

Workshop on GST Practical aspects & issues in availing or utilizing ITC under GST”

(Organised by GHAZIABAD CHAPTER OF NIRC of ICSI)

Date: 03-07-2023

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- ❑ Post-qualification experience of around 24 years in the field of direct & indirect tax particularly income tax, GST, service tax and VAT ,sales tax .
- ❑ Experience of litigation handling such as appellate proceeding before ITAT, CIT(A) , Revision etc. and advisory matters of Direct taxes particularly income tax and handling indirect tax matters such as audit, appeal to commissioner, CESTAT, SCN, adjudication, etc. of GST, service tax, DVAT, CST, Central Excise and other related matters.
- ❑ Authored the book DNA of GST Audit and Annual return, The *DNA of TDS&TCS* (including withholding tax, advance tax and equalisation levy) ,Background material on GST for empowerment of girl students ICAI, New Delhi
- ❑ Guest faculty for certification course on GST & Certification course on appeal and representation ICAI , New Delhi
- ❑ Corporate trainer and guest Faculty with **Indian Institute of Management(IIM)**, NIFMS, Faridabad(Institute of Minister Finance),ICAI New Delhi and ICSI, New Delhi and other trade association.
- ❑ Guest faculty at **NACIN (National academy of customs, indirect taxes and narcotics)**
- ❑ Articles on various topics of taxation and other legal matters.

TAX UPDATE



**Practical aspects
& issues in
availing or
utilizing ITC under
GST”**

Nature of GST law implementation

- Originally GST law was intended to be implemented as system driven tax laws.
- Latter on due to problem in IT system designing , GST become system driven tax laws.
- Mostly forms based and rule based system implemented and thereafter statutory provisions made in statute book – e. g GSTR-3B, GSTR-2A, GSTR-2B etc.

Scope of discussion

- ❑ Broad overview of ITC claim
- ❑ History of ITC from beginning of MODVAT.
- ❑ Important provisions related to claiming ITC.
- ❑ Link between supply and ITC in GST
- ❑ Block credit of ITC.
- ❑ Major issues in ITC claim.
- ❑ General objections of GST audit/preventive team
- ❑ Important case laws
- ❑ Recent developments in ITC

A white circle with a dashed green border containing the letters 'ITC' in a green serif font.

ITC

Input Tax

Credit



History Of Input Tax Credit

- ❑ MODVAT Scheme was introduced in the year 1986 to provide Credit of **duty on input** to the manufacturer for avoiding cascading effect of taxes ;
- ❑ In 1994 scheme renamed as CENVAT credit and **extended for credit** of input duty in respect of **capital goods**.
- ❑ In 2002 credit mechanism introduced in relation to **service tax**
- ❑ In 2004 combine credit mechanism "CENVAT credit rule 2004" by way of allowing intra credit of service tax and duties of excise against each other.
- ❑ in 2017 credit mechanism in the GST regime also allowing credit of IGST/SGST/CGST/UTGST/CESS on intra/inter state supply (which is similar to CST) & IGST levied on import in respect of input, input service and capital goods
- ❑ from 09-10-2019 restricting credit based on reporting in form GSTR- 2A – permissible variations- 20% (09-10-2019 to 31-12-2019) /10% (01-01-2020 to 31-12-2020 (/5% (01-01-2021 to 31-12-2021 /nil from 01-01-2022 – notification 49/2019 dated 09-10-2019 rule 36(4)
- ❑ From 01-01-2022 ITC claims will be allowed only if it appears in GSTR-2B. Rule 61A/16(2)(aa)

Ref material

Sec 16	Eligibility and condition for taking input tax credit.
Sec17	Apportionment of credit and blocked credits.
Sec 18	Availability of credit in special circumstances .
Sec 19	Taking input tax credit in respect of inputs and capital goods sent for job work.
Sec 20	Manner of distribution of credit by Input Service Distributor .
Sec 21	Manner of recovery of credit distributed in excess.
Rule 36 to 44A	CGST/SGST rules
circulars	
Forms	GST ITC 01, 02,03,04 etc.
Leading case laws	

Burden of proof-tax payer

Where any person claims that he is eligible for input tax credit under this Act, the burden of proving such claim shall lie on such person. [*S-155 of CGST Act*]

Therefore we must ensure followings

- *tax invoice, books of account,*
- *record of receiving of goods or services received*
- *Valid registration under GST.*
- *books of account etc.*
- *Ensure reporting of invoice in form GSTR-2A/2B by the supplier*
- *Not in block credit*
- *Payment within 180 days from date of invoice etc.*
- *Compliance of other conditions for eligible ITC*
- *Don't avail credit of ITC which is other wise not available , if mistake reversal immediately and if credit has been utilised must pay interest also voluntarily .*

Essential conditions of ITC claim

Section 16(1)

Every registered person shall, subject to such conditions and restrictions as may be prescribed and in the manner specified in section 49, be entitled to take credit of input tax charged on any supply of goods or services or both to him which are used or intended to be used in the course or furtherance of his business and the said amount shall be credited to the electronic credit ledger of such person.

ITC could be availed by registered person/effect of cancellation of registration- denial of ITC

Credit of ITC on **inward supply** of goods or services may be input, input service or capital goods

Used or **intended to be used** in the course of business

Used or **intended to be used** in the course of **furtherance of business**

Claimed in self assessed return GSTR-3B
without claiming not a legal right.

WHETHER UNREGISTERED PERSON MAY TAKE INPUT TAX CREDIT?

- ❑ only with registered person can avail ITC .
- ❑ **Case study:** newly incorporated company- invoice of professional service for incorporation- invoice can be issued within 30days of service - company may apply for GST under compulsory registration category – and – after registration from date of liabilities can avail credit, if applied for compulsory registration within time limit of 30 days from date of liabilities. In such cases although registration allowed later on but from retrospective date of liability so no loss of credit of ITC.

**Actual use intention
to used in business
or furtherance of
business**

- Actual use or passive use/stand by assets
- ITC allowed on closing stock
- ITC stand by capital assets
- ITC on capital work in progress
- ITC on semi finished goods
- ITC on consumables
- ITC on spare parts
- packing materials

**meaning of business-
expanded so more
credit of ITC-2(17)**

- **any** trade, commerce, manufacture, profession, vocation, wager or any other similar activity, whether or not it is for a pecuniary benefit;
- volume, frequency, continuity or regularity of such transaction is irrelevant
- activity or transaction **in connection with** or **incidental or ancillary** to above
- Inward supply **in connection with commencement or closure of business;**
- facilities or benefits to its members by club , association society, or any such body ;
-

meaning of furtherance of business- not defined

- Marketing and Sales
- Business Development
- Product Development/R
&D
- Financial Management
- For improving Operational
Efficiency
- Human Resources
- Technology Adoption:
- Legal and Regulatory
Compliance

Furtherance of business refers to

- activities or actions undertaken with the intention of promoting or advancing a business or organization.
- It encompasses strategies, initiatives, and decisions aimed at improving the overall performance, growth, and profitability of a company.

DEFINITIONS

INPUT

Any **goods** other than capital goods **used/intended to be used** by a supplier **in the course or furtherance of business.**[Sec 2(59)]

INPUT SERVICE

Any service used/intended to be used by a supplier **in the course or furtherance of business.**[Sec 2(60)]

CAPITAL GOODS

Goods, the value of which is **capitalised in the books of account** of the person claiming credit and which are **used/intended to be used** in the course or **furtherance of business.**[Sec 2(19)]

Misinterpretation of the meaning of the term “inputs”:

Issue: It has been represented that on certain occasions, departmental officers do not consider ITC on stores and spares, packing materials, materials purchased for machinery repairs, printing and stationery items, as part of Net ITC on the grounds that **these are not directly consumed in the manufacturing process and therefore, do not qualify as input.** There are also instances where stores and spares charged to revenue are considered as capital goods and therefore the ITC availed on them is not included in Net ITC, even though the value of these goods has not been capitalized in his books of account by the claimant.

Clarification: The GST paid on inward supplies of stores and spares, packing materials etc. shall be available as ITC as long as these inputs are used for the purpose of the business and/or for effecting taxable supplies, including zero-rated supplies, and the ITC for such inputs is not restricted under section 17(5) of the CGST Act.

Stores and spares, the expenditure on which has been charged as a revenue expense in the books of account, cannot be held to be capital goods. So refund of ITC shall be available.

Circular No. 79/53/2018-GST dated 31-12-2018

Definition of goods- 2(52)

every kind of **movable property** other than money and securities but **includes**

- ✓ actionable claim,
- ✓ growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

Exclusion : money and securities and other immovable properties other than plant and machinery.

- **Inputs** –Essentially a goods
- **Capital goods** – essentially a goods capitalised in the books of account
- Actionable claim in the definition of goods but item other than lottery, betting and gambling is outside GST because list in schedule-III – no supply list-(entry no-6)

Meaning of plant and machinery

no credit to

telecommunication

company of tower ,
no credit outside pipe
line

no credit to for Civil
structure in general

"**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.**

Refer- section 17.

Recent judgments

- Input tax paid by a vehicle dealer on purchase of motor car used for demonstration purpose of customer can be availed as input tax credit on capital goods and set off against output tax payable under GST. A.M. Motors. [2018] 98 taxmann.com 157 (AAR - KERALA)]

Note: no block credit for motor vehicle dealer.

WHETHER EXCESS TAX CHARGED BY THE SUPPLIER WOULD BE AVAILABLE AS ITC TO THE RECIPIENT?

Supposed the output tax on the supply is 5% but supplier recharging 18% whether full tax credit of 18% shall be allowed to the recipient. The matter was first examined by honorable Punjab and Haryana High Court in the case of **CCE Vs. Ranbaxy Labs Ltd(2006) 203 ELT 213(P&H High Court)** where it was held that where there is no dispute on payment of duties by the supplier(job Worker) there is no need to deny credit to the recipient. Similar view in other cases by honorable Punjab and Haryana High Court in the case of **V.G steel industry Vs. CCE(2011) 271 ELT 508(P&H High Court)**

CONDITIONS FOR TAKING INPUT TAX CREDIT [SEC.16(2)]



Tax paid to the
Government
16(2)©

Furnished
return.
16(2)(d)



Invoice/Debit
Note/ Other
Tax Paying
Document



Used/intended to be
used in the course or
furtherance of his
business



Such ITC details
communicated is
not restricted
16(ba)

Invoice
reported by
supplier –
GSTR-2B S-
16(2)(aa)



Goods/service
must have been
received
16(2)(b)



CONDITIONS FOR TAKING INPUT TAX CREDIT [SEC.16(2)]

Notwithstanding anything contained in this section, no registered person shall be entitled to the credit of any input tax in respect of any supply of goods or services or both to him **unless**,

- ✓ *he is in possession of*
 - ❑ *tax invoice / debit note / other tax paying documents issued by a supplier registered under this Act or*
- ✓ details of the invoice or debit note 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;
- ✓ he has **received the goods or services** or both.
- ✓ *details of input tax credit in respect of the said supply communicated to such registered person under section 38 has not been restricted;*
- ✓ subject to the **provisions of section 41** (claim of ITC as self assessed, in the return on provisional basis) 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;
- ✓ he has furnished the return under section 39.

* Prescribed rule 36 for **Documentary requirements and conditions for claiming ITC**

Rule 36(4)

w.e.f. 9-10-2019
w.e.f. 1-1-2020,
w.e.f. 3-4-2020,
w.e.f. 1-1-2021,
w.e.f. 1-5-2021
w.e.f. 1-6-2021
w.e.f. **1-1-2022.**

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

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

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

In possession of tax invoice/debit note etc.

- Invoice must have prescribed detail as per rule 36
- Physically signed or digitally signed invoice
- Any copy of invoice
- Invoice at the time of claiming of credit. But u/s 155 onus of compliance of condition of ITC on person claiming ITC must be at the time of inspection.
- Invoice in the case of tax paid under RCM method for claiming credit
- Invoice taken into account
- No depreciation on amount of input tax in respect of capital goods, if dep no valid claim of ITC

One of the condition for credit entitlement is Recipient has received the goods or services

Actual receiving of goods

Deemed receiving of goods:

Goods sent directly to job worker for further processing

goods against an invoice may be received in **lots or installments**, in such case registered person shall be entitled to take credit upon receipt of the last lot or installment. But supplier has to pay tax at the time of issuance of invoice . So mismatch of tax payment period of supplier Vs ITC CREDIT by recipient..

Needs verification with E way bill of last lot before availing ITC..

DEEMED RECEIVING OF GOODS

For the purposes of this clause, it shall be **deemed that the registered person has received the goods**

(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.

[Explanation below 16(2)(b) of CGST]

Bill to ship to model:

where the goods are delivered by the supplier to a recipient or any other person on the **direction of a third person**, whether acting as an agent or otherwise, before or during movement of goods, either by way of transfer of documents of title to the goods or otherwise, it shall be **deemed that the said third person has received the goods** and the place of supply of such goods shall be the principal place of business of such person;

[sec 10(1)(b) of IGST]

credit reversal, if recipient failed to pay within 180 days[S-16(2) 2nd proviso]

- ❑ If recipient of goods or service or both **fails to pay** the supplier amount towards the **value of supply along with tax payable** thereon within 180 days from **date of issue of invoice**, the amount of input tax credit availed along with the interest shall be payable by the recipient in prescribed manner..
- ❑ The said input tax credit can be re-availed on payment of value of supply and tax payable thereon.
- ❑ No time limit for re-availment of credit.

Non applicability of this proviso : *deemed payment shall be considered in following cases*

1. inward supplies on which tax is payable on reverse charge basis either u/s 9(3) or 9(4),
2. *schedule -1 transaction where supply without consideration is covered. Rule 37 relax the payment condition within specified 180 days.*
3. *section 15(2) (b) case where value of supply shall include any amount that the supplier is liable to pay in relation to such supply but which has been incurred by the recipient of the supply and not included in the price actually paid or payable for the goods or services or both;*

Reversal of ITC in the case of non-payment of consideration[R-37]

- (1) A registered person, who has availed of input tax credit on any inward supply of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, but fails to pay to the supplier thereof, the amount towards the value of such supply^{68b}[, whether wholly or partly,] along with the tax payable thereon, within the time limit specified in the second proviso to sub-section (2) of section 16, shall pay or reverse] an amount equal to the input tax credit availed in respect of such supply, **proportionate** to the amount not paid to the supplier, along with interest payable thereon under section 50, while furnishing the return in FORM GSTR-3B for the tax period immediately following the period of one hundred and eighty days from the date of the issue of the invoice:

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:

Provided further that the value of supplies on account of any amount added in accordance with the provisions of clause **(b) of sub-section (2) of section 15** shall be deemed to have been paid for the purposes of the second proviso to sub-section (2) of section 16.

- (2) Where the said registered person subsequently makes the payment of the amount towards the value of such supply along with tax payable thereon to the supplier thereof, he shall be entitled **to re-avail** the input tax credit referred to in sub-rule (1).]
- (4) **The time limit specified in section 16(4) 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.

Credit based on GSTR-2A but GSTR-3B not filed by supplier- rule 37A

37A. Where input tax credit has been availed by a registered person in the return in FORM GSTR-3B for a tax period in respect of such invoice or debit note, the details of which have been furnished by the supplier in the statement of outward supplies in FORM GSTR-1 or using the invoice furnishing facility (IFF), but the return in FORM GSTR-3B for the tax period corresponding to the said statement of outward supplies has not been furnished by such supplier till the 30th day of September following the end of financial year in which the input tax credit in respect of such invoice or debit note has been availed, the **said amount of input tax credit shall be reversed by the said registered person**, while furnishing a return in FORM GSTR-3B **on or before the 30th day of November** following the end of such financial year:

Provided that where the said amount of input tax credit is not reversed by the registered person in a return in FORM GSTR-3B on or before the 30th day of November following the end of such financial year during which such input tax credit has been availed, such **amount shall be payable by the said person along with interest** thereon under section 50:

Provided further that where the said supplier subsequently furnishes the return in FORM GSTR-3B for the said tax period, the said registered person may **re-avail the amount of such credit** in the return in FORM GSTR-3B for a tax period thereafter.]

ITC IN CASE OF CAPITAL GOODS[SEC 16(3)]

Depreciation claimed on Tax component of the cost of capital goods & Plant and machinery under IT Act

ITC not Available

Example:

Cost of asset	=	Rs. 100
Tax-10%(say)	=	<u>Rs. 10</u>
Total Cost		<u>Rs. 110</u>

If Depreciation charged on Rs.100
ITC Available

If Depreciation charged on Rs.110
ITC not Available

“capital goods” means the goods, the value of which is capitalized in the books of accounts of the person claiming the credit and which are used of intended to be used in the course or furtherance of the business

DEPRECIATION VS. ITC IN RESPECT OF CAPITAL GOODS

Earlier assessee has claimed the depreciation and not the ITC but latter on assessee has revised the income tax return by not claiming the depreciation and availing the ITC. Whether credit of ITC shall be available. The matter was examine by honorable **Gujarat High Court in the case of CCE Vs. Nish fibres (2010) 257 ELT 81(Guj HC)** where it was held that the idea behind permitting only one claim was not to permit double benefit. When the assessee has revised the income tax return and not claimed the depreciation finally as deductible expenditure there is no question of double benefits therefore ITC cannot be denied. Now the time limit for availing ITC is up to the due date of filing of September return of the next financial year or annual return whichever is earlier almost the due date of filing of income tax return. Therefore assessee may of take a view as per its convenience.

Note: depreciation not actually claimed but deemed to have been allowed where option u/s 44AD/ ADA /AE availed. What would happen for small business/profession? They should claim ITC.

WHETHER OWNERSHIP OF THE GOODS/CAPITAL GOODS- CREDIT OF ITC .

whether it is essential for credit of ITC that the recipient of goods/capital goods must be owner of the goods?

The matter was examined by honorable Gujarat High Court in the case of **CCE Vs. Sunrise chemical industries (2010) 262 ELT 110(Guj HC)** it is not essential for availing credit of ITC that there must be ownership of the capital goods, only requirement is the use of capital goods received in the factory. In the GST regime it is further liberalised and only possession of tax invoice, receipt of goods, payment of tax and the furnishing of return is the criteria for claiming the ITC. The capital goods or goods may not have been actually used even then credit of ITC shall be allowed.

Similar view was expressed by honorable **Punjab and Haryana High Court in the case of CCE Vs Pepsi foods Ltd(2010) 254 ELT 284** where credit was denied by the Department on the basis that assessee is not owner of the goods as important documents of the machinery was in the name of other company but assessee was using the machinery on which credit was availed. Honorable High Court held that import documents are endorsed in the name of the assessee and no condition that assessee must be owner. In the GST regime also supply is widely defined and includes not only sale but lease etc therefore in the case of financial lease, the ownership may become only after payment of last installment but credit of ITC shall be available to the recipient from very first day. In fact it is based on economic substance theory in tax laws.

Time limit for availing credit of ITC[S-16(4)]

Time limit for demand of tax u/s 73(10) is 3 years from the due date for furnishing of annual return other than fraud etc

74(10) is 5 years from the due date for furnishing of annual return- fraud etc cases.

Annual return date extended so many times but no corresponding increase in time limit for availing credit.

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 30th day of November following the end of financial year to which such invoice or debit note pertains or furnishing of the relevant annual return, whichever is earlier:

Note: no time limit for re-credit on making payment.

Constitutional validity of s- 16(4) challenged

**Surat
Mercantile Associati
on Vs UOI. [2021]
124 taxmann.com
342 (Gujarat)**

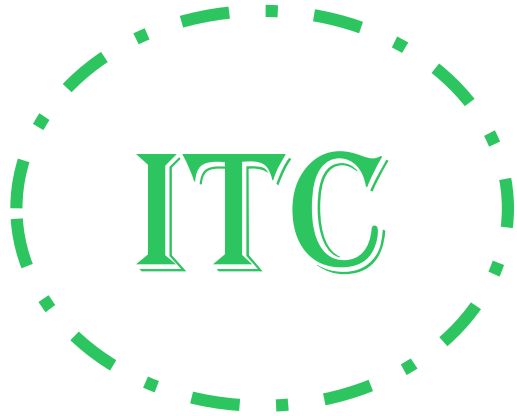
Petitioner, an association, filed a writ petition challenging constitutional validity of section 16(4) on ground being manifestly arbitrary and violative of articles 14, 19(1)(g) and 300A respectively of Constitution of India

Practical aspects-ITC

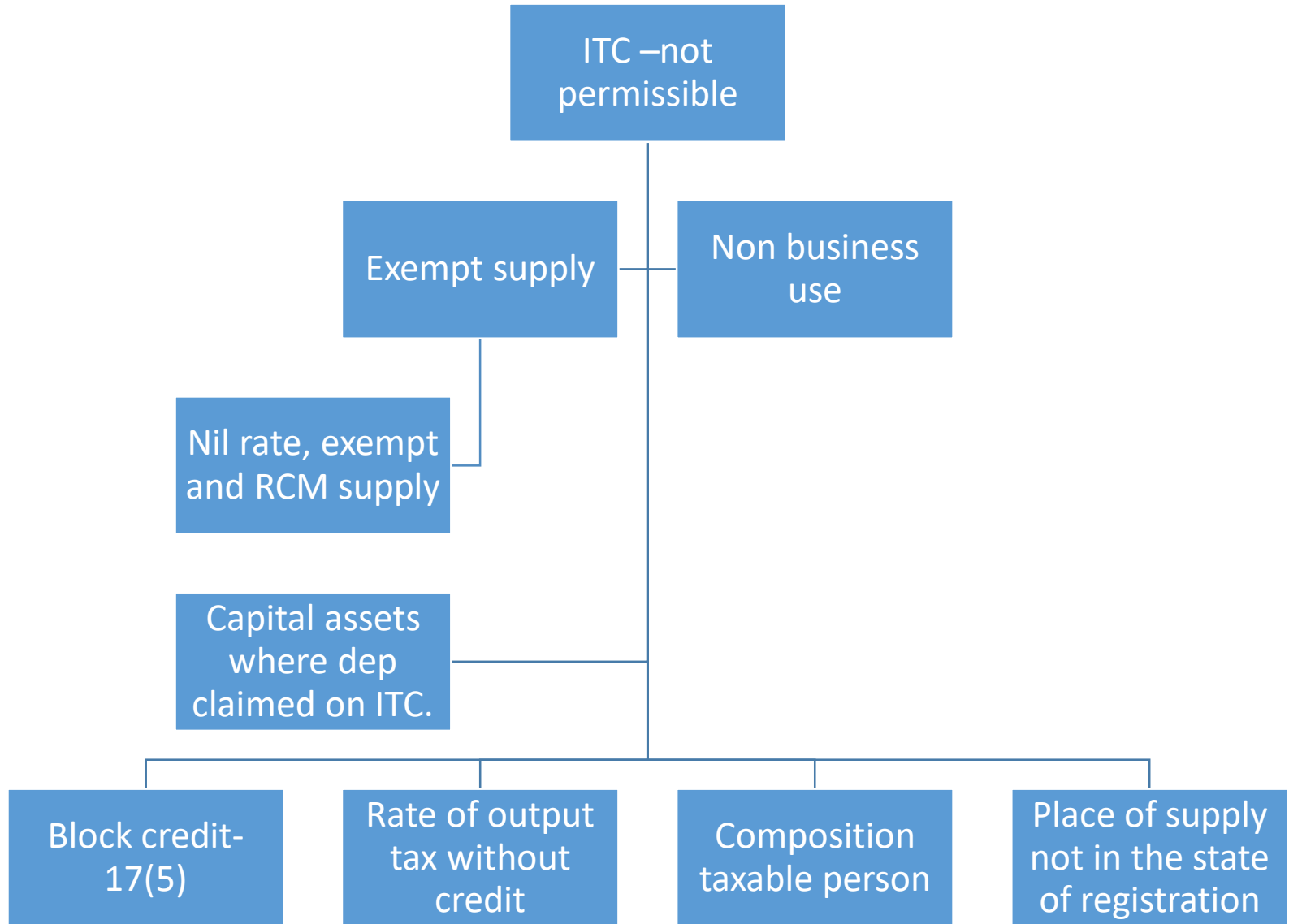
- Balance sheet of company require – age wise creditors- ITC reversal – based on that
- Proportionate credit reversal if part payment along with interest
- GSTR-2A/GSTR-3B- Rule 36
- Don't avail credit ITC just on GSTR-2B report but also verify other conditions such as receiving of goods or service/ goods supply in lot/installment
- Reversal if payment not within 180days- trade payable analysis.
- Invoice/ duty paying doc/RCM invoice
- Supplier valid registration and good credential, not being insolvent and failed to pay tax.
- Supplier registration and his inward and outward supply
- Block credit
- Purchases Vs. Gate pass
- GSTR-2B Vs. E- way bill
- Contract with supplier and who is engaging transporter
- Justification of inward supply of goods/service for use in business.

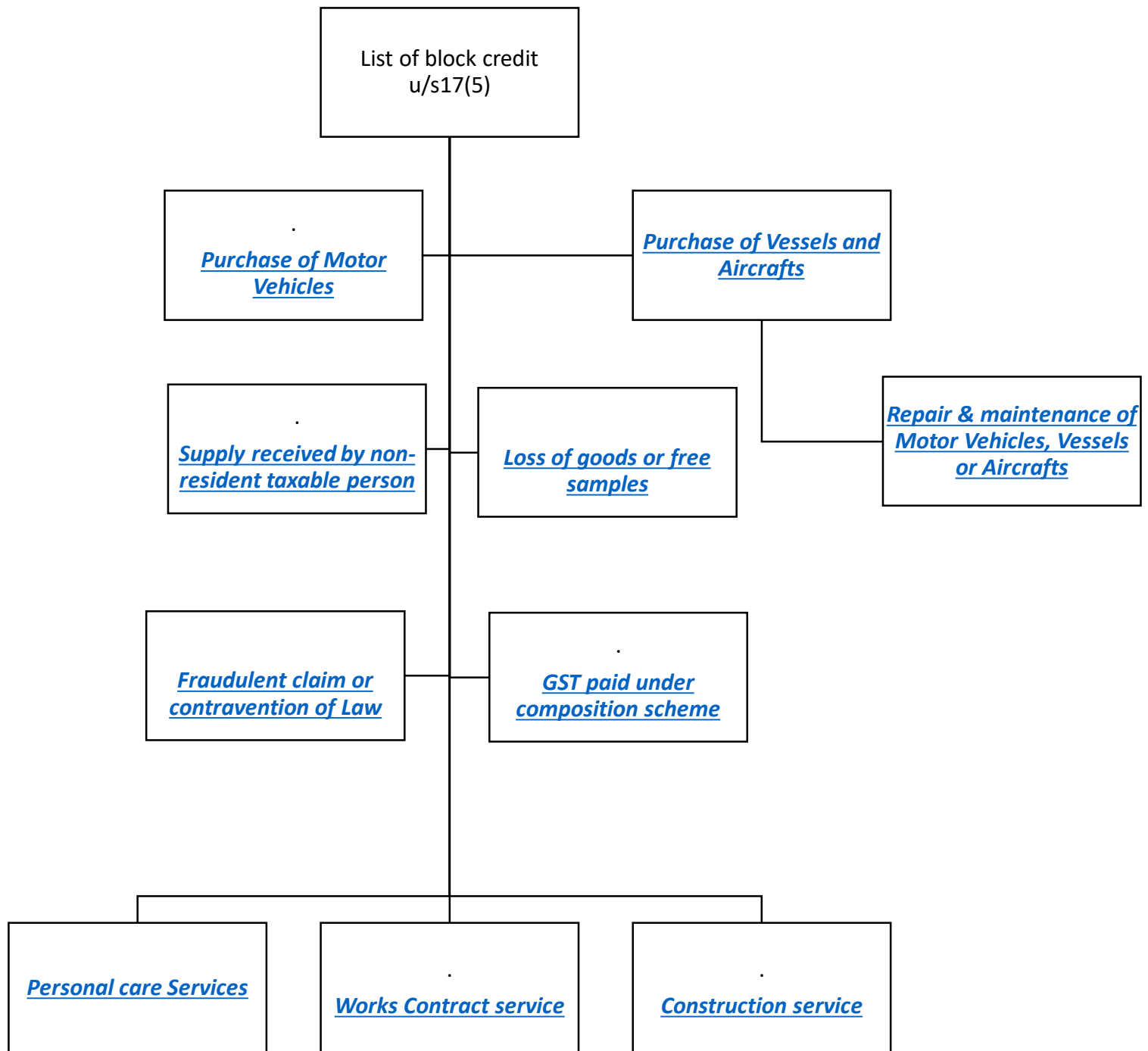
GSTR-2A/3B mismatch

- Circular 183/15/2022-GST dated 27-12-2022 – allowing credit based on CA certificate – certifying tax paid by supplier for FY 2017-18 & 2018-19 for
- **For FY 2019-20 also benefit available – as errors identical. Wipro Ltd vs. Assistant Commissioner of Central Taxes [2023] 148 taxmann.com 216 (Karnataka)**
- **what would happen where reversal of ITC of purchaser and tax collected from supplier as well?**
- **Substantive liability of supplier and protective liability of purchaser**-where tax liability was met by way of reversal of ITC at purchaser's end and recovery was also effected from supplier, that would amount to double taxation - In such cases, Department should restore ITC to purchaser if tax liability was made good by supplier - Therefore, a mechanism must be put in place to address this situation. Pinstar Automotive India (P.) Ltd. Vs. **Additional Commissioner[2023] 149 taxmann.com 13 (Madras) (HC)**



Block credit
S-17(5)





ITC blockage of motor vehicle/related to use of motor vehicle

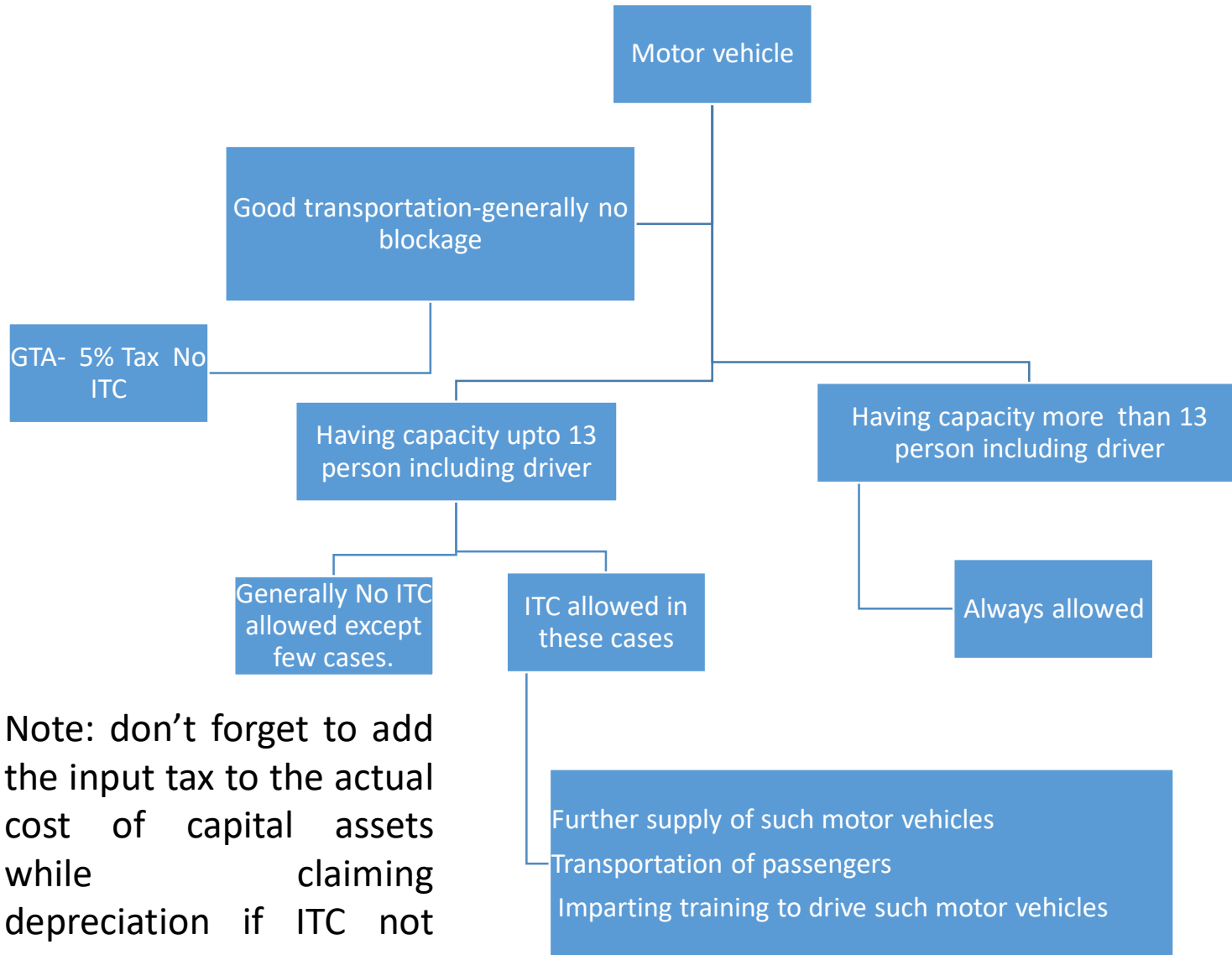
Purchaser of motor vehicle

- Section 17(5)(a) – above 13 passenger including driver no blockage
- Upto 13 passengers- generally block credit but in certain cases allowed.

Service recipient of motor vehicle

- Section 17(5)(b)(i)
No credit of ITC for inward supply of leasing ,renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except
 1. when used for the purposes specified in clause (a) or clause (aa)
 2. same line of business

Motor vehicle – ITC Blockage



Note: don't forget to add the input tax to the actual cost of capital assets while claiming depreciation if ITC not available .

WHETHER CREDIT OF ITC SHALL BE ALLOWED IN RESPECT OF MOTOR VEHICLE PURCHASED FOR COURIER SERVICE?

Earlier as per CENVAT credit rule 2004 definition of capital goods under rule 2(a)(B) **includes** (B) motor vehicle designed for **transportation of goods** including their chassis registered in the name of the service provider, when used for-

- (i) providing an output service of renting of such motor vehicle; or
- (ii) transportation of inputs and capital goods used for providing an output service; or
- (iii) **providing an output service of courier agency”**

but now under GST regime there is restriction/blockage of ITC in respect of motor vehicles and other conveyance except for transportation of goods.

Now the question may rise whether service of courier agency shall be covered under the head transportation of goods? If so no difficulty in ITC, in our view vehicle /conveyance used for services of courier is essential and part and parcel of the business particularly in the case of cash transit or transit of important valuable documents as well as articles/goods. It should be covered under transportation of goods although in the pre GST era it was specifically covered in a separate entry to remove any doubt, therefore credit must be allowed under the broader head.

Whether ITC in respect of purchase of motor vehicle and other conveyance shall be allowed if such motor vehicle/other conveyance used for renting or leasing of such motor vehicle/other conveyance?

as per section 17(5)(a) motor vehicles for transportation of persons having approved seating capacity of not more than 13 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;

Now the important question is whether leasing or renting out of vehicle or conveyance is covered in the supply of vehicle or conveyance. The definition of supply as per section 7 of the CGST act includes not only sale, transfer etc but also rental and leasing for a consideration in the course or furtherance of business. Therefore the word supply must be interpreted widely so as to allow the ITC in respect of motor vehicle/other conveyance purchased and leasing or renting within meaning of supply so credit of ITC to the person who is leasing or renting out but be careful that such transaction may be covered under reverse charge where recipient may be liable to pay tax and in such case no ITC available because supply covered under RCM is deemed as exempt . Further receipt of supply . i.e person paying rent or lease rent although laible to pay tax under RCM but not eligible for credit because leasing, renting or hiring of motor vehicles refereed under 17(5)(a)/(aa) i.e passenger transportation is also under block credit.

Narsingh Transport,
[2019] 104
taxmann.com 86
(AAR - MADHYA
PRADESH)-
favourably

ITC allowed on motor vehicle both pre amendment or post amendment if leasing or hiring of car as outward supply

- 17(5)(a)(A) mentions about making of 'further supply' of such vehicles or conveyance and, hence, the deciding factor would be the term 'further supply'. Since the term 'further supply' has not been defined in the Act, one has to go by definition of 'supply' which is the very plinth of GST law. The term 'further' prefixed to 'supply' is merely in the form of adverb and does not differentiate it from 'Supply' by any stretch of imagination. [Para 7.9]

**New Pandian Travels
(P.) Ltd
[2022] 137
taxmann.com 438
(AAR - TAMILNADU)-
Against.**

ITC not allowed on motor vehicle both pre amendment or post amendment if leasing or hiring of car as outward supply

- The taxable outward supply in this case does not include further supply of such purchased motor vehicles. Hence the applicant is ineligible to avail ITC on motor vehicles as per section 17(5)(a)(A) of CGST Act 2017.
- activity undertaken by the applicant is only renting/hiring of the Motor Vehicles with the operators and not undertaking transportation of passengers, the exception at s.17(5)(a)(B) is not available to the applicant.

BLOCK CREDIT [S-17(5)]

OLD (01-07-2017 to 31-01-2019)	NEW amendment by FA 2018 from w.e.f. 1-2-2019	Remark
<p>(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:—</p> <p>(a) motor vehicles and other conveyances except when they are used—</p> <p>(i) for making the following taxable supplies, namely</p> <p>(A) further supply of such vehicles or conveyances; or</p> <p>(B) transportation of passengers; or</p> <p>(C) imparting training on driving, flying, navigating such vehicles or conveyances;</p>	<p>(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:—</p> <p><i>(a) motor vehicles for transportation of persons having approved seating capacity of not more than 13 persons (including the driver), except when they are used for making the following taxable supplies, namely:—</i></p> <p>(A) further supply of such motor vehicles; or</p> <p><i>(B) transportation of passengers; or</i></p> <p><i>(C) imparting training on driving such motor vehicles;</i></p>	<ul style="list-style-type: none"> ▪ Earlier ITC on all type of motor vehicle was restricted irrespective of seating capacity however with effect from 1st Feb 2019, ITC shall be restricted only in case of motor vehicle for transportation of persons having approved seating capacity up to 13 persons (including driver). ▪ Further ITC allowed if such vehicle used for making certain taxable supply (A) to © ▪ In other words for all the motor vehicles with approved seating capacity of more than 13 people, ITC would be allowed irrespective of nature of further supply.

Cash carrying van – whether ITC -allowed

Not used for transportation of passenger

Whether for transportation of goods? Whether such cash is money excluded from definition of goods or it is goods?

Refer **CMSInfo Systems Ltd**
[2020] 117 taxmann.com 318
(AAAR-MAHARASHTRA)

- Earlier advance ruling authority has denied the ITC but appellate authority of advance ruling has allowed.
- description of 'goods' mentioned in Rule 138(14) includes 'money' as well when it is being transported from one place to another and, therefore, it can be decisively inferred that money under question is nothing but goods - Held, yes - Whether once it has been established that money transported by appellant in cash carry vans can be considered as goods , ITC in respect of cash carry vans will be available to appellant - Held, yes [Paras 38, 41 and 43]
- Money is defined u/s 2(75) ... as used to settle obligation or exchange of other legal tender.

Credit blockage- vessel and aircraft-S-17(5)(aa)

No input tax credit shall not be available in respect of the following,

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

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

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

(B) transportation of passengers; or

(C) imparting training on navigating such vessels; or

(D) imparting training on flying such aircraft;

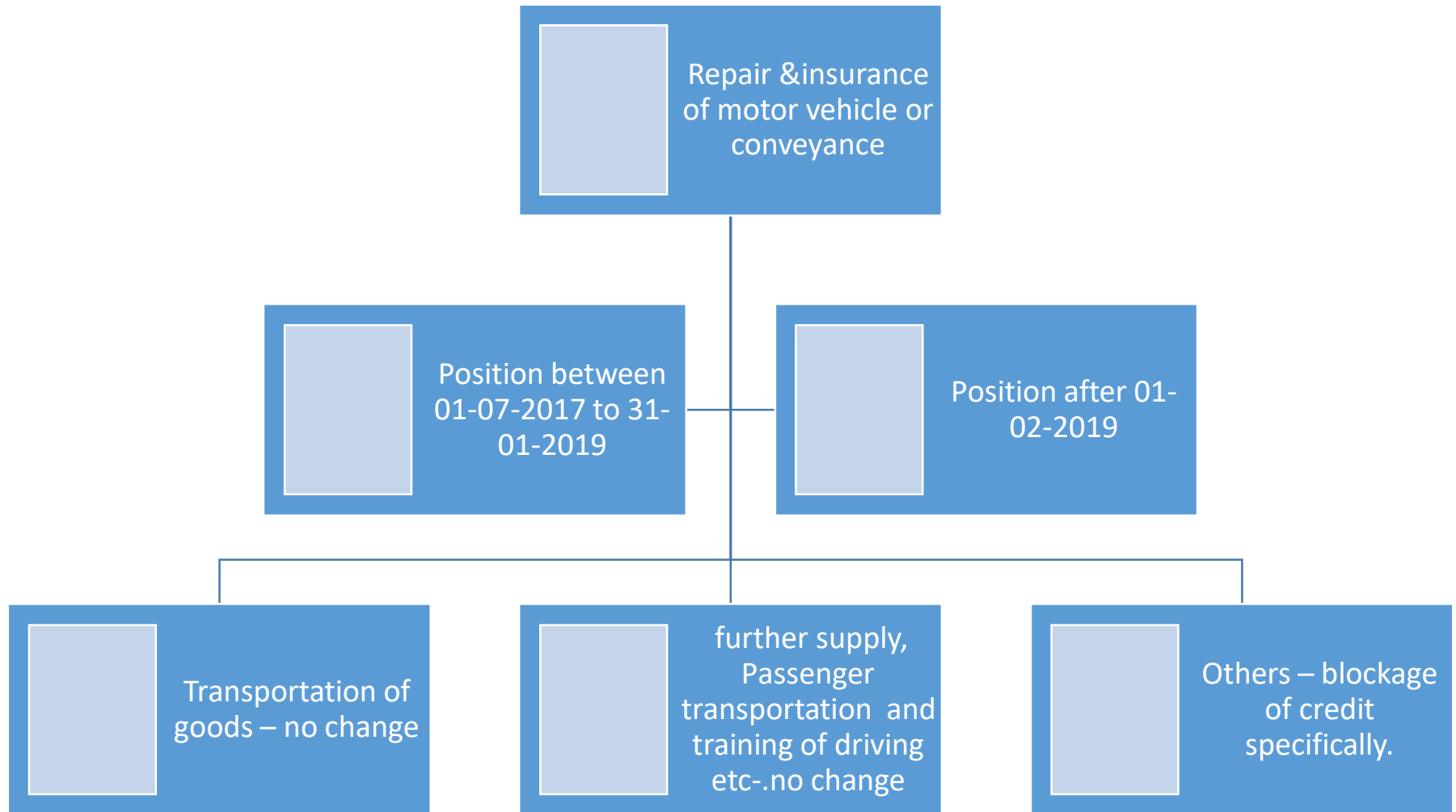
(ii) for **transportation of goods**;

Note: ITC to the airlines company as well as the registered taxable person receiving the service.

Separate entry for vessel/aircraft

OLD	NEW	Remark
<p>Earlier no separate entry under section 17(5) it was covered under other conveyance</p>	<p>Section 17 (5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:—</p> <p><i>(aa) vessels and aircraft except when they are used—</i></p> <p><i>for making the following taxable supplies, namely:—</i></p> <p>(A) further supply of such vessels or aircraft; or</p> <p>(B) transportation of passengers; or</p> <p>(C) imparting training on navigating such vessels; or</p> <p>(D) imparting training on flying such aircraft;</p>	<p>Separate entry is created for vessel and aircrafts in clause (aa) – No credit shall be available on vessels and aircrafts except when used for specified purposes under clause (aa);</p>

Credit blockage- repair , insurance etc –s-17(5)(ab)



WHETHER ITC IN RESPECT OF INSURANCE OF MOTOR VEHICLE/OTHER CONVEYANCE SHALL BE ALLOWED? [01-07-17 to 31-01-2019]

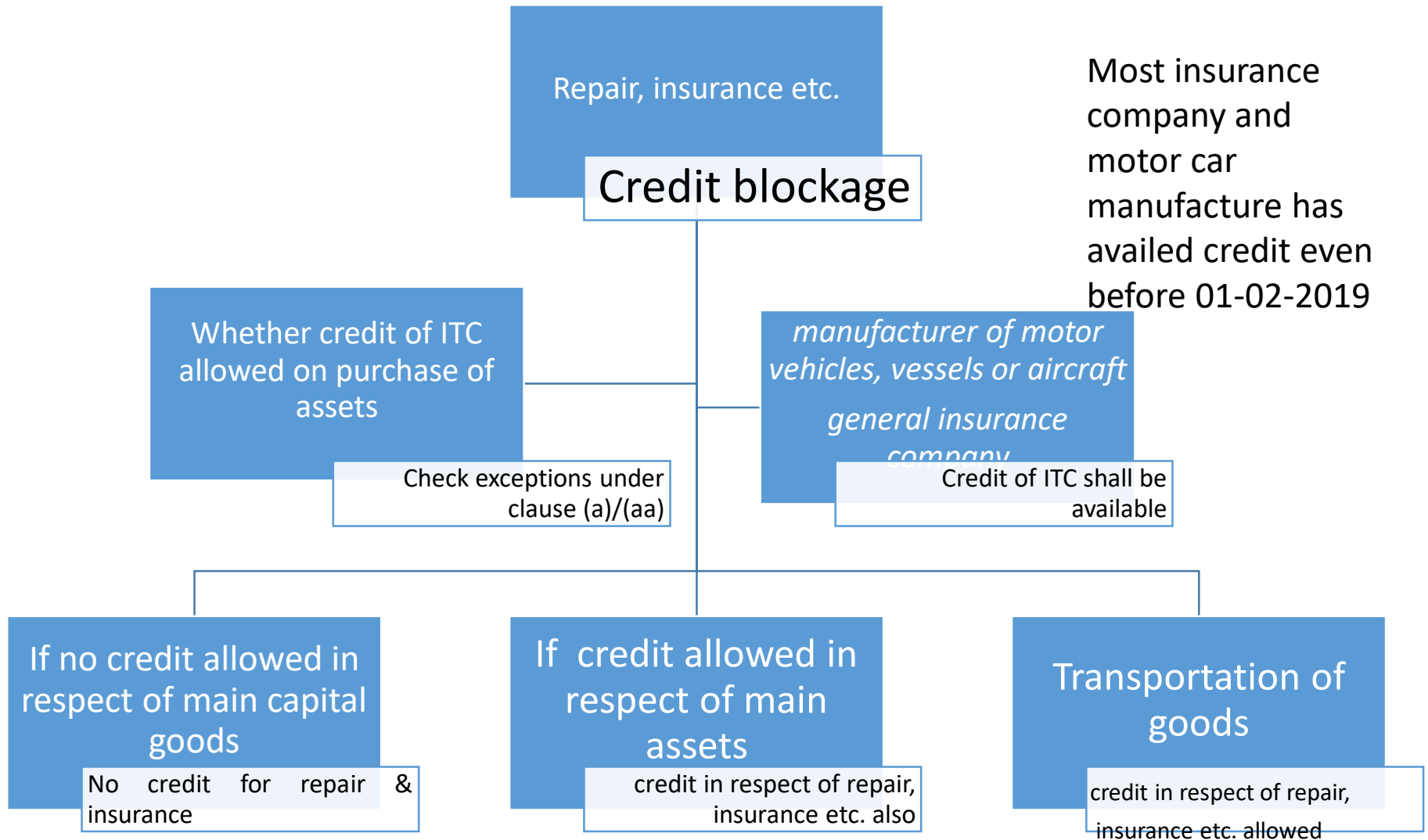
If such motor vehicles/conveyance are used for making taxable supply, credit of ITC shall be certainly allowed because it is expressly allowed in the exception where no blockage of credit. However if such motor vehicles are used otherwise in the other business, doubt may arise of the ITC.

Argument in favour: earlier in the CENVAT credit rule input service exclude among other things

(BA) Service of general insurance business, **servicing, repair and maintenance**, in so far as they relate to a motor vehicle which is not a capital goods. In other words credit was not allowed in respect of insurance, repair and maintenance of motor car. However there are no such express provision excluding such services from the definition of input service. Input service defined under section 2(60) is a wide enough . Input service is defined U/S 2(60) as “input service” means any service used or intended to be used by a supplier in the course or furtherance of business; further credit blockage is only of ITC in respect of motor vehicle and other conveyance. Therefore ITC in respect of insurance or repair may be allowed.

Argument against: since the credit is not allowed in respect of capital assets itself therefore it should not be allowed in respect of repair maintenance , insurance thereof.

General insurance, servicing, repair and maintenance etc. of motor vehicle, aircraft etc. [s-17(5)(ab)] from 01-2-2019



No Blockage of credit of ITC of repair , insurance etc to car company, general insurance co

[Amendment by CGST(Amendment) Act,2018]

input tax credit *shall* not be available in respect of *services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft, however ITC shall be available*

- (i) *where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein;*
- (ii) *where received by a taxable person engaged—*
 - (I) *in the **manufacture** of such motor vehicles, vessels or aircraft; or*
 - (II) *in the supply of **general insurance services** in respect of such motor vehicles, vessels or aircraft insured by him;*

Note: beneficiary of proposed amendment shall be car manufacturing company and insurance company.

Conditional ITC in certain cases [17(5)(b)(i)] after 01-02-2019

No ITC - food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) of s-17(5) except when used for the purposes specified therein, life insurance and health insurance:

ITC available if:

*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**;*

Example: if an airline company is providing catering services to its passengers, then it can avail of credit of taxes paid in respect of food and beverages as such supply is part of the composite supply of transportation services.

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

Obligation of employer to provide food, health service etc. under various laws

Factories act – section 46, 45

COAL MINE - Rule 2A of THE INDUSTRIAL EMPLOYMENT (STANDING ORDER) RULES 1946

- Provision related to canteen – 250 plus workers- rule may be made by state. Section 46
- First aid ambulance etc. – section 45
- Coal mines : Medical Aid, Railway Facilities etc
- Medical Examination of workers at own expense
- insure the employee in case of any injury or miscarriage that may happen in the course of employment

Unconditional blockage of ITC-S17(5)(b)(ii)]

input tax credit shall not be available in respect of the following, namely:—

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

(i).....

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

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

ITC will not be available in any case.

BLOCKED CREDITS- ITC – SEC 17(5)(b) 01-07-2017 to 31-01-2019

b) Supply of goods and services being:



ITC allowed Only if goods / services of a particular category are used towards making taxable outward supplies of the same category



ITC Allowed where govn. notified the services which are obligatory for an employer to provide to its employee under any law or services of a particular category are used towards making taxable outward supplies of the same category or as part of



NEVER allowed

COMPARISON OF CREDIT BLOCK UNDER OLD VS. GST REGIME

service tax regime

- **food items**, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are **used primarily for personal use or consumption of any employee** from the definition of input &
- input service exclude service provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, **when such services are used primarily for personal use or consumption of any employee;**

GST regime

- **food and beverages**, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery except where an inward supply of goods or services or both of a particular category is used by a registered person for making an outward taxable supply of the same category of goods or services or both or as an element of a taxable composite or mixed supply; **Here blockage for all employee or non employee use.**
- membership of a club, health and fitness centre; [**used by for any one whether employee or others.**
- **rent-a-cab, life insurance and health insurance except where it is obligatory for the employer.**
- travel benefits extended to employees on vacation such as leave or home travel concession;

GOODS USED PRIMARILY FOR PERSONAL USE OR CONSUMPTION OF EMPLOYEE- FOOD & BEVERAGES

- the term input has been amended with effect from 01-04-2011 and as per amended RULE 2(K) defining **input exclude** among other things....

(E) any goods, such as **food items, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment**, when such goods are **used primarily for personal use or consumption of any employee**;

- What would happen if the food item are used not primarily for personal use or consumption by employee but otherwise . for example such goods used by customer or a vendor or third-party service provider, or director not being an employee? Credit was allowed in pre GST era. Now in the GST regime input tax credit shall not be available in respect of food and beverages, outdoor catering.
- *In other words food items per se excluded from the input tax credit list irrespective of whether used by the employee or director or vendor or customer or otherwise else.*

WHAT IS FOOD?

- *Sec 3 (j) “Food” means any substance, whether processed, partially processed or unprocessed, which is intended for human consumption and includes primary food to the extent defined in clause (zk), genetically modified or engineered food or food containing such ingredients, infant food, **packaged drinking water**, alcoholic drink, chewing gum, and any substance, including water used into the food during its manufacture, preparation or treatment **but does not include** any animal feed, live animals unless they are prepared or processed for placing on the market for human consumption, **plants**, prior to harvesting, **drugs and medicinal products**, cosmetics, narcotic or **psychotropic substances** [FOOD SAFETY AND STANDARDS ACT, 2006]*
- **psychotropic substance** : A psychoactive drug or **psychotropic substance** is a chemical **substance** that acts primarily upon the central nervous system where it alters brain function, resulting in temporary changes in perception, mood, consciousness and behavior.

WHAT IS BEVERAGES?

Any potable(suitable or fit for drinking) liquid, especially **one other than water**, as tea, coffee, beer, or milk.

Note: water under chapter 22 is covered in the definition of beverages.

WHETHER ITC IN RESPECT OF EXPENSES ON CANTEEN SHALL BE ALLOWED OR NOT?

- Expenses on canteen by way of payment to a catering contractor to provide food for employee and ITC of service tax was examined by honourable Karnataka High Court in the case of **CCE Vs. Stanzen Toyotetsu India Pvt Ltd 2011 (23) STR 444 (Kar HC)** where Honorable High Court held that in terms of section 46 of the factories act their age obligation cast upon the employer to provide food facility and such services are not charity provided by the employer. Hence it is business expenditure and credit on such expenditure must be allowed.
- Honorable High Court of Bombay in the case of **CCE vs. Ultra Tech cement 2010(20) STR 577** has held that definition of input service for eligibility of credit is wide enough and definition does not restrict and make them exhaustive therefore ITC in respect of canteen expenses shall be allowed.
- Letter on definition of input has been revised to exclude
- **food items**, goods used in a guesthouse, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for **personal use** or **consumption of any employee** from the definition of input&
- input service **exclude** service provided in relation to outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, membership of a club, health and fitness centre, life insurance, health insurance and travel benefits extended to employees on vacation such as Leave or Home Travel Concession, **when such services are used primarily for personal use or consumption of any employee;**

Health insurance/life insurance of employee

Old law- 01-07-2017 to 31-01-2019 17(5)(b)(iii)

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

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

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

New law 01-02-2019 onwards.

No such clause . In other words no such blockage after amendment so credit of ITC shall be allowed now.

ITC IN RESPECT OF INSURANCE/HEALTH POLICY

ITC of service tax on **insurance /health service** was examined by honorable Karnataka High Court in the case of **CCE Vs.Stanzen Toyotetsu India Pvt Ltd 2011 (23) STR 444 (Kar HC)** where it was held that in the employee suffered injury or dies, there is vicarious liability imposed on the employer to compensate the employee. If the employer employs its own transportation facility in order to cover the risk, he has to take insurance policy without which vehicle cannot go on road. Under the workmen compensation act employer has to obtain insurance policy covering the risk of employee further group insurance cover the risk of employee and cast obligation on the employer to provide either ESI coverage or group insurance hence credit must be admissible of the ITC in respect of insurance. Honorable High Court in the case of **CCE Vs. micro labs Ltd (2011) 270 ELT 156(Kar HC)** allowed the credit on insurance premium paid on **group medical policy** as well as group insurance policy. However law has been amended by excluding from the definition of input service. However most of the policies and insurance coverage are under a statutory obligation therefore credit may be allowed in most of the cases. In our view credit should be allowed in every case.

Other insurance policy- credit of ITC allowed

insurance may be of the factory building, equipments other capital assets, stock, stock in transit, export of goods, import of goods etc and for a businessman there is no difference in the insurance policy in respect of such items and insurance policy for the health or life of the employee. All these are cost of sales of the goods or services therefore ITC shall be allowed in respect of all the insurance policies when output tax is a tax on the supply which include every element of cost from the material to final selling expenses.

In GST tax on value of supply which include almost every thing but credit restricted based on philosophy of central excise which is not fair law under GST and therefore increase the cascading and free flow of ITC in real sense.

Life insurance/health insurance ?

- Key man insurance policy of partner/director or key employee
- Group insurance of employee- voluntary
- Medi-claim policy of employee paid by employer under employment agreement/ beyond employment agreement
- Policy for payment of gratuity to employee at retirement/ termination

ITC in respect of Rent a Cab service/transportation service:

ITC of service tax on rent a cab service was examined by honorable Karnataka High Court in the case of **CCE Vs. Stanzen Toyotetsu India Pvt Ltd 2011 (23) STR 444 (Kar HC)** where it was held that such service procured by the assessee to ensure the worker reach the factory premises in time which has a direct bearing on the manufacturing activity. Amount spent on conveyance of the employee also taken into account while fixing the price of final product. However amendment was made in pre-GST era to exclude from eligibility of credit and same exclusion of ITC in GST era also, but credit shall be available if it is obligatory for the employer in the GST regime.

Other block credit [S-17(5)(b)(i)]

old

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

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

New

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

(b) (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;*

Effect of amendment

Nature of inward supply	Old 17(5)(b)(iii)	New no such clause
<u>life insurance and health insurance</u>	ITC in respect of <u>life insurance and health insurance was allowed if</u> (i) Government notifies the such services obligatory for an employer to provide to its employees under any law for the time being in force; (ii) Same category of outward supply	ITC shall be available.
<u>leasing, renting or hiring of motor vehicles, vessels or aircraft</u>	17(5)(b)(i) ITC in respect of rent-a-cab <u>was allowed if</u> (i) Government notifies the such services obligatory for an employer to provide to its employees under any law for the time being in force; (ii) Same category of outward supply	<u>17(5)(b)(i)</u> <u>No ITC in respect of inward supply 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 except supply of same category of outward supply</u>

ITC in respect of travel benefits to employee

Nature of inward supply	Old 17(5)(b)(iv)	New 17(5)(b)(iii)
travel benefits to employee	<p>17 (5) Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:</p> <p>(b) the following supply of goods or services or both—</p> <p>.....</p> <p>(iv) travel benefits extended to employees on vacation such as leave or home travel concession;"</p>	<p>17(5)Notwithstanding anything contained in sub-section (1) of section 16 and sub-section (1) of section 18, input tax credit shall not be available in respect of the following, namely:</p> <p>(b) <i>the following supply of goods or services or both—</i></p> <p>.....</p> <p>(iii) <i>travel benefits extended to employees on vacation such as leave or home travel concession</i></p> <p>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.]</p>

works contract services for construction of immovable property [s-17(5)(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;



Goods or services for construction of Immovable property –[17(5)(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.

Note: **construction has wide meaning here.** For the purposes of clauses (c) and (d), the expression "construction" includes reconstruction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property;

No Block credit-17(5)(d)

ITC of Glass partition in office, whether allowed?

Yes, we work India management pvt ltd –KAR/AAAR-17/2019-20 dt 06-03-2020

As fixing glass etc are detachable and stackable partition does not amount to construction of immovable property.

construction of shopping mall for rental:

High Court had read down section 17(5)(d) to give benefit of ITC to taxpayer on goods and services consumed in construction of shopping mall against GST payable on rentals received from tenants of shopping mall. Safari Retreats (P.) Ltd. v. Chief Commissioner of GST [2019] 105 taxmann.com 324/[2019] 74 GST 500/2019 (25) G.S.T.L. 341 (Orissa) wherein

SLP leave granted against the high court order by SC . Pending for disposal

.

Constitutional validity of section 17(5)© and(d) - challenged

alleged violation of article 14 for the reason that though petitioner-Company is similarly situated with the other establishments, the credit of the input goods and services utilised for construction of malls to let it out on annual rent, is denied.

- Bamboo Hotel and Global Centre (Delhi) Pvt. Ltd. v. UOI, W.P.(C) 5457/2019 and
- Riveria Commercial Developers Limited V. Union of India, W.P.(C) 11633/2019
- **Delhi International Airport (P.) Ltd. Vs UOI 2020**
- **Hinganghat Integrated Textile Park Private Limited .-Vs.- Union of India and ors [Bom HC]**

- **Meaning of plant and machinery :**
- **Plant and machinery is defined by way of explanation below section 17 as “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.**
- **by excluding land, building and other similar structure from plant and machinery clarified that these three are not plant and machinery and it should be considered as immovable property.** In other words these three are immovable property and except that others may be in the definition of plant and machinery.
- Now the question is whether cinema hall, cold storage, warehouse, godown, factory, auditorium etc are merely a building or civil structure or may be classified as machinery, equipments, apparatus fixed to earth by foundation or structural support because in all these cases some equipments etc embedded with the earth or structure on earth.
- **Meaning of building:** building is not defined in the GST law therefore it must be read and differentiated in the commercial parlance. Similarly civil structure is also not defined under GST law therefore it must be read and differentiated in commercial parlance with factory, cinema hall, warehouse, cold storage, auditorium **etc.**

Construction material/inward works contract service for repair work? explanation below 17(5)(d)]

Q. What would happen if assessee has claimed at the expense but income tax Department has the view otherwise of capitalization at the time of assessment? In such case more tax burden under income tax as well as loss of ITC because time for availing credit already lapsed. No mechanism in GST to claim credit in this situation.

ITC in respect of maintenance of a staff colony

honorable Andhra Pradesh High Court in CCE Vs. ITC Ltd (2013) 32 SCR 288 held that maintenance of staff colony especially in remote areas is necessity and therefore eligible for credit.

Repair not capitalised – ITC available in GST era also.

CREDIT OF ITC FOR CONSTRUCTION OF A WAREHOUSE

- **credit of ITC for construction of a warehouse** by service provider providing warehousing service was examined by honourable Andhra Pradesh High Court in the case of **CCE Vs. sai samhita storages private limited(2011) 270 ELT 33(AP High Court)** and held that without constructing a warehouse, taxable service could not be provided therefore input tax credit must be allowed in respect of inputs used for providing outward taxable supply and hence credit is admissible.
- Following the above, Gujarat High Court has also allowed the credit in respect of cement and steel used for construction of new jetties and other commercial buildings in the case of **Mudra Port And Special Economic Zone Ltd Vs. CCE(2015) 39 STR 726(Guj HC)**.

Note: in GST era no credit of ITC although high tax rate on building material as well as works contract service.

Blocked Credit :- Section 17(5)

input tax credit shall not be available **in respect of** the following

Goods or services which tax has been paid under **composition scheme(17(5)(e)**

Note: supplier doesn't charge tax from recipient

Goods or Services or both **received by a non-resident person** except on goods imported by him (17(5)(f)

Goods or services used for **personal consumption(17(5)(g)**

Goods **lost , stolen , destroyed , written off or disposed of by way of gift or free samples[17(5)(h)]**

More item
added to block
list – 17(5)(fa)
FA 2023 not yet
notified

Inwards supply for
CSR activities- no
more credit of ITC

goods or services or both received by a taxable person, which are used or intended to be used for activities relating to his obligations under corporate social responsibility(CSR) referred to in section 135 of the Companies Act, 2013 (18 of 2013);]

Earlier it was declared allowed by Advance rulings authority in the case of **Dwarikesh Sugar Industries Ltd [2021] 125 taxmann.com 329 (AAR- UTTAR PRADESH)** and held that Free supply of goods as a part of CSR activities do not qualify as 'gifts' because expenses incurred by company in order to comply with requirements of Corporate Social Responsibility (CSR) and therefore, its credit is not restricted under section 17 (5) (h)

BLOCKAGE OF CREDIT IN RESPECT OF GOODS LOST OR DESTROYED- INPUT VS. GOODS?

blockage of ITC in respect of goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; [S-17(5)(h)]

Meaning of in respect of :The Supreme Court ('SC') in case of *State of Madras v. M/s. Swasthik Tobacco Factory 1966 taxmann.com 5 (SC)*., held that in India tax laws the expression 'in respect of' is a **synonymous of expression 'on'**. In this case, the assessee procured raw material for manufacturing tobacco on which it had paid excise duty to his vendor. For the payment of sales tax on sales of goods, the Sales Tax Rules were allowing a deduction of 'excise duty paid in respect of goods sold' from the sales turnover. The assessee argued that under Rule 5 the expression 'in respect of' should be given very wide connotation and duty paid on procurement of raw material for manufacturing tobacco product should be allowed as deduction. The SC after referring the provisions of various Indian laws held that in Indian tax laws use of the expression 'in respect of' is a synonym of expression 'on'. Hence, the expression in the given case should be read as excise duty paid on goods sold and thus deduction of excise duty paid on procurement shall not be allowed.

Q. Question may arise whether ITC may be denied in respect of inputs lost in the manufacturing process or blockages of ITC only in respect of finished goods/stock in trade loss or destruction?

A. Section 17(5)(h) had blocked the ITC **in respect of** goods lost or destroyed, now it is essential to understand its meaning. Goods are defined in a broader way under GST and as per section 2(52) goods means every kind of movable property..... And the word **input is defined** under section 2(59) as input means any goods [other than capital goods] used or intended to be used by a supplier in the course or furtherance of business. Therefore It is essential to understand first the difference between the inputs and goods. goods may be input if used or intended to be used by the supplier in the course of business or furtherance of business but if the supplier has procured the goods not for the purpose of business but for other purpose, the same may not be input. Therefore every input is a goods but every goods may not be inputs. Whether goods lost or destroyed means inputs lost or destroyed?

- Further goods may be finished goods, stock in trade or other consumables, packing materials etc. However ITC should not be blocked in every case. In my view blockage of credit only when finished goods or stock in trade destroyed because legislature has used the term goods not input. So no blockage of credit of input tax , if loss of input during manufacturing process.

No block credit –
17(5)(h)
supporting case

- Assessee could not be allowed reversal of Input Tax Credit (ITC) in case of loss by consumption of input which was inherent to manufacturing process as such loss . **ARS Steels & Alloy International (P.) Ltd. Vs. State Tax Officer, Group-I, Chennai 2021]** 127 taxmann.com 787 (Madras)
- *In pre GST regime - Rupa & Co. Ltd. v. CESTAT 2015 (324) ELT 295 (Mad.)*

INPUTS MAY OR MAY NOT BE CONTAINED IN THE FINAL PRODUCT

- Inputs may or may not be contained in the final product as decided by honorable Supreme Court in the case of **CCE Vs. Ballarpur industries Ltd(1989) 43 ELT 804(SC)**. Similarly gas used in cutting the iron scrap into smaller pieces to facts related easily feeding to furnace is essential and integrated with the process for ultimate production of final products and therefore credit cannot be denied on the material used in this process as decided in the case of **CCE Vs. Nibha steel private limited (2010) 254 ELT 252(P&H High Court)**.
- ITC in respect of fuel like furnace OIL used for generation of power used outside the factory and the power so generated used in the manufacturing process, shall be allowed and credit cannot be denied. **CCE Nagpur Vs. Indorama, textiles Ltd (2010) 260 ELT 382(Bombay high court)**.
- Later on definition of inputs was amended with effect from 1-4-2011 to allow credit on goods used for generation of electricity or steam for captive use. Considering the above analysis ITC should not be blocked in respect of inputs lost in the manufacturing process.

LOSS OF INPUT DURING TESTING

Further **Bombay High Court** in the case of **Tata engineering and locomotive Company Ltd Vs. CCE(2010) 256 ELT 56(BOM HC)** has held that in the age of global competition, no manufacturer could afford to push its product in the national or international market without achieving certain level of quality in the product therefore quality-control is essential process in the manufacture and said process is to ensure the quality of final product hence ITC cannot be denied on goods destroyed in the quality-control process. Similar shall be the situation in the case of Pharma company also.

EVAPORATION LOSS OF INPUTS-WHETHER CREDIT REVERSAL REQUIRED?

No, matter was examine by honorable High Court of Delhi in the case of **CCE Vs. BOC India Ltd(2007) 213 ELT 647(DEL HC)** where it was held that evaporation is a natural consequence of manufacturing activity therefore credit cannot be denied.

Return of time expired goods Like medicines etc.

- **If return of expired goods within time limit for issuance of credit note u/s 34:** credit notes may be issued and adjustment of output tax by way of reduction in tax liability and consequently reversal of input tax credit as well. In other words neither input tax credit nor output tax on such goods. Refer para 3B(d) of Circular No. 72/46/2018-GST dated 26 October 2018 of circular “Further, 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 attributable to the manufacture of such goods, in terms of the provisions of clause (h) of sub-section (5) of section 17 of the CGST Act”.
- **If return of expired goods after due date of issuance of credit notes:** no adjustment of output tax as per the circular which is valid as per GST law also. Since no adjustment of output tax so in my view no need to reverse input tax credit because against the output tax corresponding input tax already adjusted at the time of supply and post supply of finished goods/stock in trade after payment of tax the only effect is less realisation of consideration and GST from the recipient of supply. Block credit for destroyed, w/off etc. is on the premise that no value of supply so no input tax.

Note: alternatively while returning expired goods it could be returned by issuing invoice/bill of supply/commercial invoice, in such case no adjustment of earlier transaction but no credit of ITC if tax charged since goods to be destroyed as not issuable after expiry.

Sales Promotion Schemes and effect on ITC and taxability

- **Free Samples:**

(A) **Taxability** :free samples are usually distributed for newer products to penetrate the market. These samples are usually distributed to unrelated persons without any consideration. Schedule I transaction only cover supplies to related persons without consideration. Hence, the distribution of free samples to unrelated persons shall not come under the ambit of 'Supply' as per Section 7 of the CGST Act, 2017 ('Act'). Hence, no GST is required to be paid on the activity of distribution of free samples.

(B) However, the input tax credit of goods distributed as free samples shall be disallowed in accordance with Section 17(5) of the Act.

Extra Units/Quantity of the Same Product(e. g Buy 3 get 1 free)

- (A) Taxability: The provision of an extra unit/quantity of the same or similar product is quite an efficient marketing strategy. This practice is commonly used by FMCG companies and retail shopping outlets. For example- 1 plus 1 offers/20% extra quantity offers on shampoos, hair oils, etc. In this case, the cost of the 1 free unit/extra quantity of shampoo is generally included in the sale price of the 1 unit for which the customer is paying. Such schemes are introduced to give to the buyer an incentive to purchase more quantity at a lesser price indirectly by giving something free. Hence, offering extra units/quantity of the same product is in the nature of discounts. GST on value of supply and value of supply shall be the transaction value which already include the extra units/QTY.
- (B) ITC: no reversal of credit is required in respect of the extra units/quantity being offered for free because it is really not free but included in the price.

Free Gifts to distributors

- Many companies offer free gifts to distributors on meeting certain targets to incentivize the distribution process. These goods may be manufactured/traded by the company itself or may be procured from outside.
- (A) Taxability if ITC already taken:** "Permanent transfer or disposal of business assets where input tax credit has been availed on such assets" is supply under schedule-1 so if ITC already taken it will be supply and subject to GST . No reversal of ITC required in such cases.
- (B) Taxability if ITC not taken:** not a supply so no question of GST. No question of reversal of ITC since not taken earlier.

Supply of parts under warranty

- Warranty is basically an undertaking by the manufacturer to the end-customer wherein all defects on account of faulty manufacture of the goods have to be repaired and the faulty parts in the product shall be replaced free of cost to the customer . Under **Basic warranty** no extra charges are paid by the customer but price of goods or service initially cover the cost to meet warranty replacement . On the other hand, warranty may be **extended warranty** which is chargeable and is optional for the customer to purchase.

(A) **Taxability:** In the event where goods are supplied to the customer under warranty, no consideration is charged for the replacement of parts or the provision of repair services. In such a case, the transaction between unrelated persons shall not be covered under the definition of supply and therefore no GST shall be chargeable. At this juncture, it is also relevant to ponder upon the fact that when such goods were purchased by the customer, the value of supply included the value of goods and services that may be supplied under warranty (on an approximate basis). Hence, in this case the question of levy of GST on the goods and services supplied under warranty should not arise.

(B) **ITC:** Further, there is no restriction on the availment of ITC on goods or services supplied under warranty, hence, no reversal of credit is required.

Free goods with main goods

- Under this scheme, an article is offered for free along with the purchase of the main product. For example- a laptop bag may be offered for free on the purchase of a laptop for which the customer is paying. In this case, the cost of the free laptop bag is already included in the price of the laptop. It is only that the supplier is misleading the customers to believe that the laptop bag is for free. The free article is just a form of offering discount to the customer on purchasing the laptop.
- This discount or the value of the free article shall not be included further in the value of the laptop for the purpose of computing the GST liability. Hence, no GST is required to be paid on the free article being offered as a promotional tool.
- Further concept of composite supply shall be applicable.
- no need to reverse the input tax credit taken on such goods. .

Blocked Credit of tax paid in demand cases

[Section 17(5)(i)]

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

Sec 74: Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any willful misstatement

or suppression of facts.

Sec 129: Detention, seizure and release of goods and conveyances in transit & released, *on payment of the applicable tax and penalty.*

Sec 130: Confiscation of goods or conveyances and payment of tax, levy of penalty etc (does not account for any goods, supplies any goods liable to tax without applied for registration; or supply contravening provision of law etc

Credit blockage in respect of Tube and pipes

Change in the definition of capital goods: in the CENVAT credit 2004, capital goods was defined under rule 2(a) Which among other things includes Tubes and pipes and fittings thereof . **Tubes and pipes are necessary for conveyance of water, steam and air two different machines which are imperative for a smooth running of the machines in the production system.** Further these may be used for supply of goods from the factory of manufacture or a storage tank/warehoused to the actual consumer of the goods. Therefore these are essential for the manufacturing in the case of factory and for supply of goods to the consumers. However in the GST regime plant and machinery is defined in a very narrow way as per explanation at the end of section 17 were under plant and machinery excludes the pipelines lead outside the factory premises. **Now the question arises pipeline are required for movement of water/liquids, steams& gases like LPG/CNG/PNG etc which cannot be moved from one place to another.** GST is a tax on supply of goods and for supply of such goods it is essential to let down the pipe and tube outside the factory premises also till the destination/consumer place therefore there is no reason to restrict or block the credit in respect of input tax on pipelines laid outside the factory premises.

Functional test- To determine whether building or plant & machinery?

In the case of **CIT v. Kanodia Warehousing Corporation [1980] 121 ITR 996 (All)**, the Division Bench of the Allahabad High Court has considered the meaning of "plant" and held that in order to find out if a building or structure or part thereof constitutes "plant", the **functional test must be applied**. It must be seen whether building or structure or part thereof, **constitutes an apparatus** or a tool of the taxpayer or whether it is merely a space where the taxpayer carries on his business.

Building qualify as plant if it is necessary for an equipment to function?

- In the case of **R. C. Chemical Industries v. CIT [1982] 134 ITR 330 (Delhi)**, the Delhi High Court has considered the meaning of "plant" with reference to S. 43(3) of the Income Tax Act and laid down the following principles. The definition of 'plant' in S- 43(3) should be given a wide meaning as it is an inclusive definition. In order for a building or concrete structure to qualify for inclusion in the term plant **it must be established that it is impossible for the equipment to function without the particular type of structure."**

dominant nature test.

❑ **Operation theatre to be treated as plant not building** The Hon'ble Apex Court in the case of **CIT v. Dr. B. Venkata Rao (2000) 243 ITR 81 (SC)** has held that an **Operation Theatre** in the hospital is **plant and not building**.

❑ **Generating station building forms part of plant:**

In case of **CIT v. Karnataka Power Corporation [2001] 247 ITR 268 (SC)**, the Supreme Court held that there was a finding by the fact finding authority that the assessee **generating station building was so constructed as to be an integral part of its generating system. It was "plant"** entitled to investment allowance

Cold storage not to be treated as buildings?

Dominant nature test

In case of **CIT v. Kanodia cold Storage 100 ITR 155 (All)**, the appellant, during the course of appellate proceedings, has submitted that the cold storage is required to be constructed and maintained as to be damp proof, heat proof and protected against entry of or damage to the stored agriculture and other produce by pests, noxious insects, rats and other rodents. The same is to be provided with insulation of the floors, roofs and doors and insulation and water proofing treatment is to be done in a proper manner in accordance with cold temperature to be maintained below or above freezing point. The Appellant has therefore submitted that the storage or chamber itself is an apparatus and tool of the trade through which the business is carried on and the insulation without the building cannot produce the result and the building without the insulation also equally disastrous for the purpose. Therefore, it was contended that **the cold storage plant is different from the other normal building because without the cold storage plant it is not possible to carry on the business of cold storage.**

Transfer of credit
between distinct person –
new registration at other
place within state

GST ITC 02A – not available for availing credit still credit denied.

section 25 (2) of the Central Goods and Service Tax Act, 2017, allow a person having multiple places of business in a State/ Union territory may apply for and obtain separate registration for each place of business.

Rule 41A of the CGST Rules, 2017 deal with the transfer of input tax credit at the time when the registered person has obtained separate registration for multiple places of business.

Form GST ITC-02A was not available on GST Portal for 30 days from registration of assessee's separate business vertical and petitioner tried to submit said Form manually also; unutilized Input Tax Credit was to be transferred to newly registered unit. Allowed in next GSTR-3B- Amount involved 2.58 cr. **Pacific Industries Ltd. Vs. UOI [2022] 137 taxmann.com 247 (Rajasthan)(HC).**

Rule 86A

Restriction on use of amount available in electronic credit ledger by Commissioner/authorised officer not below the rank of AC.

Such restriction shall cease to have effect after the expiry of a period of one year from the date of imposing such restriction

-reasons to believe that credit of input tax available in the electronic credit ledger has been fraudulently availed.

ineligible in as much as

Supplier has been found non-existent or not to be conducting any business from any place for which registration has been obtained;

ITC without receipt of goods or services or both;

tax charged in respect of invoice/debit note has not been paid to the Government by supplier ;

recipient has been found non-existent or not to be conducting any business from any place for which registration has been obtained;

not in possession of a tax invoice or debit note or any other document prescribed under rule 36,

Commissioner, or the officer authorised by him under sub-rule (1) may, upon being satisfied that conditions for disallowing debit of electronic credit ledger as above,

Blocking of credit ledger
– by commissioner or
authorized officer not
below AC- **Rule 86A**

Rule 86A of CGST Rules, 2017 empowers the Commissioner or its authorized officers to disallow debit of electronic credit ledger and block the credit based on a reasonable belief that credit of input tax available in the electronic credit ledger has been fraudulently availed or is ineligible

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blocking the input tax credit in exercise of power under Rule 86A of the Central Goods & Service Tax Rules, 2017 (for short "the Rules, 2017") to the tune of Rs.17,94,723/- allegedly towards effecting the recovery of dues under the Gujarat Value Added Tax Act, 2003 not permissible.

**S.S. Industries Vs. UOI [2020] 122 taxmann.com 296
(Gujarat)(HC)**

unless there is assessment and demand, the amount deposited by the assessee under coercion/threat of arrest, cannot be appropriated. The Revenue cannot justify retaining the amount deposited by merely saying that the same was voluntarily deposited. The Revenue should bear in mind that they are creatures of statute and are bound by statutory law; the powers that they exercise are conferred upon them by the statute and there are no powers de hors the statute. In such circumstances, the Revenue is duty bound to act as provided by the provisions under which it can exercise such powers. The Revenue is not an organization which is entitled to retain money without any sanction of law.

**KALPSUTRA GUJRAT 2020- challenging the
validity of rule 86A**

Thank You

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