used for his business.

4. Only such credit as attributable to the recipient, can be distributed by the ISD.

5. In case of excess distribution of credit to one or more recipients of credit, the excess credit so distributed shall be recovered from such recipients along with interest.

Hence, in the case of a company with a head office and various branches, only that portion of ITC that the head office is entitled to, can be claimed by the head office. The remaining amount shall be distributed to the branch offices as per the provisions of section 20.

Q193. An ISD has received inward supplies in the month of April 2020, accounted the invoice in the same month and the supplier has also uploaded the invoice in Form GSTR-1 as well in the month of April 2020, thereby reflecting in Form GSTR-6A of the ISD respectively.

Can the ISD distribute the ITC related to such invoice in May 2020?

Ans. For an ISD, it is relevant to note that availing and distribution of ITC are linked to each other.

The provisions of section 20 read with rule 39(1)(a) mandates that the ITC available for distribution in a month shall be distributed in the same month and the details of the same shall be uploaded *vide* Form GSTR-6. Even Form GSTR-6 in GST portal has necessary restrictions in place on such distributions. Therefore, for the question in hand, the distribution of ITC in May 2020 availed in April 2020 is not allowed.

However, as per section 39(9), an invoice omitted to have been distributed in the month of April 2020 can be disclosed in the

amendment table while filing Form GSTR-6 for the month of May 2020.

Q194. A taxpayer has multiple branches. It receives invoices at its Head Office in respect of services consumed in all branches. The taxpayer does not have ISD registration.

Whether it can issue invoices to its branches in normal course so that the branches can avail proportionate ITC?

Ans. Tax invoice can be issued for any supply of goods or services or both as per section 31. If there are no supply by and between distinct persons i.e., head office and branches, invoice as per section 31 cannot be issued. Also, the registration provisions require compulsory registration of an ISD *vide* section 24(viii) of the Act. In view of this position of law, the taxpayer in the instant case cannot issue normal tax invoice to its branches for sharing of ITC relating to invoice received at the head office and services consumed at the branches.

Q195. Can an ISD distribute credit of tax paid on goods purchased?

Ans. ISD is defined in 2(61) to mean an office of the supplier of goods or services or both which receives tax invoices issued under section 31 towards receipt of **input services** and issues a prescribed document for the purposes of distributing the credit of CGST, SGST/UTGST or IGST paid on the said services to a supplier of taxable goods or services or both having same PAN as that of the ISD.

The concept of ISD as defined above, is incorporated in the law to distribute the common ITC in respect of input services amongst the distinct persons under same PAN. The credit of goods cannot be distributed amongst distinct persons. There can always be stock transfer amongst the distinct persons.

6
Miscellaneous

Q196. What do you mean by the term "ITC availed"? Does it mean ITC taken to electronic credit ledger or ITC adjusted against output tax liability.

Ans. **'**ITC availed' means ITC taken to electronic credit ledger. This is on the basis that words 'availed' and 'utilized' have been separately used in GST Law.

Q197. Are there any recent changes / amendment in law with reference to the Finance Act, 2020 and Finance Act, 2021 in the matter of taking ITC? If so, whether such changes have been made effective?

Ans. Yes, amendments with respect to ITC have been made by both Finance Acts 2020 and, 2021.

In Finance Act, 2020 [Section 120 of Finance Act, 2020]-It was proposed to omit the words "*invoice relating to such*" from section 16(4) of the Act which was brought into force w.e.f.1-01-2021 *vide Notification 92/2020 - Central Tax dated 22-12-2020*. Due to the said amendment, ITC for a debit note shall now be available till due date of furnishing return under section 39 for the month of September following the end of the financial year to which such debit note pertains or furnishing of annual return, whichever is earlier. Therefore, original invoice date shall not be considered for availing ITC on any debit note.

Finance Act, 2021 [Section 109 of Finance Act, 2021] inserted following Clause "aa" after section 16(2)(a): "*(aa) 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;"*. This amendment is yet to be notified.

Q198. A high sea sale is done by A Ltd. to B Ltd. and duly endorsed bill of entry exists. B Ltd. has given address of its Head office, but GSTIN mentioned is that of the Branch. Whether ITC is available in this case? If so, to whom?

Ans. In case of high sea sales, the end buyer who gets the goods cleared from the customs on presenting the bill of entry for home consumption and payment of applicable import duties is treated as importer.

In the given situation, since GSTIN is of the branch of B Ltd., the credit will be available to the branch B Ltd. Merely furnishing the address of head office on endorsement should not be a ground for denial of otherwise eligible credit. Reliance can be placed on the judgement in *Spm India Ltd. v. Commissioner of Central Tax, Bengaluru West [2019 ACR 832]*. Alternatively, the procedure of amendment to endorsed bill of entry as per section 149 of the Customs Act, 1962 can be undertaken within the prescribed time.

Q199. Rate of GST on inward supply is reduced from say from 18% to 12%. Whether GST of 6% (18 minus 12) has to be reversed in respect of inputs, semi-finished or finished goods held in stock at the time of such reduction in rate?

Ans. No.

There is no such provision in GST law to reduce the ITC of inputs held in stock or contained in semi-finished or finished goods in the situation where the tax rates of same HSN inputs have been reduced.

Rationally as well, there is no requirement to reduce corresponding ITC, as ITC has been claimed by registered taxpayer after observing the conditions laid down in section 16(2). Section 16(2)(c) prescribes one of the conditions of availing ITC is payment of taxes by supplier of goods to the Government either by cash or by utilising the credit. Accordingly, Government already has recovered the tax element and therefore, there is no requirement for reversal of ITC on account of reduction in rates of same HSN inputs.

Q200. Can an entity set off ITC availed on inputs utilized in making a zero-rated supply against its any other taxable output supply? This way its ITC gets fully utilized and the entity is not required to apply for refund of ITC on inputs, which is available in case of

zero-rated output supply. Elaborate other provisions relating to ITC in case of exports?

Ans. A registered taxable person is eligible to avail ITC as per section 16 subject to the provisions of 17 of the Act. ITC on account of exempt supplies is required to be reversed. Exports get the benefit of zero-rating and not considered as an exempt supply under GST. No one to one co-relation is required and utilisation of credit is to be done in compliance of section 49 read with rule 88A.

Accordingly, in the given scenario, the registered taxable person can utilise the available credit for payment of output tax liability arising out of domestic supply.

Export / zero rated supply are treated at par with domestic taxable supply for the purpose of availment, reversal, blocking and utilisation of ITC.

Q201. A firm uses the car owned by the partner for its business purposes. Maintenance and servicing of car is the responsibility of firm. For such maintenance, GST is paid on purchase of spare parts and service charges. Can the firm claim ITC of such GST paid?

Ans. As per sections section 17(5)(a) and 17(5) (ab) , ITC is blocked not only on the purchase of car being motor vehicle, but also on the services of insurance, servicing, repairs & maintenance of the car, whether or not it is used for the purpose of or in the course of business and whether or not it is registered in the name of the taxpayer.

Further, it may be noted that the ITC is blocked under clause (ab) for the ***services*** of general insurance, servicing, repair and maintenance and a careful reading of the said provision will lead to an inference that ITC on 'goods' are not affected by this provision, since the fundamental definition of 'services' under GST law means 'anything other than goods……" as per section 2(102). It is possible to read clause (ab) as follows:

— the ***services*** of general insurance,

— servicing,

— repair and maintenance

Further, S. No. 2 of *Circular No. 47/21/2018-GST dated* 8-*06-2018* has clarified on the taxability for servicing of cars as under:

'*Issue No.2 - How is servicing of cars involving both supply of goods (spare parts) and services (labour), where the value of goods and services are shown separately, to be treated under GST?*

2.1 The taxability of supply would have to be determined on a case to case basis looking at the facts and circumstances of each case.

2.2 Where a supply involves supply of both goods and services and the value of such goods and services supplied are shown separately, the goods and services would be liable to tax at the rates as applicable to such goods and services separately.'

As per the above Circular, if the supplier charges tax on the servicing of cars, then there is a clear distinction for the recipient between input on goods and input on services apparent from the underlying tax invoice in hand for availing ITC. In such scenario, the recipient would be legally right in claiming ITC on such component of tax on goods in the form of spare parts since blocking of ITC under clause (ab) of section 17(5) is applicable only in the case of services.

Further, when the ITC *per se* is blocked even when the motor vehicle is purchased, owned or registered in the name of the company, the answer cannot be any different in the case of a car used for the business purposes which is owned by the partner of a firm. ITC is blocked and cannot be claimed on the maintenance and servicing of car in the form of service charges, irrespective of it being the responsibility of the firm. However, as stipulated above, with respect to the purchase of spare parts, the taxpayer has the legal validity to claim ITC on such input of goods in the form of spare parts, provided it is explicitly classified as goods in the tax invoice by the supplier and such a credit is not restricted in any other manner under the GST law.

Q202. Under a joint development agreement, land developer owner can utilize the ITC on his GST liability towards flats allotted to him and which are sold by him either when they are under construction or after construction by the land owner. If land developer pays GST under reverse charge mechanism on TDR for selling his portion of flats after completion of construction,

can he take such GST amount as ITC to pay GST on flats sold during construction phase?

Ans. ***ITC by Landowner***

In joint development agreements (hereinafter referred as "JDA"), the landowner gives the development rights of his land to the developer and in exchange gets a certain number of flats. The landowner, who is going to receive flats in exchange of land, is free to sell those during the construction and in such scenario, it will be subject to GST. Further, the transaction of giving flats to the owner of the land will also attract GST on the date of exchange itself. However, the developer's GST liability arises only after issuing the Completion Certificate (hereinafter referred as "CC") or first occupation in the project, whichever is earlier. In such scenario, the land owner will not be able to avail ITC of the tax charged to him by the developer, since the time of supply for the above discussed transaction falls in differed tax period. This provision results in blockages of working capital and ultimately increases the costs of flats to be sold by the landowner. This was seen as going against the tenet of the GST and causing cascading effect.

Besides the above, *CBIC vide FAQ's (Part II) on real estate vide Circular F. No. 354/32/2019 - TRU dated 14-05-2019* clarified *vide* S. No.2 that after even after the introduction of new rates of 1.5% and 7.5% without ITC (w.e.f 01-04-2019), on the construction activity, the land owner is entitled for ITC **only** in respect of those taxes charged to him by the developer of such apartments. From this, we can conclude that the intention of the Law is to allow ITC to the land owner. Further, this constraint was discussed in the 43rd GST Council Meeting dated 28.05.2021, where they proposed appropriate changes in the relevant notification for an explicit provision to make it clear that land owner promoters could utilize credit of GST charged to them by developer promoters in respect of such apartments that are subsequently sold by the land promotor and on which GST is paid. The developer promotor shall be allowed to pay GST relating to such apartments any time before or at the time of issuance of completion certificate. This recommendation has been brought to effect through *Notification No. 03/2021 – Central Tax. (Rate) dated 02-06-2021*.

CBIC vide FAQ's (Part II) on real estate vide F. No. 354/32/2019 - TRU dated 14-05-2019 clarified in Sr. No.7 that GST on TDR / FSI is payable @ 18% with ITC under Sl. No. 16 (iii) of *Notification No. 11/2017 – Central.Tax. (Rate) dated 28-06-2017*. Hence, from the clarification, it appears that the promoter is eligible for ITC of the taxes remitted under reverse charge mechanism. However, one has to take note of the following:

- Supply of TDR or FSI or long-term lease of land used for the construction of residential apartments in a project that are booked before issuing of completion certificate or first occupation is exempt. In other words, supply of TDR or FSI or long-term lease of land, on such value which is proportionate to the construction of residential apartments that remain un-booked on the date of issue of completion certificate or first occupation would attract GST at the rate of 18%.
- Besides the above, in case of construction of commercial apartments, the supply of TDR or FSI or long-term lease of land will attract GST of 18% without determining whether it is completed or not. The exemption given for the construction of residential apartments is not available where the construction relates to commercial apartments like shops, offices, godowns, etc.
- Difference in the tax rate for the construction of commercial apartments in real estate project vis-à-vis residential real estate project.
- Construction of an apartment by a promoter which is taxable at the rate of 1% (or) 5% GST is to be discharged in cash only.

Considering the above facts and the composition of the project, we can conclude that the promoter can take the credit but the same will be subject to section 17 read with rule 42.

Q203. Whether tax paid on transfer of land development rights before 01-04-2019 by developer is eligible for ITC, if the same developer is under old scheme on exercising the option as per *Notification No. 3/2019-Central Tax (Rate)-29-03-2019*?

Ans. ITC is allowed under section 16 if the same is attributable to taxable supplies for the purpose of business and is not being specifically

blocked under section 17. Thus, the developer/ builder is eligible to claim ITC on the GST paid on development rights under invoice issued by landowner, if the same is used for making taxable supply i.e., construction of immovable property intended to be sold before issuance of first occupancy/ completion certificate.

However, such ITC shall be subject to reversal under rule 42. Going by the logical basis of calculations specified in rule 42, proportionate ITC to the extent attributable to the units that are sold after issuance of first occupancy/ completion certificate are to be reversed. However, when such project spans over several years, ITC already availed and utilized in earlier years cannot be subjected to reversal if the sale of immovable property is made after first occupancy/ completion certificate in the subsequent years, since there is no such mechanism of reversal of ITC over multiple years of turnover as has been specified in rule 42 until 31st March 2019. Such loophole has been identified and plugged in by way of amendment in rule 42 w.e.f. 1st April, 2019 as per *Notification No. 16/2019 – Central Tax dated 29-03-2019.*

Even though the amendment in rule 42 ~~as above~~ shall be effective from 1st April 2019, since rule 42(2) prescribes annual evaluation of credit reversal within September following the end of the financial year, the calculation of ITC reversals notified w.e.f. 1st April, 2019 as per the amended rule 42 can be construed to be applicable for the ITC availed during the period April 2018 to March 2019 as well.

Further, proportionate credit to the extent attributable to the units that are used by the developer/ builder on his own account in the form of self-occupancy/ leasing/ renting purpose is also not available to the developer/ builder, since as per section 17(5)(d), no ITC is available for goods or services received by a taxable person for construction of an immovable property on his own account, other than plant and machinery, even when used in course or furtherance of business.

Thus, the developer should be able to bifurcate input tax credit utilized for making taxable supply and non-taxable supply. Also, self-invoice is essential for availing such ITC and it cannot be availed merely by recipient against receipt voucher issued by the supplier landowner.

Further, with reference to change in the GST law for the real estate sector w.e.f. 1st April, 2019, subject to the prescribed conditions, taxpayers have the option to continue to pay tax in the old rate for the ongoing projects, thereby continuing to retain the credit availed relating to such ongoing projects. Accordingly, the taxpayer opting for the old scheme shall continue to retain such ITC on TDR, subject to proportionate reversal as per amended rule 42.

Q204. Whether ITC attributable to cancelled flat is available to the developer where there is a change of the project from the old scheme to the new scheme and can there be any tax planning for the same?

Ans. With effect from 01-04-2019, the effective rate of GST applicable on the construction of residential apartments by promoters in a real estate project are as under:

Description	***Effective Rate of GST (Before deduction of the value of land)***
Construction of affordable residential apartments	1% without ITC on total consideration.
Construction of residential apartments other than affordable residential apartments	5% without ITC on total consideration.

The above rates are effective from 01-04-2019 and are applicable to the construction of residential apartments in a project which commences on or after 01-04-2019 as well as on 'on-going projects.' The question of taking ITC does not arise.

However, it is pertinent to note the following:

Section 31(3)(d) categorically states that a registered taxable person, who is in receipt of advance payment with respect to any supply of goods or services, should issue a receipt voucher. In the construction industry, it is customary to collect an advance from the prospective buyer of the property and on such receipt, the developer is mandated by the above-referred section to issue a receipt voucher containing the particulars as prescribed in rule 50.

It is imperative to mention that, at the time of cancellation of flat, there may be refund voucher or credit note depending on whether invoice is issued at the time of receipt of advance.

Further, section 31(3)(e) read with rule 51 provides for the scenario where, supply is not made, and tax invoice not issued; here refund voucher (at the time of cancellation of flat) should be issued against such payment. Contents of refund voucher are identical to the requirements of receipt voucher except that cross-reference of receipt voucher is required and the amount of refund is to be indicated, instead of the amount received as advance. If a refund voucher is made, it should be for the full value of the advance including the amount of GST. The said tax refunded can be adjusted against the tax pay out or otherwise refund can be applied under section 54.

CBIC vide. *F. No. 354/32/2019-TRU dated 7-05-.2019* in their FAQ for real estate has clarified a similar situation which is enumerated below:

> *"How to compute adjustment of tax in a credit note to be issued u/s 34 by real estate developer in case the unit was booked prior to 1st April, 2019 on which GST was paid on part consideration received at the time of booking, but cancelled after 1st April, 2019.*
>
> *Reply:*
>
> *Developer shall be able to issue a credit note to the buyer as per provisions of section 34 in case of change in price or cancellation of booking provided that the amount received in excess if any, consequent to issuance of credit note, is refunded to the buyer by the developer before September following the end of the financial year. Developer shall be able to take adjustment of tax paid in respect of the amount of such credit note. For example, a developer who paid GST of Rs. 1,20,000 at the rate of 12% (effectively) in respect of a gross amount of booking of Rs. 10,00,000 before 1st April, 2019 shall be entitled to take adjustment of tax of Rs. 1,20,000 upon cancellation of the said booking on or after 1st April, 2019 against other liability of GST including liability arising at the rate of 5% / 1% provided*

that the entire amount received from the buyer is refunded by the developer. Further, in case apartments booked prior to 1.04.2019 on which GST has been paid till 31.03.2019 at the old rates of 8%/ 12% with ITC, are cancelled and rebooked at the new rates of 1% / 5% without ITC or sold after issuance of completion certificate, the credit taken in respect of such apartments for supply of service till 31.03.2019 on which tax was paid @ 8%/ 12% with ITC shall be required to be reversed."

In both cases of refund voucher and credit note, the registered person is eligible to adjust the tax portion in the above-referred documents against the tax pay out and the said documents are not valid documents for availing the ITC as per section 16(1) read with rule 36.

Q205. Can real estate developers claim ITC against the bills of work contractor?

Ans. In terms of *Notification No 03/2019-Central Tax (Rate) dated 29-03-2019,* a promoter who is involved in construction of residential apartments either under Residential Real Estate Project (RREP – Construction of Commercial apartments i.e., shops, offices, godowns, etc., not more than 15% of total carpet area) or Real Estate Project (REP – Construction of Commercial apartments i.e. shops, offices, godowns are more than 15% of total carpet area) shall not be eligible to claim ITC against the bills of works contractor.

In simple words, a builder who is involved in construction of residential apartments (either affordable or non-affordable as per *Notification No 03/2019-Central Tax (Rate) dated 29-03-2019*) shall not be eligible to claim ITC and has to pay tax at the rate mentioned in the above notification, i.e., 1% (after deduction of 1/3rd for land value) in case of affordable residential apartments and 5% (after deduction of 1/3rd for land value) in case of non-affordable residential apartments.

At the same time, a builder who is involved in construction of commercial apartments like shops, offices etc., under RREP is not eligible to claim ITC and has to pay tax at the rate mentioned in the above notification, i.e., 5% (after deduction of 1/3rd for land value).

However, a builder who is involved in construction of commercial apartments in a real estate project (Other than RREP) is allowed full ITC and to pay GST at the applicable rate as given in the notification.

Above provisions are tabulated as under:

S.No.	Name of the Service	Rate in New Scheme from 01.04.2019
1.	Construction of *affordable residential apartments* by a promoter in a RREP / in REP	1% (No ITC)
2.	Construction of *residential apartments other than affordable residential* apartments by a promoter in an RREP/ in REP,	5% (NO ITC)
3.	Construction of commercial apartments (shops, offices, godowns etc.) by a promoter in an RREP.	5% (NO ITC)
4.	Construction of commercial apartments in a Real Estate Project (REP) other than Residential Real Estate Project (RREP) or in an ongoing project in respect of which the promoter has opted for old rates	a. 12% (after 1/3rd abatement allowed for land value) b. With Full ITC

Q206. Whether a builder engaged in constructing a residential complex can avail ITC and pay GST @ 12%?

Ans. In the context of a builder who is also the promoter of a residential project, an option was available only for specified ongoing projects as on 01-04-2019 as per *Notification No. 3/2019 - Central Tax (Rate) dated 29-03-2019.* As per the notification, the supplier had to submit a declaration to intimate to the Department within the time limit prescribed that he would continue to remain in the old scheme i.e., paying the taxes at regular rates and also availing ITC. If the aforesaid conditions are complied with, the builder can continue to avail ITC and pay GST for the ongoing projects as per old rates.

However, any project commencing on or after 01-04-2019 is mandatorily covered by the said notification and hence, the builder will not be in a position to claim ITC and pay GST at old rates. The builder will be paying taxes at 1% or 5% for the affordable and regular housing projects respectively.

Further, in case of any builder who is not a promoter of the residential project, the applicable rate of tax shall be 18% and ITC is available to such builder.

Q207. As tax auditor, do we have to report the effect of ITC taken on say gifts, free samples in tax audit as GST audit has been discontinued?

Ans. GST audit has not been discontinued. As per amended section 35 read with section 44, only certification by a Chartered Accountant/Cost Accountant has been replaced by self-certification by the taxpayer himself. Tax auditor's responsibility under Income Tax Act would continue to be governed by the relevant provisions of the Income Tax Act,1961.

Q208. As per section 54, refund can be claimed based on the realisations on zero-rated supply of services. Can refund be claimed on ITC pertaining to old period in that realization period?

Ans. Refund of unutilised ITC against export of services is governed by section 54 read with Rule 89 (4). There is no one-to-one corelation between ITC availed, export invoices raised, money realisation, and refund claim. As per the formula provided for claiming refund of unutilized ITC, ITC availed in a previous period cannot be claimed as refund while filing refund application for the tax period in which realisation is made. However, based on the Delhi High Court ruling in the case of *Pitambara Books* [W.P.(C) 627/2020] as well as the amended refund *Circular No.135/05/2020 – GST dated 31-03-2020*, one can club more than one tax period and claim refund of ITC from prior period against the realisations made in future period

Q209. Mr. S sells goods at the rate of 3%, 5% 12% and 18% and receives input of 18% *via* e-commerce mode and has accumulated ITC in electronic credit ledger since 2017.

Whether Mr. S is required to reverse ITC or claim refund?

Ans. As per section 54(3) of the Act, "*Subject to the provisions of sub-section (10), a registered person may claim refund of any unutilised input tax credit at the end of any tax period:*

Provided that no refund of unutilised input tax credit shall be allowed in cases other than—

(i) zero-rated supplies made without payment of tax;

(ii) where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies (other than nil rated or fully exempt supplies), except supplies of goods or services or both as may be notified by the Government on the recommendations of the Council:

Provided further that no refund of unutilised input tax credit shall be allowed in cases where the goods exported out of India are subjected to export duty:

Provided also that no refund of input tax credit shall be allowed, if the supplier of goods or services or both avails of drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.

From an analysis of the above provisions, it can be said that the rate of tax on inputs purchased via e- commerce operator is higher than the rate of tax on outputs. Mr. S falls under inverted duty structure. Hence, refund is allowed under inverted duty structure subject to exclusion of output supplies @18% from inverted duty turnover in the formula prescribed under rule 89(5). It may not be out of place to mention that ITC at all rates will form part of net ITC used in the formula. For calculation purposes, net ITC will not include ITC on services and capital goods. However, the entire turnover will form part of adjusted total turnover.

Q210. In March 2021, a client made tax invoice by charging IGST, but that supply was exempt supply. The client is not paying IGST amount. What remedy is left with the service provider. Return in Forms GSTR-3B and GSTR-1 is already filed.

There are two alternative remedies available in the given situation to the service provider. As per the provisions of section 54, refund can

be applied under *"Excess Payment of Tax Category"* as per section 54(8)(e) read with *Circular No. 125/44/2019 – GST dated 18-11-2019*. The said application should be accompanied with an undertaking from the recipient declaring non-availment of ITC on the same in order to prove that the incidence of tax has not been passed on.

Another option is that the service provider can issue a credit note in terms of section 34 and can get his output liability adjusted till September, 2021.

Q211. As per section 54, ITC on capital goods cannot be claimed as refund.

Can I opt for refund with payment of tax by consuming the ITC on capital goods? Is there any time limit for consuming ITC?

Ans. As per the provisions of section 54 and section 16, if the exports are made with payment of tax, ITC on capital goods can be encashed. This is because in case of exports with payment of tax, the entire output tax paid (IGST) gets refunded. The exporter can export choosing any method, with or without payment of tax, even on consignment-to-consignment basis and can shift the method any number of times without any legal bar. ITC can be carried forward without any restriction on the time limit.

Q212. Can we claim refund of unutilised ITC of CGST? In scenarios like inter-State purchases and local sales, ITC of IGST is first setoff against CGST liability and then against SGST liability. However, where the taxpayer also has some ITC of CGST, he cannot utilise it at all and that continues to remain in e-credit ledger as it cannot be set off against SGST liability. Suggest a solution for this issue.

Ans. A registered person can claim refund of unutilised ITC only in two scenarios as provided in the proviso to section 54(3). Accordingly, refund of unutilised ITC can be availed –

a) when zero rated supplies are made without payment of tax, and

b) where the credit is accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies. (Inverted duty structure)

Rule 88A read with *Circular No. 98/17/2019-GST, dated 23-4-2019* allows utilization of ITC of IGST towards the payment of CGST and SGST/UTSGT **in any order** and in any proportion subject to the condition that the entire ITC on account of IGST is completely exhausted first before the ITC on account of CGST or SGST/UTGST can be utilized.

Hence, the only mechanism to avoid accumulation of credit under CGST head or SGST head is to utilise the IGST balance partly for payment of outward liability of CGST and partly for SGST. This would ensure set off of IGST balance with both liabilities and avoid accumulation of credit under any one head.

Q213. In the case of sale of garments through e-commerce platform, the input GST rates are much higher than the outward sales (like commission on sales @ 18%). Similarly, GST rates on spices are 5% & 0% and the raw materials and packing materials are charged to tax at 5%, 12% and 18%. Further, input services like advertisement, sale promotion activities etc. are chargeable to 12%/18%. Thus, there is huge accumulation of ITC in the electronic credit ledger.

In such cases, is there any way to claim refund of the same?

Ans. Inverted tax structure refers to a situation where the GST rate paid on inputs received, is more than the GST rate of tax on output supplies (other than nil rated or fully exempt supplies).

The taxpayer is eligible for the refund of accumulated ITC due to the inverted tax structure as per clause (ii) of first proviso to section 54(3). Form RFD-01 has to be filed to claim the eligible refund. Eligible quantum of refund is computed as per the prescribed formula in rule 89(5). Refund is to be claimed within the due date for furnishing of return under section 39 for the period in which such claim for refund arises.

No refund of unutilised ITC shall be allowed in cases where the goods exported out of India are subjected to export duty.

Q214. A registered dealer paid cess on purchase of certain raw materials or other items. However, his output never attracts cess.

Can he utilise the cess for the normal output tax payment? If not, what is the remedy? Is he required to add the cess to the cost of the product / P&L A/c, or will the Government give back by way of refund?

Ans. As per section 11 of the Goods and Services Tax (Compensation to States) Act, 2017, the provisions of the CGST and IGST Acts and the rules made thereunder including those relating to ITC, apply in relation to compensation cess levied under section 8 of the said Act. Therefore, ITC can be availed on GST compensation cess paid on inward supplies, subject to credit blocking provisions under section 17(5).

However, as per the proviso to section 11 of the Goods and Services Tax (Compensation to States) Act, 2017, credit of cess paid can be utilized only for the payment of GST compensation cess liability and not for the output tax payment of other taxes (CGST / SGST / IGST / UTGST). For example, a dealer in motor cars can claim ITC on the compensation cess charged by the manufacturer, but he can utilise the same only for payment of compensation cess on cars sold by him and not for payment of CGST / SGST.

Thus, where the output goods are not such goods which are liable to compensation cess, the ITC on compensation cess paid may remain unutilised. The provisions for refund of cess are not applicable in this case. To the extent there is no provision for refund, compensation cess may be cost.

Going by the provisions of section 9(2) of the Goods and Services Tax (Compensation to States) Act, 2017, and as clarified in *Circular No. 1/1/2017-Compensation Cess dated 26-07-2017*, the refund of ITC of compensation cess can be claimed on exports under both the arrangements for refund of ITC on exports:

(a) Refund of compensation cess paid on goods exported, on the same lines as refund of the IGST under section 16(3) (b) of the IGST Act, 2017.

(b) In case of goods exported under bond or LUT, without payment of IGST and compensation cess, refund of ITC of compensation cess relating to goods exported on the same

lines as refund of input taxes under section 16(3)(a) of the IGST Act, 2017.

Q215. If a registered person has returned the goods/services (purchase return) by way of a tax invoice, can he upload the invoice in Form GSTR-1 return and discharge the liability in the month in which the invoice was raised or should he wait for the supplier to issue a credit note and include the credit note in Form GSTR-3B return in the month in which the credit note was received and reverse the ITC?

Ans. Once the tax invoice is raised, it implies that the registered person is providing the outward supply. Besides, the registered person might have prepared e-way bill declaring the particulars of the tax invoice as a supplier. Hence, the particulars of the tax invoice must be reported in Form GSTR -1.

In the instant case, the supplier should not issue credit note for sales return.

Q216. Whether transitional credits are part of ITC as per GST laws or do they have a separate existence?

Ans. The term 'input tax' as per GST law is defined thus:

"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……"*

Sections 140 and 141 provide the transitional arrangements for ITCs. As per these sections, the credit under various scenarios shall be transitioned to the GST regime from old regime as input tax in electronic credit ledger by filing the transitional forms. Accordingly, whichever tax credit will be allowed to transit, it will be added to the pool of ITC of GST regime as valid input tax. Therefore, transitional credits are part of ITC under GST law and they do not have a separate existence.

Q217. Whether ITC attributable to outward supplies (both goods and services) written off as bad debts need to be reversed?

Ans. There is no provision in the GST law requiring a registered person to reverse the ITC attributable to the outward supplies which are written off as bad debts.

Q218. A seller has duly filed his Form GSTR-1 but due to some error on the portal, few invoices got omitted and were not reflected on the portal, although the tax liability was fully paid in Form GSTR 3B. Complaint was filed on Helpdesk and as per their response, the invoices are visible to them on the portal. But the invoices were not reflected in Form GSTR-2A of the purchaser, and he could not take ITC. The seller tries to enter those invoices in Form GSTR-1 of the next month, error message states that the invoices already exist in respective return period. If he tries to amend the invoices, error comes stating that respective invoices do not exist in the return period. The invoices ultimately are not reflected in Form GSTR-2A of the purchaser, and he is not able to avail ITC.

Is there any way to deal with such procedural lapses that hamper availing of ITC by the buyer?

Ans. This is a procedural issue and reply of GSTN is material in such cases. Also, your acknowledgement in Form GSTR-1 filed would be important to provide the actual date of filing of Form GSTR-1. Please take screen shots of the message that you get stating that "*the invoices already exist"* when you attempt to amend the already filed invoices. The recipient may avail the ITC based on the invoices though not reflected in Form GSTR-2A. He can write to GSTN about this issue with all evidence and screenshots marking a copy to the jurisdictional officer.

Q219. When ITC is taken, it enters into a common pool of ITC in the electronic credit ledger. Whether this ITC needs to be used in a particular proportion when taxpayer has various business verticals under the same GSTN? Whether one-to-one co-relation of inputs with corresponding output supply needs to be ensured by the taxpayer?

Ans. The definitions of 'input' [section 2(59)], 'input services' [section 2(60)] and 'capital goods' [section 2(19)] include the phrase *"used or intended to be used in the course or furtherance of business"*. As per section 16(1), ITC shall be available to a registered person on input services, inputs or capital goods used or intended to be used in the course or furtherance of business. Except for few services as mandated in section17(5)(b), where there is specific

condition of nexus between inward and outward supply, the Act permits the registered person to avail ITC which results in any taxable outward supply.

In the given case, the registered person is having a single GST registration for multiple verticals; the entire liability of all verticals will reflect in electronic liability ledger and the corresponding ITC will be reflected in electronic credit ledger. Considering the provisions as deliberated above, the registered person is not barred from utilising the available ITC across all business verticals as the said ITC is available as a common pool in electronic credit ledger. The GST law does not necessitate one-to-one co-relation of inputs with outputs for utilisation of ITC.

Q220. Can ITC be availed if the vendor has filed Form GSTR-1 and the same is reflected in Form GSTR-2A of the buyer but the vendor does not file his Form GSTR-3B?

Ans. Rule 36(4) states that the eligibility of ITC is on the basis of Form GSTR-1 /IFF furnished by the supplier which will reflect in Form GSTR-2A of the buyer. Hence, the buyer can avail ITC when it is reflected in Form GSTR-2A and need not wait for the vendor to file Form GSTR-3B. However, owing to the condition set out in section 16(2)(c), the ITC taken gets confirmed only when the vendor pays tax on inward supplies of the recipient. Therefore, if the vendor does not file his Form GSTR-3B, the condition of payment of tax will not be fulfilled and thus, the credit will have to be reversed. The said rule has however been challenged in various High Courts and the matter is pending for final decision.

Q221. Whether availing ITC in the books of account and not in Form GSTR-3B, is an acceptable method for complying with the time limit for taking ITC?

Ans. As per the provisions of CGST Act, 2017, ITC is said to have been availed only when it is made available in the electronic credit ledger through furnishing Form GSTR- 3B. Hence, mere making an entry in the books of accounts does not amount to availment of ITC.

Q222. Assuming we receive the GST invoice from an entity which is supposed to generate IRN, but the concerned entity has not generated such IRN, whether we can take ITC on such invoice?

Ans. 1. As per section 16 (1), the entitlement to ITC is subject to the conditions and restrictions as may be prescribed. Rule 36 specifies the documentary requirements for claiming ITC.

2. As per section 31, a registered person supplying taxable goods or services is required to issue a tax invoice showing particulars prescribed in rule 46. The said Rule 46, *inter alia*, at clause (r) requires a tax invoice to contain QR Code, having embedded Invoice Reference Number (IRN) in it, in case invoice has been issued in the manner prescribed under rule 48(4).

3. Rule 36 (1) & (2) provide that ITC can be availed on the basis of tax invoice issued by the supplier of goods or services, in accordance with the provisions of section 31 and that ITC can be availed only if all the applicable particulars as specified in Chapter VI (which covers the aforesaid Rule 46 as well as Rule 48), are contained in the tax invoice.

4. As per rule 48(4), invoice shall be prepared by such class of registered persons as may be notified by including such particulars contained in Form GST INV-01 after obtaining an Invoice Reference Number (IRN) by uploading the information contained therein in the common portal.

5. Further, as per rule 48(5), every invoice issued by a person to whom sub-rule (4) applies in any manner other than the manner specified in said sub-rule (4), shall not be treated as an invoice.

6. It follows from the above that an entity which is supposed to generate invoice with IRN, generates an invoice without obtaining IRN, such invoice will not be a prescribed document for taking ITC as it fails to meet with the aforesaid requirements, particularly that such invoice shall not be treated as invoice in view of the provision under rule 48(5). Accordingly, ITC cannot be taken on such Invoice.

Q223. A company has not yet started commercial production. All the expenses incurred on the project are being capitalized by the company.

Can the company adjust ITC availed on its inputs and capital goods, for payment of output tax on:

a) Incidental income arising during pre-operation phase?

b) Sale of goods/services after commencement of commercial production?

Ans. As per section 16, ITC can be availed on inputs, input services and capital goods before commercial production is started as they are used or intended to be used in the course or furtherance of business, subject to conditions specified and as may be prescribed. Such ITC would be credited to electronic credit ledger and as per section 41, it can then be adjusted against the output tax arising out of incidental income during pre-operation phase & also against their sale of goods and services after commencement of commercial production.

To avail ITC from the beginning, the company will have to ensure due registration under GST since start of the project. Such registration may be a voluntary registration under section 25(3) since at the inception it would not have threshold turnover required for normal registration under section 22.

As per section 29(2)(d), a proper officer may cancel voluntary registration taken under section 25(3) if the business is not commenced within six months from the date of registration. This provision may pose difficulty if the business is not commenced within six months. However, as per section 2(17) – definition of business – under its clause (d), business includes acquisition of goods including capital goods and services in connection with commencement of business and this can be relied upon to submit that business commences with these activities and 'normal' production and sales are not required for 'commencement of business'.

Q224. A taxpayer is engaged in real estate business, and he has opted for the new scheme. He is also in the business of sale of land and bungalow.

Whether for the payment of GST under reverse charge, indirect expenses incurred for both businesses are to be included and what is the criteria or basis of the bifurcation?

Ans. As per *Notification No 03/2019-Central Tax (Rate) dated 29-03-2019),* the promoter shall maintain project wise account of inward supplies from registered and unregistered suppliers. Further, they will calculate tax payments on the shortfall at the end of the

financial year and shall submit the same in the prescribed form electronically on the common portal by end of the quarter following the financial year.

CBIC has not issued any specific criteria with respect to apportionment of common expenses between multiple projects registered separately. One way of doing this is to bifurcate the said common expenses based on carpet areas of the projects. In this case, Business 1 – Sale of land (Project 1 registered separately under RERA and different from Project 2) and Business 2 – Sale of Bungalow (Project 2 registered separately under RERA and different from Project 1) are to be evaluated separately. When the threshold of 80% gets breached for any one of the projects, payment under reverse charge become applicable for that project.

Q225. For apartment associations, where partial exemption is there for flats with charges less than Rs.7,500 p.m., proportionate ITC is to be availed. However, maintenance charges are collected in advance in April while ITC accrues evenly every month. How do we ensure that eligible ITC is adjusted towards output liability?

Ans. ITC of a particular tax period can only be adjusted against the liability of the said tax period or any subsequent tax periods. There is no provision under the GST law to set off ITC of future tax period with liability of current tax period.

Q226. Whether we can avail ITC in case of composite supply when principal supply is capital goods and the other supply is supply of services? Please provide clarity on reversal of such ITC. For e.g., air conditioner with installation services.

Ans: In the case of purchase of air conditioners, the supplier of air conditioner also provides installation services in most cases. Thus, both supplies of air conditioner and its installation are naturally bundled and supplied with each other in the ordinary course of business. Therefore, it is a composite supply. The principal supply of air conditioner and its installation charges are coincidental. Value of Capital goods purchased (AC) = Value of AC + Installation charges.

Accordingly, the taxpayer can avail ITC on composite inward supply of air conditioner with installation services if such goods are used in the course or furtherance of business.

The condition and manner of reversal of ITC on capital goods has been provided in section 17(2) read with rule 43, when such goods are used for both taxable and exempt supply. Further, in case of supply of capital goods on which ITC has been taken, an amount needs to be paid as per section 18(6) read with rule 40(2).

Q227. Whether ITC needs to be reversed on sale of duty credit scrips which are exempt? If yes, how should the ITC be reversed?

Ans: Duty credit scrips attract Nil rate of GST under S. No. 122A of Notification No. 2/2017-Central Tax (Rate) dated 28-06-.2017 and thus, supply of the same is an exempt supply in terms of section 2(47).

Duty credit scrips are incentives given by the Government of India to exporters of goods/services. It is important to note that sale of duty credit scrips occurs only when the same cannot be used to pay custom duty.

If the recipient is engaged in making both taxable and exempt supply, ITC attributable to inputs/input services used for exempt supply will have to be reversed in the ratio of the exempt turnover to the total turnover as prescribed in rule 42 read with section 17(2).

Q228. How can ITC be availed by the service recipient (Mr X) for reimbursement of expenses incurred at a port relating to import of goods by its pure agent (Mr Y) especially in view of rule 36(4) i.e., matching of Form GSTR-1 vs GSTR-2A? In this case, bills including GST are raised by the supplier (Mr Z) in the name of Mr Y (pure agent) and such bills are reimbursed at actuals by Mr X under pre-existing contract with Mr Y for services as pure agent.

Ans. In case of reimbursements, which are pure agency in nature, there is a requirement under rule 33 that the agent must 'hold out' to the supplier that he is acting on behalf of his principal. This being the case, the supplier should raise invoice on the principal and not on the pure agent, but collect the money from the pure agent. The pure agent will raise his invoice as per rule 33, mention the total amount of reimbursement separately as against the value of supply for his services and charge GST only on the value of supply. By doing this,

(a) money paid on behalf of the principal by the pure agent is recovered by the pure agent

(b) invoice of supplier, as it is raised on the principal, will appear in Form GSTR-2A of principal and he will be entitled to ITC if other conditions for taking ITC are fulfilled.

In the given case, since the invoice is raised on the agent, only the agent can avail ITC. If he intends to pass on that ITC to the principal, he should exclude such amount from reimbursement in his invoice and add it to taxable value and charge GST as well on that amount.

Q229. In case of flood claims, fire claims or theft claims w.r.t. damaged/ stolen stocks, assessment of loss of stock is done excluding GST because in most cases at the time of purchase, the ITC has been availed and the same is accounted for in the books and reflected in GST returns. Hence, the insured entity gets the claim for loss excluding GST. Insured does not reverse the GST as the claim is exclusive of GST. However, GST Department issues notice to the insured entity to reverse the ITC on stocks which are damaged/lost and then the insured entity is bound to pay tax. At that point of time, it claims GST so paid from the insurance company in addition to loss assessed. The insurance company then asks for GST returns with reversal of GST in books and returns and also a certificate from Chartered Accountant to sanction GST claim.

Whether the above procedure followed by the insured entity and insurance company is correct?

Ans. (i) Generally, the insurance company will indemnify the insured with the value of stock before the loss. Suppose taxable value of stock is Rs. 100/- and GST charged is Rs. 18/- the insured would have taken ITC of Rs. 18/-. However, as per section 17(5)(h) (*goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples)* the insured is required to reverse the ITC of Rs. 18/-. Since ITC is not eligible as per above provision, the same becomes cost of the stock lost. Hence, total loss of stock is Rs. 118/- and the insurance company has to compensate Rs. 118/-. However, the insurance company may want to ensure whether ITC involved in the loss of stock has

been reversed so as to validate the exact value of loss of stock. For this purpose, the insurance company requires the insured to get CA certificate confirming that ITC has been reversed in the books and GST returns though there is no express requirement for the insured to get CA certificate as per CGST Act or rules.

(ii) From the above discussion, the procedure adopted by insured and insurance company appears to be proper to arrive at the value of loss of stock. However, the insured has to pay interest under section 50, in this matter, since he reverses the credit belatedly that too after being pointed out by the Department. The Department may also levy penalty under section 73 or 74

Q230. What is the recovery mechanism for wrongly availed ITC?

Ans. The demand of ITC wrongly availed or utilized for any reason is covered under section 73 or 74. While section 73, *inter alia,* deals with ITC availed or utilized for any reason other than *mens rea*, section 74 deals with ITC availed or utilized in cases involving *mensrea.*

In case of non-payment of the amount assessed under section 73 or 74 recovery proceedings shall be initiated under section 78 on the expiry of three months of the date of service of the said order. Further, the proper officer can follow one or more of the following modes of recovery against the defaulter as per section 79:

— Deduct from any money due to such defaulter

— Detaining and selling any goods belonging to such defaulter

— Recovering from third parties who are required to pay to such defaulter

— Distraining any movable or immovable property belonging to such defaulter

— Recover as the arrears of land revenue through Collector.

— Recovery as imposition of fine through Magistrate

— Encashment of the bond/instrument executed

Further, the State or Union Territory officer can recover the amount payable to Central Government (CGST/IGST) as if it were arrears of

SGST/UTGST and credit the same to the Central Government and *vice versa*.

Q231. A Pvt. Ltd. supplies bullion on large scale. Due to rule 86B, every month 1% of tax is paid by him in cash and thus, ITC is getting accumulated.

Can any tax planning be done for such a situation?

Ans. **The** proviso to rule 86B lists out the following situations where the requirement of 1% tax being paid in cash is not applicable for a registered person:

(a) the said person or the proprietor or karta or the managing director or any of its two partners, whole-time directors, members of managing committee of associations or board of trustees, as the case may be, have paid more than one lakh rupees as income tax under the Income-tax Act, 1961 in each of the last two financial years for which the time limit to file return of income under sub-section (1) of section 139 of the said Act has expired; or

(b) the registered person has received a refund amount of more than one lakh rupees in the preceding financial year on account of unutilised input tax credit under clause (i) of first proviso of sub-section (3) of section 54; or

(c) the registered person has received a refund amount of more than one lakh rupees in the preceding financial year on account of unutilised input tax credit under clause (ii) of first proviso of sub-section (3) of section 54; or

(d) the registered person has discharged his liability towards output tax through the electronic cash ledger for an amount which is in excess of 1% of the total output tax liability, applied cumulatively, upto the said month in the current financial year; or

(e) the registered person is -

(i) Government Department; or

(ii) a public sector undertaking; or

(iii) a local authority; or

(iv) a statutory body.

Further the Commissioner or an officer authorised by him in this behalf may remove the said restriction after such verifications and such safeguards as he may deem fit.

If the taxpayer can ensure that he falls within any one of the above categories, the interest of the Revenue will be secured and consequently, the taxpayer shall also not be restricted by rule 86B.

Q232. What are the implications of not following rule 86B?

Ans. Rule 86B of the, restricts the usage of ITC to 99% of the outward liability for the said month for the applicable registered persons where the value of taxable supply other than exempted and zero-rated supplies exceeds Rs. 50 lakhs in the said month. The said rule was introduced to curb t fake ITC claims and frauds.

The constitutional validity of rule 86B, has been challenged by the taxpayers through various writ petitions filed across High Courts as no such restriction is imposed by the Government through the CGST Act, 2017 and the relevant State/UT GST Acts, 2017.

Practically, the Department would view non-adherence to the said rule as a non-compliance and violation and hence may tend to block the ITC (as is currently done on the common portal) by exercising the power under rule 86A and may also cancel or suspend the GST registration for any discrepancies noted as per rule 21(e).

Q233. What are the consequences of taking ITC on the basis of books of accounts instead of 105% of Form GSTR-2B, if ITC as per the books of accounts is higher than eligible ITC of 105% of Form GSTR-2B?

Ans. Post insertion of rule 36(4) read with rule 60(7), every taxpayer is mandated to avail ITC in Form GSTR-3B on the basis of reconciliation of purchase invoices with Form GSTR-2B.

The said rule was operationalised to restrict the ITC availment in respect of only those invoices/debit notes which are furnished by the

supplier in their Form GSTR-1 within the prescribed time and are reflected in Form GSTR-2B/A of the recipient.

Therefore, any ITC availed in excess of the ITC as reflected in Form GSTR-2B would be viewed as non-compliance and such ITC shall have to be reversed by the taxpayers.

Q234. Whether ITC can be used for payment of taxes while filing Form DRC-03? If yes, whether there are any exceptions?

Ans. Under rules 42 and 43, Form **DRC-03 can** be **used** for reversal of **ITC**. As per said rules, the amount of **ITC** can be reversed by the registered person in Form GSTR-3B or Form **DRC-03.** *Rules 42 and 43 mention the manner of determination of ITC and reversal of ITC in certain situations, where common inputs, input services and capital goods are involved.*

The instructions appended in Para 8 of Form GSTR-9C provide that additional liability declared in the said form, shall be paid through electronic cash ledger only using FORM DRC-03. As per this, while filing the annual reconciliation statement, the ITC cannot be utilised, and cash has to be paid.

As per section 49(4), the amount available in the electronic credit ledger may be used for making any payment towards output tax under the CGST Act or under the IGST Act in the prescribed manner. Also, as per section 41, every registered person, subject to conditions, be entitled to take ITC, as self-assessed, in his return, provisionally to the credit of his electronic credit ledger. This ITC shall be utilised only for payment of self- assessed output tax as per the return.

It is to be noted that interest liability on above taxes paid using Form GST DRC-03 have to be discharged only by debiting electronic cash ledger. The electronic credit ledger cannot be used for any liability other than output tax liability, vide sections 49(4) and 41.

Q235. A hotel in Delhi charged CGST & SGST on the outward supply of accommodation provided by it to a recipient located in the State of Maharashtra. Whether such recipient can claim ITC of CGST in the State of Maharashtra?

Ans. According to section 12(3) of IGST Act, the place of supply of services provided in relation to an immovable property is the location of the immovable property which means that the same would be an intra-State supply and GST liability will be CGST and SGST.

CGST and SGST of one State cannot be claimed as ITC in another State

Hence, CGST and SGST paid to a hotelier in Delhi for the supply of accommodation services cannot be claimed as ITC in Maharashtra.

Though, there are no explicit restriction in law to claim ITC in respect of the CGST paid in one State (Delhi) in another State (Maharashtra), it is to be specifically noted that claim of ITC is not a matter of right to any registered person and there should be specific substantive provision in law to grant ITC in such scenarios. Since such specific provision is absent, the CGST paid in Delhi cannot be claimed as CGST ITC in Maharashtra.

Q236. A proprietorship firm has four business verticals- (i) Trading in coal (ii) Trading in other minerals (iii) Supply of labour (iv) Transportation service. All the four businesses are registered under the same PAN. The registered person does not avail any ITC in respect of labour supply business. He utilises ITC available in other businesses to pay the tax liability under labour supply business.

Can he do so? Explain the relevant provisions.

Ans. It is mentioned that all the four businesses are registered under the same PAN.

If single GST registration is used for all the verticals / businesses, ITC available in one business can be utilised for payment of tax for any other business vertical(s). As the GST law does not mandate any one -to -one correlation between inputs and outputs, all the purchases and its corresponding ITC will get aggregated in the electronic credit ledger and can be used for the payment of output tax liability of any business/vertical.

According to section 25(2), a person having multiple places of business in a State or Union Territory may be granted separate registration for each such place of business.

If separate GST registration is taken for each such business having same PAN, ITC could be availed, and utilised GSTIN wise as electronic credit ledger and other ledgers are maintained GST number wise.

Also, supply of goods or services or both between related persons or between distinct persons as specified in section 25, when made in the course or furtherance of business is deemed to be supply as per Entry 2 in Schedule I.

In view of the above, ITC available in one business having separate GST number cannot be used for the output liability of another business (Labour services business) with different GST registration number under the same PAN.

Q237. In case of goods transport agency ("GTA") service, when GST is paid by the receiver, whether he/she is eligible to take ITC of such tax paid?

Ans. GST can be paid by GTA service recipient on reverse charge basis @ 5% (2.5 CGST+2.5 SGST) as per section 9(3) Notification *No: 13/2017- Central Tax, (Rate) dated 28-06-2017* as amended. However, credit of input tax charged on goods and services should not be taken.

Hence, question arises as to whether the recipient who is paying GST @ 5% on GTA services under reverse charge can avail ITC, considering the condition that ITC is not to be taken for paying tax at the rate of 5%.

On a careful reading of the conditions specified in the rate notification as '*ITC charged on goods and services* ***used in supplying the service*** *has not been taken'*, it can be observed that the condition is stipulated only for the supplier of the GTA services and not for the recipient.

Section 9(3) empowers the recipient of service only to discharge the liability deeming the recipient as an outward supplier only for the limited purpose of payment of tax. The conditions specified in 5% rate notification is applicable for supplier of service and not for recipients of service. When the condition specified in the rate notification is applicable only for supplier of the goods transport agency services,

then Explanation (iv) shall be equally applicable only to outward supplier of goods transport agency services.

Hence, if the GTA services is received in the course and furtherance of business for making outward taxable supply, the tax paid by the recipient under reverse charge basis will be eligible for ITC.

Q238. GST has been collected on transport charges, but the supplier does not pay GST on the same. The recipient, therefore, pays the tax under reverse charge and avails ITC. Though GST has been paid on transport charges, the same has not been recorded by the recipient; only transport expenses have been recorded.

Is there any non-compliance relating to ITC?

Ans. As in the given case, the GTA has collected GST, it indicates that the GTA has paid tax under forward charge @ 12% under section 9(1) and hence any payment under reverse charge by the recipient would be considered as a payment without levy and would not be considered as tax. Therefore, the recipient will not be eligible to take ITC on such payment.

As far as GST collected by the GTA is concerned, the recipient will be ineligible to avail the ITC as the condition under section 16(2)(c) of tax being actually paid to the Government has not been satisfied.

GST paid to GTA, which has not been paid to the Government, is ineligible ITC as mentioned above and hence not accounting it as an ITC in books and showing only as an expense is the correct treatment from accounting perspective.

Moreover, the supplier (here GTA) in this case is guilty of contravening the provisions of section 76(1) as any amount collected as tax should be remitted to the Government and cannot be retained even if, tax has been paid by the recipient under reverse charge.

Q239. In the case of a hospital, how can ITC be claimed? The outpatient pharmacy sales of the hospital attract GST. Suggest the best option to keep track of the ITC in such cases.

Ans. Even though the health care services provided by hospitals are exempt at large, there are several other supplies which are taxable as well.

Where the input of goods or services are used exclusively for providing taxable supply, then ITC shall be fully eligible on the same (subject to other conditions prescribed in the law). Similarly, when the input of goods or services are used exclusively for providing exempt supply, then ITC shall be ineligible on the same. However, where such input of goods or services is commonly used in the business for providing both taxable and exempted supply, section 17(2) read along with rule 42 & 43 shall be applicable.

As per rule 42, ITC being input and input services, partly used for effecting taxable supplies including zero rated supplies and partly for effecting exempt supplies, shall be attributed for effecting taxable supplies proportionate to the turnover of such taxable supplies and the computation mechanism of identifying such eligible credit and reversable credit has also been prescribed in the said rule. Such computation shall be made on monthly basis and to be reevaluated at the end of the financial year.

Similarly, as per rule 43, if the capital goods are used partly for taxable supplies and partly for exempted supplies, then the credit of the capital goods attributable to exempt supplies shall be reversed over a period of 60 months in the proportion of turnover as per the computation mechanism and procedure specified in the said rule.

For e g., with respect to the pharmacy run as part of the hospital, the supply of medicines and allied items provided by the hospital through the pharmacy to the in-patients (patients who are admitted for treatment in the hospital) is part of composite supply of health care treatment and thus not separately taxable and hence ITC cannot be availed on medicines & allied items used for this purpose, whereas the supply of medicines and allied items provided by the hospital through the pharmacy to the out-patients is taxable and hence ITC can be availed on the items used for such purpose.

Similarly, food supplied to the in-patients as advised by the doctor/nutritionists is a part of composite supply of healthcare and not separately taxable. Other supplies of food by a hospital to patients (not admitted) or their attendants or visitors are taxable. Such eligibility/ineligibility of the ITC would remain the same irrespective of whether the food is prepared by the canteens run by the hospital or is being outsourced to outdoor caterers.

In the context of the aforementioned determination of eligible and ineligible credits, it is essential to maintain the records, registers and documents in such a manner that the purpose or usage of every credit is clearly identified as attributable to taxable or exempted supply.

Ultimately, it is the onus of the taxpayer recipient to prove the correctness of availment of ITC and the computation and underlying basis of such availment. A robust mechanism of maintaining the stock records of the pharmacy with a clear tracking of what is supplied to the hospital inpatients and what is supplied to the outpatients / common public will enable the taxpayer to ensure accuracy in ITC availment. The internal controls of the pharmacy should be in such a manner that the documents, records & tracking of the inward and outward movement of goods are driven by standard operating procedures and a system-oriented linking shall be established between the pharmacy supplies to inpatients vis-à-vis the admission, discharge & other records of the inpatients maintained by the hospital.

Q240. (A) Whether ITC is available on cement and TMT bars used in the construction of the foundation of factory shed?

(B) Whether the answer would change, if the registered person using TMT bars in construction of factory shed was manufacturer of his own TMT bars? In other words, whether ITC will be available on direct raw material, other inputs and input services used in manufacturing of TMT Bars used by the company for construction in its own building (captive consumption)?

Ans. (A) The first query deals with inputs being cement and TMT bars being used in construction of foundation of factory shed. It does not discuss anything on input services. Going by the query, we need to refer Section 17(5)(d) of the CGST Act, 2017 wherein it is mentioned that ITC shall not be available in respect of-

"*(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 to Section 17(5)(d) states that 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.***"**

On plain reading of the above, one can appreciate that, ITC is barred on goods received by a taxable person for construction of immovable property on his own account including when such goods are used in course of furtherance of business.

Further, one can also understand that the foundation laid for construction of 'factory shed' becomes an immovable property and it is completely different from the foundation or structural support made for fixing / installation of plant and machinery for smooth operations.

Hence, ITC cannot be claimed on cement and TMT bars used in construction of factory shed.

(**B**) The above answer will not change even if the registered person using TMT bars in construction of factory shed was manufacturer of his own TMT bars.

The query mentions about 'captive consumption', of TMT bars. It is important to understand whether it is a captive consumption or not.

Concept of 'Captive Consumption'

The word 'Captive Consumption' refers to goods produced or manufactured in a factory and used within the factory in the manufacture of other goods. When goods manufactured by one division/ plant are transferred to and consumed by another division/ plant of the same organization or related undertaking for manufacturing another product, such goods are also said to be captively consumed. In short, product manufactured in the

factory is not being sold rather used for further production is called 'captive consumption'

Concept of 'Personal Consumption'

The term 'Personal Consumption' will imply that, the goods manufactured by the registered person shall be consumed by the registered person himself. For e.g., A baker who is involving in sells cakes may consume the cake himself.

Hence, as per the above query, when the TMT bars are manufactured by a company and it is used by the same company for construction of its own building, it will amount to personal consumption and not captive consumption.

Coming to the eligibility of ITC, section 17(5)(g) blocks ITC on goods or services or both used for personal consumption. And in the instant case, since the manufactured TMT bars are used for personal consumption, ITC will not be eligible on the same.

Q241. From a joint reading of section 2(46), section 49(2) and section 41(1), can it be concluded that ITC in the electronic credit ledger is only a provisional credit which can be utilized to discharge the self-assessed output tax?

Ans. Section 41 talks about *"Claim of input tax credit and provisional acceptance thereof".* Further section 42 deals with about *"Matching, reversal and reclaim of input tax credit".*

Provisions of section 42 are applicable only in cases for matching, reversal and reclaim of credit and are based on details of inward supply furnished by the registered person. The basic premises of section 42 rested upon the details of inward supply furnished under section 38. The return to be furnished under section 38 was Form GSTR-2.

The time limit for furnishing Form GSTR-2 in section 38 has not been notified till date. Para 2 of *Notification No. 58/2017-Central Tax dated 15-11-2017* is reproduced as follows: -

"*2. The extension of the time limit for furnishing the details or return, as the case may be, under sub-section (2) of section 38 and sub-*

section (1) of section 39 of the Act, for the months of July, 2017 to March, 2018 shall be subsequently notified in the Official Gazette."

Further, rule 69 provide that the matching under section 42 of details of inward supply should be extended if the due date of filing of Form GSTR-2 under section 38 has been extended and prescribed mechanism itself is not in place.

Since, matching under section 42 is only possible on filing of details of inward supplies under section 38 and date of filing of return under Form GSTR-2 under section 38 has not been notified till date, the date of matching by virtue of first proviso to rule 69 has also been extended. Once the date of matching under section 42 read with rule 69 has been extended then any action on account of non-compliance of discrepancies as highlighted under the provisions of section 42 cannot be initiated.

Provisions of section 42 are a complete code in itself. It provides a manner and the procedure for doing the things and if the system itself is not in place for compliance of provisions of that section, then in such case, there cannot be a case for non-compliance of the provisions contained in the section itself. Therefore, ITC in the electronic credit ledger is not merely provisional credit & is the final credit available to a registered taxpayer.

Q242. What are the points to be considered while replying to a proper officer against a notice issued for a variance in the ITC availed in Form GSTR-3B vs. Form GSTR-2B?

Ans. An assessee getting the communication/notice from the Department w.r.t variance in Form GSTR-3B / Form GSTR-2B must reply considering both procedural & legal aspects.

Procedural Aspects:

Variance can be due to various factors like:

- ITC in excess to the extent of 5% over and above Form GSTR-2B,
- ITC on invoices not claimed in earlier tax periods and claimed in current tax periods,

- ITC in Form GSTR-2B but claimed in subsequent periods, ITC reversed earlier but reclaimed in the current tax periods (180 days criteria)

Reconciliation should be attached with the reply. In case of remaining mismatch, it is prudent to ask for time as amendments can be considered in accordance with timelines in section 37.

Legal Aspects:

One may point the following:

- Legal validity of rule 36(4)
- Concept of "*Lex not cogit impossibila*" w.r.t section 16(2)(c) and therefore Form GSTR-2A, and Form GSTR-2B.

Q243. In case of organisations dealing in "NIL" rated items, how should ITC be reported in Form GSTR-3B? Amount reflected in Form GSTR-3B is to be reflected in Annual Return, and hence ITC cannot be zero. If it is being reflected as ITC and being reversed as per rule 42 in GSTR-3B, then in Form GSTR-9 (Annual Return) the total amount is reflected as tax paid by the concern, which is also not correct.

What will be the correct procedure for reflecting it in monthly as well as Annual Return?

Ans. Supplier dealing in "NIL" rated items should avail full ITC at the time of filing monthly Form GSTR-3B under the head "All Other ITC" and the same should be reversed in the same Form GSTR-3B under the head "ITC Reversal as per rule 42 and 43". This will lead to simultaneous availment and reversal of ITC and hence net availment of ITC will be NIL.

At the time of filing of Form GSTR-9, the ITC availment as per Form GSTR-3B will be auto populated in Table 6 of Form GSTR-9. Hence, the registered person is expected to give the break-up of such ITC taken and report the reversal in Table 7.

However, it could be stated that when a registered person is dealing exclusively in exempt or NIL rated supply of goods or services or both, there is no specific restriction in the GST Law that such registered person should not show the amount of ITC availed in Table 4(A)(5) under the head "*All other ITC*" and reverse the same amount

in Table 4(B)(1) under the head "A*s per rules 42 & 43 of CGST Rules*". At present, ITC from Form GSTR-2B of a registered person gets auto populated in Form GSTR-3B. The registered person can then reverse the appropriate ITC depending upon his eligibility and other conditions.

Disclosure:

Particulars	Disclosure in Form GSTR-3B	Disclosure in Form GSTR-9
Availment of ITC	Table 4(A)(5)	Table 6(B)
Reversal of ITC	Table 4(B)(1)	Table 7(C)

Q244. Client wrongly took ITC of Rs.1,00,000/- in CGST at the first time. Later, while reversing the ineligible credit, the software was updated with the instruction that whatever amount was filled in CGST, the same amount was to be automatically filled in SGST. Hence, Rs.1,00,000/- has been reversed for both CGST and SGST.

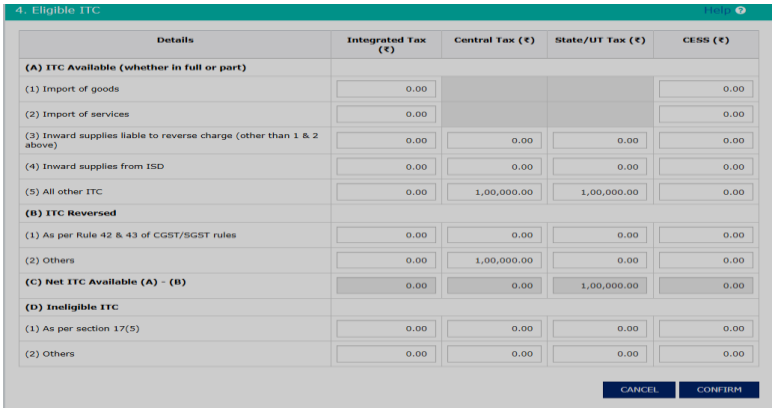
How to resolve it and get SGST ITC?

Ans. On GST Portal, the amount of SGST gets automatically filled whenever the amount in CGST field is entered and *vice versa.* This automation is there in every field of Form GSTR-3B except "Others" as given under "(B) ITC Reversed" section meaning thereby, the taxpayer can reverse either the ITC of CGST or SGST as applicable, under the section "Other Reversal" in Table 4B (2) of Form GSTR-3B.

In the instant case, the taxpayer wants to avail ITC of Rs. 1,00,000/- under the head of SGST only and for that, following steps needs to be followed:

- Firstly, avail ITC of Rs.1,00,000/- under the head SGST in "All other ITC" field. Here, due to the automation facility in GSTN Portal, Rs. 1,00,000/- will be auto filled in CGST head as well.
- Now, due to auto fill, there will be excess ITC availment in CGST field. Therefore, the taxpayer will have to reverse ITC under the head CGST only in "Other reversal" section. As already mentioned, auto fill automation is not made applicable

under "Other Reversal" section. The same can be seen from the below mentioned screen shot.



4. Eligible ITC

Details	Integrated Tax (₹)	Central Tax (₹)	State/UT Tax (₹)	CESS (₹)
(A) ITC Available (whether in full or part)				
(1) Import of goods	0.00			0.00
(2) Import of services	0.00			0.00
(3) Inward supplies liable to reverse charge (other than 1 & 2 above)	0.00	0.00	0.00	0.00
(4) Inward supplies from ISD	0.00	0.00	0.00	0.00
(5) All other ITC	0.00	1,00,000.00	1,00,000.00	0.00
(B) ITC Reversed				
(1) As per Rule 42 & 43 of CGST/SGST rules	0.00	0.00	0.00	0.00
(2) Others	0.00	1,00,000.00	0.00	0.00
(C) Net ITC Available (A) - (B)	0.00	0.00	1,00,000.00	0.00
(D) Ineligible ITC				
(1) As per section 17(5)	0.00	0.00	0.00	0.00
(2) Others	0.00	0.00	0.00	0.00

CANCEL CONFIRM

Hence, by following the above specified steps, ITC of Rs.1,00,000/- can be availed only in SGST field.

Q245. Whether ITC can be availed on the brokerage paid to a commodity broker in respect of transactions undertaken in 'futures' at the Commodity Exchange?

The purpose of 'futures' is to hedge the risk of up / down movement of price of commodities. These commodities are raw material for the business of the recipient.

Ans. It is assumed that the business of the recipient is of taxable supplies and the commodity is being used as raw material for the same. The hedging transaction is being done in the course and furtherance of business of taxable outward supply and thus, GST paid on brokerage charges paid to broker will be eligible as ITC.

However, had these commodities not been the raw material for the business of the recipient and he was transacting for the purpose of gains, then the same being transaction in securities, no ITC would be allowed / ITC would require to be completely reversed, as the output supply is considered as exempt supply.

Q246. Whether ITC taken, being shown in Form GSTR-2A but ineligible as per section 17(5) and later reversed, be subject to interest? Whether such reversal is covered by section 50(3)? If yes, what will be the rate of interest?

OR

Whether interest under section 50(3) is payable, if ITC is wrongly availed but reversed within 6 months?

Ans. Reversal of ineligible ITC will attract interest @ 18% p.a., if the same is utilized and reversal is made through cash ledger. Where the ITC is availed but not utilised and reversed through credit ledger, the same will not attract interest. Such ITC does not reduce or impart the tax liability and interest under section 50(1) is payable when the tax is not paid.

Further, interest under section 50(3) is attracted only in case of mismatch of ITC, which is claimed in excess by the recipient, but not confirmed by the supplier under section 42(10) or in case of credit note being issued by supplier, but corresponding ITC not reversed by the recipient under section 43(10). It is pertinent to mention here, that the matching mechanism envisaged under sections 42 and 43 is not practically operational as of now.

In the present case, ITC is duly appearing under Form GSTR – 2A and hence interest will not be payable under section 50(3) irrespective of, whether the credit is reversed within 6 months or beyond 6 months. Interest will be attracted only where the ITC is reversed through electronic cash ledger.

However, there is an alternative view that reversal of wrongfully availed ITC will be subject to interest even if the same is not utilized. Further, interest @ 24% under section 50(3) will be payable in case of reversal of undue or unmatched ITC.

Q247. Can an agent paying full consideration on behalf of principal for receipt of service, avail ITC on such consideration paid?

Ans. As per the definition in section 2(5), *'agent' means a person, including -------, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another*.

Further, as per section 2(88), *'principal' means a person on whose behalf an agent carries on business of supply or receipt of goods or services or both.*

Here the question refers to payment of consideration made by agent on behalf of principal for receipt of service. Thus, it refers to the expenditure incurred by agent in the capacity as agent and not on his own account. For example, a law firm paying registration and approval fees in the name of a company, estate agent paying a month's office rent to landlord on behalf of tenant company.

In such cases, as the agent is only incurring the expenditure and the transaction is between the principal and the third party, and the third party's invoice would be on principal, agent cannot claim ITC thereon and it is the principal who would be entitled to ITC subject to fulfilment of conditions for eligibility.

As per rule 33, subject to satisfaction of conditions therein, subsequent recovery of consideration including the tax he has paid, by agent from principal, is a disbursement and recovery of such cost or expenditure by agent from principal shall be excluded from the value of supply of service between agent and principal and hence not subjected to tax.

Q248. The GST rate for HSN Code 1905 (specified type of bread and other bakery Items) is 5% and GST on restaurant services under normal scheme is also 5% (without ITC).

Can a taxpayer engaged in the business of bakery items claim ITC if he charges 5% as per HSN Code 1905?

Ans. Restaurant and bakery are different businesses. Restaurant is a place of business where food items are prepared, generally in the same premises, and served to customers for consumption based on customer's orders. As per Schedule II, entry no.6 (b), such activity is treated as supply of service. The rate of tax for the same is as provided in Notification on rate of tax on services, that is, *Notification No. 11/2017 -Central Tax (Rate) dated 28-06-2017* as amended. The said Notification, at S.No.7(ii) specifies a rate of 5% (CGST +SGST) for restaurant service (except other than at specified premises) subject to the condition that ITC on goods and services used in supply of service has not been taken.

Bakery is a place where ready to eat and other food products are sold to customers across the counter. These items are typically pre-packed, and no cooking is done in the premises of bakery. This is

supply of goods and tax rates / exemptions as provided under *Notification No. 1/2017 -Central Tax (Rate) and Notification No. 2/2017 – Central Tax (Rate),* both dated 28-06-2017, as amended, apply.

The question refers to bakery items attracting 5% rate as per HSN Code 1905 (CGST +SGST). This rate is provided in Schedule I at Sr. No. 99 and 100 for specified items, falling under HSN 1905 without any condition as to ITC. The taxpayer engaged in the business of bakery products and paying tax accordingly on supply of such items can claim ITC as there is no restriction provided on ITC for such goods, unlike in the case of restaurant service. The eligibility would, of course be subject to fulfilment of other conditions to claim ITC.

Q249. As per rule 36(4), only 5% of matched ITC can be availed in respect of unmatched ITC not reflected in Form GSTR-2A. Suppose a taxpayer avails only matched ITC every month. Few invoices in respect of which ITC is availed in a month are of the previous month and are reflected in previous month's Form GSTR-2A also.

Whether the invoices reflected in previous month's Form GSTR-2A will be considered under unmatched category for this month? To illustrate, say ITC on invoice dated 1st April is availed in Form GSTR -3B for the month of June. This particular invoice is duly reflected in Form GSTR-2A of the month of April. While determining ITC eligibility as per rule 36(4) for the month of June, whether this particular invoice will be considered as part of unmatched ITC or matched ITC or shall be altogether excluded from this working?

Ans. The answer to the above query can be bifurcated into parts for easy understanding.

a) As per rule 36(4), only 5% of matched ITC can be availed in respect of unmatched ITC not reflected in Form GSTR-2A.

Rule 36(4) nowhere talks about Form GSTR-2A. Further, it talks about Form GSTR-1 / IFFs being filed as per section 37(1) which implies that the returns are filed within the prescribed time limit. Based on the timely filing of returns from suppliers' end, the same will automatically reflect in Form GSTR 2A & 2B of the recipient.

However, since Form GSTR-2A is dynamic report, let us consider that, the 5% calculation on matched ITC will be done as per Form GSTR- 2B as it is a static report and does not change based on the belated filings of other suppliers.

b) *Suppose a taxpayer avails only matched ITC every month. Few invoices in respect of which ITC is availed in a month are of the previous month and are reflected in previous month's Form GSTR-2A also.*

It is understood that the taxpayer is availing ITC as per Form GSTR-2B i.e., matched ITC and few invoices of which ITC is availed as per Form GSTR-2B are of the previous month which are reflected in previous month's Form GSTR-2A.

The above situation is very much possible. In case a supplier files the return after the due date of Form GSTR-1 / IFF, naturally, the said entry will reflect in Form GSTR-1 of the same month, but it will reflect in Form GSTR-2B of subsequent month. Hence, it is appearing that Form GSTR-2B may contain invoices of previous month.

c) *Whether the invoices which are reflected in previous month Form GSTR-2A will be considered under unmatched category for this month? To illustrate, say ITC on invoice dated 1st April is availed in Form GSTR -3B for the month of June. This particular invoice is duly reflected in Form GSTR-2A of the April month.*

As explained above, Form GSTR-2A is a dynamic report and Form GSTR-2B is a static report. According to the querist, the invoice is dated 1st April and it is availed in the month of June and hence, it will be considered under "*un-matched category*".

It is necessary to understand that, as mentioned by the querist, the taxpayer avails only matched ITC every month. i.e., from Form GSTR-2B. In this scenario, when the 1st April invoice is reflected in Form GSTR-2B of June month and if the same credit is availed by the taxpayer, there is no question of mismatch that can happen as already the said credit is matched as per Form GSTR-2B.

As premised, Form GSTR-2A is a dynamic report and where the supplier would have filed his Form GSTR-1 belatedly, i.e., in the

month of June, the entry will still get recorded in April month's register. However, this entry will come in Form GSTR-2B as matched credit only in the month of June i.e., at the time when the supplier has filed his return. Since, the entry is reflected in Form GSTR-2B, it will not be considered as mismatch in this regard.

d) While determining ITC eligibility as per rule 36(4) for the month of June, whether this particular invoice will be considered as part of unmatched ITC or matched ITC or shall altogether be excluded from this working?

As premised above, the particular invoice will be considered as part of matched ITC as it will be appearing in Form GSTR-2B of June month (as per example discussed above).

Q250. There is no section or circular or notification authorising implementation of Form GSTR-2B. Whether it is correct to avail ITC on the basis of Form GSTR-2B?

Ans. In order to provide legal sanction to Form GSTR-2B, an amendment has been made in the CGST Rules, 2017 *vide Notification No. 82/2020–Central Tax dated 10-11-2020* wherein rule 60 has been substituted with effect from 1-01-2021. As per sub-rules (7) and (8) of amended rule 60, Form GSTR-2B has been notified to give the legal backing to the said form.

Therefore, it is correct to avail ITC based on Form GSTR-2B.

Q251. Comment on the validity of Form GSTR-3B vs Form GSTR-2A mismatch and issuance of ASMT-10 specifically when revision of Form GSTR-3B is not permissible and Form GSTR-2 facility is still not operational and Form GSTR-2B does not reflect correct data.

Ans. ASMT-10 is a notice, issued after scrutiny of the GST returns filed by the taxpayer, intimating discrepancies found in the said returns and seeking explanation for same.

With effect from 09th October 2019, sub-rule (4) has been inserted in rule 36 due to which every taxpayer is eligible to claim ITC only with respect to those invoices/debit notes which are furnished by the suppliers in their Form GSTR-1.

This rule mandates every taxpayer to reconcile their purchase invoices with Form GSTR-2B in order to avail ITC in GSTR-3B, though there is no such restriction in the Act.

However, taxpayers have filed various writ petitions across various High Courts challenging the constitutional validity of rule 36(4) on the grounds that the said condition is imposed only through rules (delegated legislation) and is not provided under the CGST/ SGST Act.

Further, the new sub-clause (aa) inserted in section 16 *vide* Finance Act, 2021 which imposes the restriction on availment of ITC based on the details furnished by the suppliers) indicates that the Government wants to enhance ease of doing business by enabling the system to auto-populate return (Form GSTR-3B) through the data filed by the taxpayer and all his suppliers and improve the compliance level. The said amendment is yet to be notified and is not in force.

In view of the above, while the legal validity of such rule shall be tested in Courts, taxpayers are suggested to avail ITC based on Form GSTR-2B [since the ITC is auto populated in Form GSTR-3B from Form-2B as per rule 60(7) and (8)] to avoid unnecessary disputes and penal consequences

Q252. Whether Forms GSTR-2A or GSTR-2B ought to be followed for availing ITC?

Ans. In some cases, it has been observed that few transactions are reflected in Form GSTR-2A but not in Form GSTR-2B or *vice versa* irrespective of the fact that the supplier has filed both Form GSTR-1 & Form GSTR-3B. The GSTN portal is considering ITC only from Form GSTR-2B causing mismatch with books as well as Form GSTR-3B.

Form GSTR-2A gives month-wise details of supplies declared by the supplier in his Form GSTR-1 based on the date of the supplier's invoice. For example, if a supplier declares the invoice dated March '21 in his Form GSTR-1 of May '21 filed by 20th June '21, the said invoice detail will be reflected in the Form GSTR-2A of March '21 only, since the invoice is dated Mar '21. Form GSTR-2A is a dynamic form which constantly keeps changing as and when the supplier furnishes the outward supplies in his Form GSTR-1.

Form GSTR-2B has been made available on GST portal with effect from August '20. It gives details of supplies declared by the supplier in his Form GSTR-1; however, it is a static form and its details do not change every month. For a particular month, this form takes details of invoices which are declared up to 11th (due date of Form GSTR-1) / 13th (due date of IFF) of the succeeding month.

Rule 36(4) requires the recipient to avail ITC in respect of those invoices or debit notes, the details of which have been furnished by the supplier in Form GSTR-1 or IFF. However, the said rule does not specify the Form i.e., GSTR 2A or GSTR-2B, that needs to be followed in order to determine this. However, as per the said rule the registered person is eligible to take credit in respect of invoices or debit notes which have been uploaded by the suppliers under sub-section (1) of section 37 in Form GSTR-1 or using the IFF. However, since the ITC is auto populated in Form GSTR-3B from Form-2B as per rule 60(7) and (8), for the purpose of availing ITC one has to use Form GSTR 2B.

In view of the above, it can be observed that Form GSTR-2B provides the ITC details of only those invoices furnished by the supplier in respective monthly Form GSTR-1 between the due date of furnishing of monthly Form GSTR- 1 for previous month (M-1) to the due date of furnishing of Form GSTR-1 for the current month (M). For example, Form GSTR-2B for the month of February 2021 will consist of all the documents filed by suppliers who choose to file their Form GSTR-1 monthly from 00:00 hours on 12th February 2021 to 23:59 hours on 11th March, 2021.

Further, the registered person is expected to defer the ITC in his books of accounts and follow up with the supplier for filing the particulars of the invoice in Form GSTR-1. Once the same is duly filed (within the time limit specified in section 16(4)) the registered person can claim the ITC in Form GSTR-3B *vis-à-vis* entry to be passed in books for transferring the deferred ITC to ITC account. In case, the supplier does not file the invoice particulars in Form GSTR-1 within the time prescribed in section 16(4), the ITC so deferred needs to be charged to profit and loss account.

Q253. If the supplier issues a time barred credit note he cannot reduce his output tax liability.

Whether in case of receipt of such time barred credit note, recipient needs to reverse the ITC?

Ans. Section 34 governs the principles of credit note. It specifies scenarios in which credit note can be issued & also the time limit, till which it can be issued for a particular financial year. If a credit note is issued post that specified time limit, the supplier shall not be entitled to reduce his liability.

On the buyer's end, the credit was claimed w.r.t original invoice and subsequently, a credit note is received, because of price drop or discount, or goods returned. As per provisions of section 16, the buyer needs to reverse the credit, even if the same is time barred, as the related ITC will not stand as eligible credit in his books.

Q254. Explain the treatment of ITC in books of account on purchase of fixed asset (capital assets)?

Ans. Appropriate accounting entries have to be passed for the purchase of capital asset and the related ITC involved.

Data is to be captured in the books of accounts in respect of capital assets where ITC is claimed and those for which ITC is not claimed.

If a registered person claims depreciation on the tax component of the cost of capital goods under the provisions of the Income-tax Act, 1961, ITC on the said tax component shall not be allowed.

If capital asset is used exclusively for effecting taxable output supply, then the entire ITC is eligible without any restriction. On the other hand, if the capital asset is used for making exempt supply, then there cannot be any claim of ITC at all.

In some of the situations, the capital asset is used partly for business and partly for non-business purposes or partly for effecting taxable supplies and partly for exempt supplies. In such case, ITC attributable to taxable supply alone is eligible *vide* section 17(1) and 17(2) read with the rule 43.

Considering the above aspects, ITC register is also to be maintained for claiming ITC which includes the inward supply relating to capital

assets. This register should include details and data in respect of each of the capital asset purchased separately.

Q255. Can ITC be claimed of IGST paid on ocean freight?

Ans. *Notification No. 10/2017 - Integrated Tax (Rate) dated 28-06-2017* stipulates the categories of supplies which are liable for payment of GST under reverse charge. S No. 10 of the said notification provides for payment of GST on ocean freight by the importer.

S.No.	***Category of supply of services***	***Supplier of service***	***Recipient of service***
(1)	***(2)***	***(3)***	***(4)***
10	*Services supplied by a person located in non- taxable territory by way of transportation of goods by a vessel from a place outside India up to the customs station of clearance in India.*	*A person located in non-taxable territory.*	*Importer, as defined in clause (26) of section 2 of the Customs Act, 1962, located in the taxable territory.*

As inferred from the above, if GST is charged by an Indian shipping lines on freight, ITC will be available as the same has not been restricted under section 17(5) of the Act. If IGST is paid under reverse charge on ocean freight charged by the foreign shipping lines to the Indian importer, then also ITC can be availed.

Where the transportation services were provided by the foreign shipping lines to the foreign exporter, the applicability of reverse charge is itself subject to consideration by the Hon'ble Apex Court in the case of *Union of India vs M/s Mohit Minerals Pvt. Ltd.[2021-TIOL-21-SC-GST-LB]*. It may be noted that the Hon'ble Gujarat High Court in the case of *Mohit Minerals Pvt. Ltd. v. Union of India and 1 Other(s) [2020-TIOL-164-HC-Ahm-GST]* has held that the levy of GST on such ocean freight is ultra-vires and unconstitutional.

Q256. Whether ITC can be availed on courier charges levied on export of goods?

Ans. The admissibility of ITC depends broadly on satisfaction of the following conditions:

→ Procurement of goods or services or both is in the course or furtherance of business

→ Documents prescribed for claiming ITC are in possession

→ Inward supply has been received

→ Tax has been paid in cash or through utilization of ITC

→ Return under section 39 has been filed

→ Inward supplies are not otherwise blocked or restricted under section 17(5)

There is no doubt that the service of a courier agent has been availed to achieve business objective. Hence, the said service has been consumed in the course of business. However, challenge will be to satisfy that they have received the activity in the State where the business is registered since ITC is permitted only when it is consumed within the said State. This analogy is drawn from the principal of destination-based tax. The State which consumes the goods or services or both is eligible to enjoy the tax on such supply. Further, the place of consumption of goods or services is determined by the concept of 'place of supply'.

Since 01.02.2019, the place of supply for transportation of goods to a place outside India has been amended from location of the recipient to the place of destination of such goods. The relevant extract of section 12(8) of the IGST Act is as under:

"12. Place of supply of services where location of supplier and recipient is in India. —

(8) ***The place of supply of services by way of transportation of goods, including by mail or courier to, –***

(a) a registered person, shall be the location of such person;

(b) a person other than a registered person, shall be the

location at which such goods are handed over for their transportation

***Provided that where the transportation of goods is to a place outside India, the place of supply shall be the place of destination of such goods**."*

The rationale for the above amendment was expressed in the agenda to the 28th GST Council Meeting held on 21st July 2018 in New Delhi, which is as follows:

"In order to provide a level playing field to the domestic transportation companies and promote export of goods, it is proposed that the transportation of goods from a place in India to a place outside India by a transporter located in India would not be chargeable to GST, as place of supply will be outside India."

Contrary to the above, when the place of supply of service is outside India and the location of the supplier is in India, the transaction happens to be a supply in the course of inter-State trade or commerce as per section 7(5)(a) of the IGST Act, 2017 and thus, is subject to IGST. Hence, the courier agent will charge IGST in his tax invoice declaring the place of supply as non-taxable territory (Other Territory) which is not the State where the business is registered. Hence, ITC may be challenged.

However, there is a second school of thought which sets forth that ITC is allowed on the following grounds:

a) The proviso does not apply to the transportation of goods by mail or courier since sub section (8) to section 12 of IGST Act, 2017 is non-restrictive (comma has been used before the phrase commencing with the word "including") and similar arrangement has not been made in the proviso. Hence, the place of supply in case of courier should be the location of recipient. Therefore, the ITC would be available of CGST & SGST or IGST, as the case may be, charged by the courier service provider to the recipient of service.

b). If the proviso is applied to the transportation of goods by road, mail or courier, the intention of the amendment does not get fulfilled since tax is required to be discharged. This is so

because transport of goods by air and sea has been exempted *vide* S No. 20a and 20b of *Notification No. 9/2017-IGST (Rate) dated 28-06-2017* [Exemption is valid up to 30-09-2021].

c) Lastly, even if IGST is paid under IGST Act, 2017 (by virtue of the Proviso), it can be argued that the same would be available as ITC since the amount is paid to the Centre and the same is not shared with any States.

Q257. Whether IGST charged on rent paid to the landlord (registered in Rajasthan) in respect of an immovable property located in Maharashtra can be availed as ITC?

Ans. The place of supply and address of the recipient of the service as shown in the tax invoice is relevant for claiming ITC. The place of supply shall invariably be in Maharashtra, as the service relates to immovable property. The address of the recipient shown in the tax invoice can either be in Maharashtra or in any other State. If the address of the recipient shown in the tax invoice is in Maharashtra, then there is no bar in claiming ITC by the recipient. However, if the address of the recipient as shown in the tax invoice is in a State other than Maharashtra, then claiming of ITC by the recipient is not possible. We do not wish to go into the fact whether charging IGST is correct or not in this transaction.

Q258. Can refund of unutilized ITC of Financial Year 2019-2020 be claimed in 2020-2021?

Ans. Section 54(1) of the CGST Act 2017 provides that the person claiming refund may make an application before the expiry of two years from the relevant date. Relevant date for different scenarios has been covered in Explanation 2 to Section 54. Therefore, refund of unutilized ITC of 2019-20 can be claimed in 2020-21 as the period of 2 years would not have elapsed in any scenario.

Q259. Whether a builder paying GST @ 5% should show all ITC in Form GSTR-3B and then reverse it or there is no need for him to disclose ITC in Form GSTR-3B?

Ans. Whatever tax has been paid on inward supplies including tax payable on inward supplies liable to reverse charge shall not be availed as ITC. Such un-availed ITC should be shown as ineligible ITC in the monthly Form GSTR-3B [Row No. 4(D)(2)].

Q260. In the case of a developer promoter, the value of land is deemed to be one third of the total amount charged for such supply.

Whether one third of the total ITC on inputs and input services needs to be reversed?

Ans. (i) As per *Notification 11/2017- Central Tax (Rate) dated 28-06-2017,* it has been prescribed that one third value of land shall apply for the purposes of valuation of the construction activity.

(ii) There is no requirement to reverse credit to the extent of deemed land value as the core activity carried on is construction of building/ complex etc.

(iii) Further, such activity will fall under entry no. 5(b) of Schedule II whereby the activity is considered as supply of service (where supply takes place before issuance of completion certificate).

Q261. Can ITC be availed on housekeeping/ gardening expenses?

Ans. (i) Section 16(1) allows a registered person to take ITC in respect of goods or services used in the course or furtherance of business. The definition clause of the term "business" includes any activity or transaction in connection with or incidental or ancillary to the activities mentioned in clause "*(a)"* of such definition.

(ii) The activity of gardening may happen inside or outside the factory. In both cases the activity of gardening may be in the course or furtherance of business. Upkeep and maintenance of garden would facilitate pollution free environment and the same is essential for the smooth running of factory or place of business. In service tax regime though the input services definition did not specifically cover maintenance of garden, several judicial decisions held that activity of garden maintenance has nexus with business. Following are some of the judgements delivered in favour of assessee:

(a) *In CCE, Bangalore-II v. Millipore India Pvt. Ltd. [2012 (26) STR 514 (Kar.)]* the Karnataka High Court held that the definition of input services is broadly worded, and landscaping of factory garden could legitimately be

claimed to be input services, entitled for the claim of CENVAT credit. Revenue's appeal was rejected.

(b) *M/S HCL Technologies Ltd v. C.C.E. NOIDA [2015 (8) TMI 595 - CESTAT (New Delhi)] [2015 (40) S.T.R. 369 (Tri. - Del.)]* - In a series of judgments, the Tribunal has held garden maintenance services qualify as input services. Therefore, the observation of the authorities below that it has no nexus with the output service is untenable. The same is therefore allowed.

(c) M/s Dow Chemical International Pvt. Ltd. v. C.C.G. ST., Navi Mumbai [2020 (2) TMI 1001 - CESTAT Mumbai]

(d) M/S. L & T Howden Limited v. Commissioner (Appeals), GST and Central Excise – Surat-I – [2018 (6) TMI 1197 - CESTAT (Ahmedabad)]

(e) M/s Gmm Pfaulder Ltd [2016 (12) TMI 334-CESTAT (Ahmedabad)]

(iii) Similarly, in the case of housekeeping services the credit is admissible because adequate housekeeping will ensure workplace to be clean, safe and comfortable environment for employees, visitors, customers etc. It would be pertinent to say that without housekeeping service, a business activity may not run smoothly, and it has a clear nexus with business activity and ITC would be eligible on the house keeping services.

Going by all the above, GST involved in the housekeeping / gardening expenses incurred by a registered person can be claimed as ITC, if incurred in the course of and furtherance of business.

Q262. Can a person take ITC on capital goods installed in office such as computer, AC, cooler, water filter and other electrical fittings? Please explain with respect to each capital goods.

Ans. As per section 2(19), 'Capital goods means goods, the value of which is capitalized 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"

This definition itself makes it clear that ITC can be availed on capital goods. Also, the test of capital goods is not based on the nature of such goods but based on whether or not such goods are capitalized in the books of accounts. Accordingly, ITC can be availed on capital goods installed in office such as computer, AC, cooler, water filter and other electrical fittings. However, while availing ITC on capital goods, apart from ensuring compliance with the general provisions of ITC under the GST law, it is very important to factor the following specific provisions as well:

1. Depreciation claim:

As per section 16(3), '*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, the input tax credit on the said tax component shall not be allowed*.' Hence, ITC can be availed on the capital goods only if the tax component is not capitalized along with the asset for the purpose of claiming depreciation under Income Tax Act.

2. Utility of the capital goods

ITC of capital goods can be availed fully, only if the capital goods are used exclusively for the taxable supply of goods or services or both. If such capital goods are used for personal purpose or are being used for manufacturing or selling or providing exempted supply, then ITC shall not be available. If the capital goods are used partly for taxable supplies and partly for exempted supplies, then the credit of the capital goods attributable to exempt supplies shall be reversed over a period of 60 months in proportion to the turnover as per the procedure specified in rule 43.

3. Blocked credit under sec 17(5)

ITC is allowed, if the same is not being specifically blocked under the law. While one may have to refer section 17(5) for the detailed list of blocked credits along with the exceptions, some of the commonly found blocked credit in the case of capital goods are in brief as below:

(a) Motor vehicles, vessels & aircraft for transportation of persons

(b) Works contract services for construction of immovable property (other than plant and machinery) (Note: Though works contract

is in the nature of 'input services' and not 'capital goods', it would still be relevant to take note of such blocked credit in this context, from the broad perspective of capitalisation in the books of accounts)

(c) ITC on goods or services 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.

(d) Capital goods used for personal consumption;

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

4. ITC on capital goods held on the day immediately preceding the date of registration

As per section 18(1)(a) and (b), a person newly registered under GST can avail ITC on the stock held on the day preceding grant of registration. However, such credit ***cannot be availed*** for the capital goods.

Q263. Higher ITC than the eligible amount has been claimed wrongly in the previous month and the same is now to be reversed. Therefore, the resultant figure would be negative in ITC table in Form GSTR-3B.

Whether this is possible?

Ans. Yes, it is possible in Form GSTR-3B. Excess ITC taken should be reversed in Table 4(B)(2) *[(B)ITC Reversed (2) Others]*. If it shows negative balance, the same is automatically added to payment Table 6.1 *[6.1 Payment of tax]* as liability and the same is to be discharged through payment to the taxing authority.

Q264. Part-1-Company A is in the hospitality sector. Its subsidiary, Company B, is engaged in travel management and provides package for official and personal tours. Presently, when an employee of Company A goes on official tour and stays in the hotel run by Company A, Company A does not charge anything from the employees for the accommodation. Since, it is free of cost, whether Company A has to reverse the proportionate ITC on accommodation services?

Since Company B provides an official tour package, the employees of Company A are asked to avail such services of Company B for all their official tours. Now, Company B arranges accommodation in the hotel run by Company A and raises the bill on Company A for the package including the amount paid to Company A for accommodation.

Part 2- Whether Company A can avail ITC on the amount charged by Company B for providing such accommodation service? If they were unrelated, whether the answer would be different?

	Treatment under GST
Part-1	• Official tour is not for the personal consumption of the employees of Company A but is in the course or furtherance of business of Company A. Therefore, accommodation services provided by Company A to its employees is to enable them to discharge their official duties. • As the employees are mandated to travel as a part of their duty for the business of Company A, it cannot be considered as gift by Company A to its employees. • It is stated that the consumption of various resources of the company by the employee in the course of discharge of their official duties cannot be construed as supply as the element of supply in terms of "duality" specified in section 7(1)(a) is not present in the above transaction assuming that all the hotels of Company A are under the same GSTIN. Since the employees are staying in the accommodation for official purposes, the service is not provided to the employee *per se* but is in the nature of self-service. Based on the foregoing discussions, as the said transaction is not covered within the scope of supply it will not correspondingly fall under the category of exempt supply as per section

	Treatment under GST
	2(47), and as such, there is no requirement to reverse ITC proportionate to such service as per section 17(2) and section 17(3).
Part-2	***If both companies are related persons*** • *Invoice raised by Company B on Company A for arranging official tours:* 1. Company B will charge on company A for tour package (including accommodation) under "tour operator service" category and applicable GST Rate is 5% as per *Sl. No. 23(i) of Notification No. 11/2017-CT Rate dated 28-06-2017*. Since the said tour is in the nature of official tour, the expenses incurred by Company A is deemed to have been incurred in the course or furtherance of business as per section 16(1) and hence ITC will be available to Company A, as there is also no specific restriction for such ITC under section 17. 2. As both Company A and Company B are related parties as per the explanation to section 15 and since full ITC of the bill raised by Company B is available to Company A, as per the Second Proviso to rule 28 of the invoice values adopted by the Company B shall be deemed to be the open market value for such tour operator services. • *Invoice raised by Company A on Company B for accommodation service:* 3. Company A will raise invoice on company B towards the accommodation charges. Company B cannot avail ITC of GST charged in the said invoice as Company A is not in the same line of business as tour operator services. This restriction is specifically provided as a condition in *Sl. No. 23(i) of Notification No. 11/2017-CTR dt.*

	Treatment under GST
	28-06-2017. 4. As ITC is not available to Company B in respect of such accommodation service the 2nd proviso to rule 28 will not apply and hence, value of the accommodation service charged by Company A should be at open market value as per rule 28(a). *If both companies are unrelated persons:* 1. The answer will remain the same as stated above, subject to the determination of taxable value for such services. As both are unrelated parties instead of following rule 28 of CGST Rules, 2017 invoices for the services should be raised for transaction value as defined under section 15(1).

Q265. A registered person (recipient) took ITC as per GSTR-2A plus percentage allowed as per rule 36(4) and it covered all his ITC. The supplier, however, has not filed GSTR-1 or has not included the said invoice in filing his GSTR-1 until the time period available under section 16(4). Hence the corresponding credit has not reflected in GSTR-2B of the registered recipient.

Whether the ITC taken by the recipient is liable for reversal?

Ans. The given query can be illustrated with an example as below:

ITC as per books of accounts	INR 107,000
ITC reflected in GSTR-2B	INR 100,000
ITC availed in GSTR-3B [restricting to 105% of ITC as per GSTR-2B in terms of rule 36(4)]	INR 105,000
Scenario: The differential ITC of Rs.7,000 was never reflected in GSTR-2B in future periods as well until the time period available as per section 16(4)	
Query: Whether the differential amount of Rs. 5,000 availed in GSTR-3B over & above the ITC as per GSTR-2B can be retained or should it be reversed?	

1. GSTR – 2A had attained legitimacy on account of rule 60(1). Rule 60(1) provides that details of outward supply furnished by supplier in GSTR -1 shall be made available electronically to the recipients in Part A of Form GSTR -2A; GSTR – 4A; and GSTR – 6A, through the common portal.

2. Legal sanction to Form GSTR-2B has been attained on account of sub-rules (7) and (8) of amended rule 60 [with effect from 1-01-2021] of the CGST Rules. *[vide Notification No. 82/2020–Central Tax dated 10-11-2020*]

3. As on date, GSTN provides only details of invoices uploaded by the supplier in GSTR-1 through GSTR-2A and GSTR-2B. No details about the filing status or the details of invoices uploaded in GSTR-3B by the supplier is provided in GSTN. Hence fulfilling of section 16(2)(c) is not possible to be verified by the recipient.

4. Section 16(4) provides that a person shall not be entitled to take ITC in respect of any invoice / debit note for supply of goods or services or both after happening of earlier of the following events:

   (i) the due date of furnishing of the return under section 39 for the month of September following the end of financial year to which such invoice or debit note pertains or

   (ii) furnishing of the relevant annual return

   Thus, the requirement prescribed under section 16(4) is to be fulfilled at the time of availing the ITC. It is not applicable for the events taking place after the date of availing the ITC.

5. Hence there is no requirement of reversal of ITC in the above stated scenario. In the example scenario stated above, the ITC of INR 105,000 availed in GSTR-3B can be retained and need not be reversed.

Q266. Table 4 of Form GSTR-3B requires reporting of ineligible ITC. Whether the same needs to be shown in row B or row D in Table 4?

Ans. There were two school of thoughts for presenting the values of

ineligible ITC in the Form GSTR 3B, prior to introduction of Form GSTR 2B and auto-filled Form GSTR 3B:

A. REPORTING GROSS ITC:

→ report gross total ITC [including ineligible ITC under section 17(5) and other ineligibles] in Table 4.A.(5);

→ reduced the ineligible ITC in Table 4.B.(2); and

→ disclose the break of the Ineligible ITC, reported in the Table 4.B.(2), in Table 4.D.(1) and (2).

B. REPORTING NET ITC:

→ report the net ITC in Table 4.A.(5);

→ disclose the break up of the Ineligible ITC in Table 4.D.(1) and (2).

However, after the introduction of Form GSTR-2B and auto-populated values in Form GSTR 3B, every registered person has to adopt the first school of thought, since the reporting is on gross level.

Q267. If the vendor did not file its Form - GSTR 3B but file Form GSTR-1, can the recipient avail ITC?

Ans. At the time of enactment of GST law, it was stated that ITC would auto-populate in Form GSTR-2A on basis of outward supply furnished by supplier in Form GSTR-1. And in order to claim ITC, purchasing recipient was supposed to file purchase summary in Form GSTR-2 by accepting, rejecting, modifying the details of ITC auto-populated in its Form GSTR-2A. In case of any missing details of invoice, adding of such invoice was allowed subject to acceptance of same by the supplier.

However, right from the inception of GST law, Form GSTR-2 was not operational and finally, filing of Form GSTR-2 was suspended in August 2017 by the Government.

As on date, GSTN provides only details of invoices uploaded by the supplier in Form GSTR-1 through Form GSTR-2A and Form GSTR-2B to the recipient. No details about the filing status of Form GSTR-3B is provided in Form GSTR 2A or Form GSTR 2B reports which are relied upon for the reconciliation and availment of ITC.

In case of *Kabeer Reality Private Limited vs. Union of India [Writ Petition No. 15645/2019 dated 17.10.2019]* – Madhya Pradesh High Court pronounced that tax recovery has to be initiated against the supplier for non-payment of taxes by filing Form GSTR-3B.

Supreme Court in the case of *Arise India Limited vs. Union of India [Civil Writ Petition No. 2106/2015],* which was an Appeal to the Special Leave Petition under DVAT Act, 2016, has also held that ITC cannot be denied to a *bonafide* purchaser availing ITC, owing to the seller's default to pay his tax dues.

Hon'ble Madras High Court in the case of *D.Y. Beathel Enterprises Vs. The State Tax Officer (Data Cell), (Investigation Wing), Tirunelveli [2021(3) TMI 1020]* has held that when it has come out that the seller has collected tax from the purchasing dealer, the omission on the part of the seller to remit the tax in question must have been viewed very seriously and strict action ought to have been initiated against the seller. The relevant extract is as follows:

> *"11. It can be seen therefrom that the assessee must have received the goods and the tax charged in respect of its supply, must have been actually paid to the Government either in cash or through utilization of input tax credit, admissible in respect of the said supply.*
>
> *12. Therefore, if the tax had not reached the kitty of the Government, then the liability may have to be eventually borne by one party, either the seller or the buyer. In the case on hand, the respondent does not appear to have taken any recovery action against the seller / Charles and his wife Shanthi, on the present transactions."*

Hence, if all conditions provided in section 16 are satisfied, and if the relevant invoice is reflecting in Form GSTR-2A, a view can be taken that a genuine taxpayer can avail ITC.

Q268. Can the Department raise a demand for payment of GST on account of ITC mismatch between Form GSTR-3B and Form GSTR 2A for the period 1-7-2017 to 31-3-2018 inspite of the fact that the taxpayer has produced all the tax invoices relating to the mismatch and payment was also made within 180 days?

It is pertinent to note that rule 36(4) has been inserted with effect from 9-10-2019.

Ans. Matching of ITC availed with Form GSTR-2A has been a requirement, right from 1st July 2017 in terms of section 16(2)(c). Though Form GSTR-2A was made available only by December 2017 / January 2018, considering the difficulties in matching, *CBIC vide Removal of difficulty Order No. 02/2018-Central Tax* even extended the period of availing ITC, (only the matched ITC) up to March 2019 for financial year 2017-18.

Department is not barred from questioning non-compliance with section 16(2)(c) which is a pre-condition to avail credit. All credits availed *vide* GSTR-3B are provisionally credited to electronic credit ledger. Section 155 places the burden to prove eligibility, that is, satisfaction of 'all' conditions on the registered person. As such, Department is not barred from issuing notices and when the burden to prove eligibility is on the registered person, delay in introducing Form GSTR-2A or rule 36(4), do not provide any route to registered person to stop the notice at the threshold itself.

Q269. Bills of F.Y. 2019-20 (for instance - July, 2019) are uploaded by the supplier in their Form GSTR-1 of July, 2019 but returns were filed late in April, 2021. All the bills are reflecting in Form GSTR-2A of July 2019 with filing date as April 2021. ITC was claimed in Form GSTR-3B of July, 2019 but the supplier didn't file Form GSTR-1 and was always giving excuse until April, 2021.

Whether such ITC will be disallowed on the ground that the supplier filed its Form GSTR-1 late and that the cut-off date for availing ITC is the due date for filing the return of the month of September of next financial year though the bills are uploaded in Form GSTR-1 of correct tax period i.e., July, 2019?

Ans. Payment of tax on outward supplies by a supplier is not limited to Form GSTR-3B such as Form GST DRC-3, etc. As such, recipient is responsible only to ensure compliance with all pre-conditions to claim credit including section 16(2)(c). Supplier may be liable for consequences of delay in payment of output tax, but recipient will not be barred from claiming *bona fide* credit within the time limit specified in section 16(4). There is no recourse for revenue against recipient when eventually supplier has deposited the output tax. This

It is not out place to mention here, that even GST Council also support the recipient where supplier has not deposited tax as evident from para 18.3 of the minutes of 28th GST Council meeting held on 4-08-2018 in New Delhi which stated as follows:

> *"18…….* ***There would be no automatic reversal of input tax credit at the recipient's end where tax had not been paid by the supplier. Revenue administration shall first try to recover the tax from the seller and only in some exceptional circumstances like missing dealer, shell companies, closure of business by the supplier****, the input tax credit shall be recovered from* ***the recipient by following the due process of serving of notice and personal hearing****. He stated that though this would be part of IT architecture, in the law there would continue to be a provision making the seller and the buyer jointly and severally responsible for the recovery of tax, which was not paid by the supplier but credit of which had been taken by the recipient. This would ensure that the security of credit was not diluted completely."*

Q270. In case of flood claims, fire claims or theft claims w.r.t. damaged/ stolen stocks, assessment of loss of stock is done excluding GST because in most cases at the time of purchase, the ITC has been availed and the same is accounted for in the books & reflected in GST returns. Hence, the insured entity gets the claim for loss excluding GST. Insured does not reverse the GST as the claim is exclusive of GST. However, GST Department issues notice to the insured entity to reverse the ITC on stocks which are damaged/lost and then the insured entity is bound to pay tax. At that point of time, it claims GST so paid from the insurance co. in addition to loss assessed. The insurance company then asks for GST returns with reversal of GST in books and returns and also a certificate from Chartered Accountant to sanction GST claim.

Whether the above procedure followed by the insured entity & insurance co. is correct?

Ans. (i) Generally, the insurance company will indemnify the insured with the value of stock before the loss. Suppose taxable value of

stock is Rs. 100/- and GST charged is Rs. 18/- the insured would have taken ITC of Rs. 18/-. However, as per section 17(5)(h) (*goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples)* the insured is required to reverse the ITC of Rs. 18/-. Since ITC is not eligible as per above provision, the same becomes cost of the stock lost. Hence, total loss of stock is Rs. 118/- and the insurance company has to compensate Rs. 118/-. However, the insurance company may want to ensure whether ITC involved in the loss of stock has been reversed so as to validate the exact value of loss of stock. For this purpose, the insurance company requires the insured to get CA certificate confirming that ITC has been reversed in books and GST returns though there is no express requirement for the insured to get CA certificate as per CGST Act or rules.

(ii) From the above discussion, the procedure adopted by insured and insurance company appears to be proper to arrive at the value of loss of stock. However, the insured has to pay interest under section 50, in this matter, since he reverses the credit belatedly that too after pointing out by the Department. The Department may also levy penalty under provisions of section 73 or 74

Q271. In a recent advance ruling pronounced by the Uttar Pradesh Advance Ruling Authority, ITC on goods procured for CSR has been allowed considering it as involuntary inward supply under Companies Act. However, whether GST needs to be charged while making outward supply to the beneficiary. In case GST is not charged on outward supply, will it not violate provisions of Schedule I to the CGST Act, 2017?

Ans. When goods forming part of business assets, on which ITC has been availed, are disposed of permanently even without consideration, GST will attract. The said activity will be considered as supply as per Section 7 \ (1) \(c). Hence, the supply should be under the cover of the tax invoice. If the registered person does not issue a tax invoice, then it will be considered a violation of the provisions of Schedule I. Further, this has also been clarified by CBIC in their 3rd edition of FAQs on GST dated 15-2-2018. The FAQ is reproduced below for reference:

"*Q 11. A dealer of air-conditioners permanently transfers an air conditioner from his stock in trade, for personal use at his residence. Will the transaction constitute a supply?*

Ans. Yes. As per Sl. No.1 of Schedule-I, permanent transfer, or disposal of business assets where input tax credit has been availed on such assets shall constitute a supply under GST even where no consideration is involved."

Q272. A resident welfare association procures different input/input services for providing services to its residents. It does not charge GST on its services as the monthly contribution per member is less than Rs. 7,500. It wants to claim ITC on such inputs/input services and then claim refund of such ITC. It is of the opinion that if ITC is not allowed to it, the tax paid by it on such inward supplies will increase the cost of the services and thus, the exemption to its output services will not be of much use.

Can the resident welfare association avail ITC on input/input services and then claim refund of the same?

Ans. Section 17(2) clearly lays down that ITC is eligible only to the extent attributable to taxable supplies (including zero rated supplies). When the outward supplies are fully exempt as in this case, the resident welfare association is not eligible to claim any ITC.

Notwithstanding the above, section 54(3) specifies the situations under which only the accumulated ITC will be given as refund under GST. The two scenarios envisaged are:

a. ITC accumulated on account of making zero rated outward supplies without payment of IGST

b. ITC accumulated due to inverted duty structure (where the tax on outward supplies is lesser than the tax on inputs)

Neither of the above two situations would be applicable for the resident welfare association even if it becomes eligible to avail ITC. Hence, there is no legal possibility of refund.

Therefore, the resident welfare association, is not eligible to avail ITC as all its outward supplies are exempt, and consequently the question of refund of ITC does not arise.

Q273. Mr. A owns a car which is insured by Company I. The vehicle meets with an accident and Rs. 1 lakh is incurred for repairing the same. Company I agree to pay Rs. 75,000 as part of the claim and Rs. 25,000 has to be borne by Mr. A. Dealer gives an invoice to Mr. A in his name but in his GSTR-1 he gives credit to the insurance company. Insurance company claims credit on the entire bill of Rs. 1 lakh.

1) Whether Insurance co. is correct in claiming the ITC on the entire invoice?

2) Whether dealer is doing the correct reporting?

3) What if Mr. A is a travel operator who is eligible to claim ITC on vehicle and wants to claim ITC on at least Rs. 50,000 - how can he claim the ITC?

Ans. Section 2(93) defines a 'recipient' of supply of goods or services or both to means *inter alia* the person who is liable to pay the consideration, where a consideration is payable for the supply of goods or services or both.

In this case both Company I & Mr. A are recipients to the extent of consideration paid by them. Therefore,

1. The Insurance company claiming full ITC would be wrong to the extent of consideration paid by Mr. A.

2. In his GSTR-1, the dealer should have reported the value of supply in proportion to the consideration received.

3. Mr. A can claim ITC only to the extent of his payment which is Rs. 25,000/- and if he intends to claim ITC on Rs. 50,000/- he should have made payment to that extent.

Q274. A foreign entity is providing OIDAR services and its liaison office (LO) in India is registered under GST as its authorized representative.

Can the LO claim ITC of the GST charged on the invoices received by them?

Ans. If the LO in India is the supplier of OIDAR service and it raises invoice for the purpose of GST, the LO can claim ITC as there is no specific restriction for the same under GST Law.

However, if the foreign entity is registered as 'non-resident taxable person' and issues invoice for the supply of OIDAR service in the capacity of '*non-resident taxable person'*, it will be able to claim ITC on only the goods imported by it as section 17(5)(f) specifically blocks the ITC on goods or services or both received by a non-resident taxable person.

Q275. If a supplier has charged a higher rate of tax than the actual rate of tax on the invoice and recipient has availed ITC of the tax paid, can ITC be denied to recipient in respect of excess tax charged by the supplier?

Ans. As per section 16(1), registered recipient shall be *entitled* to take the ITC on *taxes "charged"* on supply of goods or services or both subject to fulfilment of conditions prescribed in section 16(2) read along with rule 36. On a plain reading of section 16(1), the moment the conditions for availing ITC are fulfilled, the recipient shall be entitled for ITC of whatever taxes "charged" on the invoice for the supply of goods or services or both notwithstanding the fact that excess tax has been charged.

Also, it is pertinent to note para 10-13 of Madras High Court Judgment in the case of *Visteon Automotive Systems Pvt. Ltd. vs The Deputy Commissioner (CT) – IV (FAC) 2020 (2) TMI 403 – Madras High Court* wherein decision given in context of VAT law gains relevance in present GST regime and the summary of the judgment is as follows:

"The purpose of allowing input tax credit on capital goods and inputs ***are to reduce the cascading effect of the tax on the products/goods sold by a dealer under the provisions of the said Act.***

Even if the registered dealer had deliberately paid tax in excess and passed on the incidence of such tax to the petitioner with a view to liquidate the excess credit of input tax accumulated in their hand, the petitioner cannot be denied of the input tax credit of tax paid and reflected in the invoice.

Under those circumstances, ***the option available to the commercial tax department would be to recover the amount of tax passed on in excess from the registered dealer who sold such capital***

goods to the petitioner if it facilitated the petitioner to avail credit of such tax if such tax was otherwise not payable.

It is not the case of the respondent that there was deliberate ploy on the part of the dealer who sold the capital goods to the petitioner by charging tax at 12.5% to liquidate accumulated credit. In my view, whether the tax was paid at 4% or 12.5% as the case may be, ***it is irrelevant as far as the respondent is concerned as the issue is revenue neutral.*** *I therefore see* ***no reason why credit availed by the petitioner should be disallowed particularly in the light of the fact that intention of the legislature is to reduce the cascading effect of the tax the final product****."*

Applying the rationale of the above- referred judgment to the present GST regime as the ITC principle remains the same, it could be concluded that the reversal of excess ITC would not be in line with the intention of the legislature.

However, the above decision and position will hold good only when the supplier has not issued any credit note as per section 34 for the excess payment of tax made by him, which would result in reversal of such credit received in excess by the recipient.

Q276. As per explanation (i) of section 16(2)(b), it shall be deemed that the registered person has received the goods 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.

Based on such explanation, whether ITC can be availed once the invoice is issued in the name of the recipient and ownership (including risk and reward) of goods is transferred to the recipient, even though the goods are actually received at a later date?

Ans. Deeming fiction given in the explanation (i) of section 16(2)(b) applies **only for registered persons on whose instruction the goods are delivered to the recipient.**

As regards ***the recipient*** to whom the goods are to be delivered by supplier is concerned, he can **avail ITC only on actual receipt of**

goods in accordance with section 16(2)(b) of the Act and above explanation does not hold good in context of the recipient.

Q277. Whether ITC on listing fee paid in lump sum to stock exchange for the full year can be availed immediately once it is paid in the beginning of the year?

To elaborate, in case of services, tax is payable on receipt of advance. Therefore, in case of services like annual charges for maintenance contracts, annual rentals for immovable property, annual lease rentals and annual premium paid for insurance, whether ITC can be taken at the time when payment is made as invoice for such expenses is also issued at the time of payment though such services are continually supplied over a period of one year?

Ans. In case of continuous supply of services, tax invoice has to be issued in accordance with section 31(5). As per section 13(2)(a), tax is payable on receipt of advance or issuance of tax invoice, whichever is earlier. As per section 16(2)(b), one of the conditions to avail ITC, is that the recipient should have actually received such goods or services. Since service is intangible, one cannot determine, as to when service is actually received. Further, explanation below section 13(2), which creates a deeming fiction, reads as under:

For the purposes of clauses (a) and (b)—

(i) the supply ***shall be deemed to have been made to the extent it is covered*** *by the invoice or, as the case may be, the payment;*

In view of this deeming fiction, a view can be taken that the recipient can avail ITC as the services are deemed to have been made to the extent covered by invoice. In the above situations mentioned (in question), recipient can avail ITC at the beginning of the year even though services are rendered over a period of year, subject to satisfaction of other conditions specified under section 16.

Q278. How can a taxpayer claim ITC on capital expenditure where construction period of the said plant & machinery is more than two years, and no production has started as also accounting is being done in work in progress account?

Ans. As per Schedule III to the Companies Act, 2013, capital work in progress (CWIP) is shown under Non–Current Assets and further the

moment the construction of plant & machinery gets completed it will be re-capitalized to the relevant fixed asset account.

As per section 2(19), capital goods means any goods, the value of which is capitalized in the books of account of the person claiming the ITC and which are used or intended to be used in the course of business.

The term *"plant and machinery"* as per explanation to section 17 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.

Perusal of the above two definitions indicate that capitalization of value is not necessary in case of plant and machinery, but they must be used for making outward supply of goods and/or services. When the plant and machinery is under construction and no production has started, it cannot be said that the same is being used for making outward supplies but at the same time there exists an intention to use it for the furtherance of business. Therefore, ITC can be availed on such plant & machinery as there exists an intention to use the same for furtherance of business and capitalization is any way not required.

Q279. A company is into maintenance and repair of vehicles. It also imports parts for sale to its customers. Â customer approaches the company for change of engine of his car (BMW). Since the engine is not manufactured in India, the company gives an order for supply of engine to overseas company. The payment to overseas company is made by the customer and he asks the Indian company for clearance of engine by paying IGST. The Indian company charges the customer only for installation of engine.

Can the Indian company claim ITC for IGST paid at the time of import of engine especially when it had neither paid the

overseas vendor for supply, nor has billed the said amount to Indian customer?

Ans. No, the Indian company is not eligible for claiming ITC on IGST paid on import of engine as the Indian company is not the user of the engine and is neither the supplier of the said engine to the customer. Since, ITC can be availed on goods or services used or intended to be used in the course or furtherance of business as per section 16(1), no ITC can be availed on the IGST paid by the Indian company as the said engine is not being used by the said Indian company. Also, since the Indian company is not acting as trader in the given example, the ITC of motor vehicles engine cannot be availed by the Indian company.