INPUT TAX CREDIT-IN DEPTH ANALYSIS

By: Pradeep K. Mittal B.Com,LLB,FCS Advocate, PKMG Law Chambers Pase Central Council Member of ICSI, New Delhi E-mail id: pkmittal171@gmail.com Contact no. 9811044365, 9911044365

Analysis and Interpretation: Concept, Analysis and Critical Issues of Input Tax Credit under GST:

Introduction: <u>Concept – Input Tax Credit</u>

Input Tax Credit is the core concept of GST as GST is destination based tax. It avoids cascading effect of taxes and ensures that tax is collected in the state in which the goods or services both are consumed.

"Input Tax Credit" means credit of 'input tax' as defined under section 2(56) of CGST Act.

INPUT TAX CREDIT

- Section 2(62) of CGST Act defines 'Input Tax' as follows:
- "Input Tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—
- (a) the integrated goods and services tax charged on import of goods;
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9; (Reverse Charge of CGST)

- (c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act; (Reverse Charge of IGST)
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or (Reverse Charge of IGST)
- (e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act, but does not include the tax paid under the composition levy;

ANALYSIS OF SECTION 16

- **Basic Provision**
- (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.

• Notes:

• It is important to note that credit is available in respect of a 'registered person' for the inputs 'used by him in his business'. Registered taxable person in a state entity and shall not be assumed or presumed to be a legal entity as a whole. Thereby, input tax credit availed in a state must not be in relation to the business of any other registered person.

- According to Section 16(1), A Registered Persons 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.
- To summarize the abovementioned provision, it is pertinent to mention that there are basically following kinds of Outward Supply
- i. Taxable Supply
- ii. Exempt Supply
- iii. Non Taxable Supply
- iv. Zero rated Supply

- (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.
 Explanation.—For the purposes of this clause, 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;

- (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:
- Provided that where the goods against an invoice are received in lots or instalments, the registered person shall be entitled to take credit upon receipt of the last lot or instalment: Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier,

- an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:
- Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.

The Hon'ble Allahabad High Court in case of <u>Varuna</u> <u>Sulphonators Pvt. Ltd. v. UOI</u> had the occasion to deal with the term "use" is appearing in definition of 'input'. It held that:

 The MODVAT Scheme does not emphasis that during the manufacturing process, the entire duty-paid must be actually consumed, but the emphasis is on the use of the duty-paid input in the manufacture of final product. The word 'used' and 'consumed' are not identical and synonymous. They have not been defined in the Rules and in the Central Excise and Salt Act, 1944. The verb 'use' as per Chambers English Dictionary means "to put to some purpose; to avail oneself of; to resort to; to make use of; to take or consume...".

- The verb 'consume' in the same dictionary means: "to destroy by wasting, fire, evaporation, to use up, to devour, to waste or spend, to exhaust....".
- The word 'used' does not indicate that a thing, which is liquid, can be said to be used only when it is spent up to the last drop. The word 'consumed' may be used in the sense that a thing which is consumed must be finished, exhausted or devoured in full, but that is not the sense in which the word 'used' is used.

Thus, To qualify for MODVAT credit, what is required that a given input should be used in the manufacture of final product. There is nothing to show that MODVAT credit will not be allowed, if a manufacturer is not able to prove that required input has been exhausted so as to not leave even a drop of it behind.

Further, the Hon'ble Tribunal in case of Graver & Weil (I) Ltd. v. CCE (I) Mumbai [2004(174) E.L.T. 487 (Tri.-Mumbai)] has held that the words "used for" must not be interpreted in a restrictive manner:

- The words 'used' employed in the term under reference would extend the benefit to an use even for part of the process of production of a commodity. There is no cause to interpret the word 'used for' in a restricted manner.
- The definition of 'input' used in as against 'for'. The interpretation given to the word 'for' in the judgment referred above will equally be applicable for interpreting the word 'in' also. Any expenses incurred for business can also said to be incurred in the course of business. Therefore, meaning of 'input' as given in section 2(52) of GST Act is very wide.

Singh Alloys and Steel Ltd. vs. Assistant Collector of Central Excise (08.01.1993 - CALHC)

• Analysing the meaning of inputs as provided in the explanation it would appear that everything is an input if it is (i) manufactured and used within the factory of production or (ii) used in relation to the manufacture of the final products, and (iii) paints and packaging material.

The exceptions relate to items which would otherwise have come within the inclusive definition of inputs. The need to except arose because the items would otherwise have been covered.

- The definition of inputs is not dependent upon what ought to be used but what is in fact used. There is no dispute that the petitioner No. 1 had in fact, used and uses the items in the manufacturing of ingots. The Supreme Court has also held that manufacture would include a process which was commercially expedient in the production of goods
- IN RE, Collector of Central Excise v. Eastend Paper Industries MANU/SC/0107/1989 : 1989(43)ELT201(SC); Collector of Central Exise, Jaipur v. Rajasthan State Chemical Works : AIR 1991 SCC 2222, That the process in question is commercially expedient has not been doubted.

JUDICIAL PRECEDENT

- In re. Asstt. Commissioner, CGST & CX, (2018) 97 taxmann.com 636
- It held that 'where recipient is eligible for full input tax credit' as used in second proviso to rule 28 means that recipient will be eligible to take full input tax credit of amount of tax paid by supplier as mentioned in respective invoice or any other document valid under section 16(2)(a).
- However, no input tax credit is available to recipient of goods/services if value declared by supplier in invoice/debit note is zero.

• What is an Outward Supply?

Section 2(83) "outward supply" in relation to a taxable person, means supply of goods or services or both, whether by sale, transfer, barter, exchange, licence, rental, lease or disposal or any other mode, made or agreed to be made by such person in the course or furtherance of business;

In case where the Outward Supply is Exempt

- As per provisions of Sec. 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.
- Sec.17(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

JUDICIAL PRECEDENT

- In Re: Columbia Asia Hospitals Private Limited (13.11.2018
 Authority For Advance Rulings): MANU/AR/0410/2018
- FACTS
- The Applicant is a private limited company engaged in providing health care services categorizing them as Inpatient (IP) and Out-patient (OP) services. The Company is also engaged in supply of medicines (pharmacy) to inpatients and out-patients. It also operates Restaurant/Canteen services in its premises which is used for supplying food and other eatable items to its patients and their attendants.

- The question on which advance ruling is sought is as follows:
- (a) "Whether two or more supplies of goods or services which are naturally bundled in which principal supply is exempt and others are taxable, can be treated as composite supply and if yes, principal supply being exempt supply, can the said composite supply be treated as exempt supply or the same cannot be treated as composite supply?
- (b) If not treated as composite supply, is registered person allowed to claim input tax credit of tax paid on procurement of capital goods, inputs and input services related to both taxable supply and exempted supply?"

RULING

- It has been held that since the applicant is using the input and input services in the course and furtherance of business, credit of such tax paid on such inward supplies can be claimed by it. As per provisions of Section 17(2), the amount of credit claimed as per sub section (1) of section 16 needs to be restricted to so much of input tax as is attributable to the supplies which are taxable under the CGST Act.
- The health care services being an exempted supply, either as an individual supply or as a composite supply, credit of input tax claimed which is attributable to such supplies of health care services needs to be reversed.
- The reversal of ITC claimed shall be made as per the provisions of section 17 read with rule 42.

• Thus, the applicant is eligible to tax paid on the inputs, input services and capital goods which are attributable to the supplies of goods or services which are taxable under the provisions of the CGST and not attributable to exempt supplies of goods or services under the CGST Act.

In case where the Outward Supply is Zero Rated Supply

- (1) "zero rated supply" means any of the following supplies of goods or services or both, namely:—
- (a) export of goods or services or both; or
- (b) supply of goods or services or both to a Special Economic Zone developer or a Special Economic Zone unit.
- (2) Subject to the provisions of sub-section (5) of section 17 of the Central Goods and Services Tax Act, credit of input tax may be availed for making zero-rated supplies, notwithstanding that such supply may be an exempt supply..

- (3) A registered person making zero rated supply shall be eligible to claim refund under either of the following options, namely:—
- (a) he may supply goods or services or both under bond or Letter of Undertaking, subject to such conditions, safeguards and procedure as may be prescribed, without payment of integrated tax and claim refund of unutilised input tax credit; or
- (b) he may supply goods or services or both, subject to such conditions, safeguards and procedure as may be prescribed, on payment of integrated tax and claim refund of such tax paid on goods or services or both supplied, in accordance with the provisions of section 54 of the Central Goods and Services Tax Act or the rules made thereunder.

JUDICIAL PRECEDENT

- In re. Vservglobal (P.) Ltd. MANU/AR/0390/2018
- The applicant is an Indian company incorporated to provide back office support services to overseas companies engaged in trading of chemicals and other products in International Trade. The orders for supply of said services are received in its Mumbai office and also services are executed form its office situated in Mumbai.
- The applicant requests the authority for advance ruling to decide as to whether the aforesaid services proposed to be rendered qualify as 'Zero Rated Supply' in terms of Section 16 of the Integrated Goods & Services Tax Act, 2017 or not?

Ruling

- It has been held that since the applicant facilitates supply of goods or services or both between overseas client and customers of overseas client, the applicant is clearly covered and falls in definition of 'intermediary' as contained under section 2(13) of IGST ACT. The place of supply in case of services provided by the applicant being intermediary would be location of supplier of services in terms of section 13(8) of IGST Act., i.e., India.
- Thus place of supply in case of services not being outside India, services proposed to be rendered by applicant do not qualify as 'export of services' as defined under section 2(6) and, thus, not a 'zero rated supply' as per section 16(1) of IGST Act.

• The Hon'ble CESTAT in Appeal No. ST/60798/2018 vide order dated 02/11/2018 in case of <u>Voith Paper Factories Limited</u> held that in case agent is providing services in India on behalf of Principal located outside India and receives commission for the same in Foreign Convertible exchange, recipient is not liable to pay Service Tax on reverse charge mechanism.

Conditions for claiming ITC

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

- 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;
- (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: provided that where the goods against an invoice are received in lots or installments, the registered person shall be entitled to take credit upon receipt of the last lot or installment:

Provided further that where a recipient fails to pay to the supplier of goods or services or both, other than the supplies on which tax is payable on reverse charge basis, the amount towards the value of supply along with tax payable thereon within a period of one hundred and eighty days from the date of issue of invoice by the supplier, an amount equal to the input tax credit availed by the recipient shall be added to his output tax liability, along with interest thereon, in such manner as may be prescribed:

- Provided also that the recipient shall be entitled to avail of the credit of input tax on payment made by him of the amount towards the value of supply of goods or services or both along with tax payable thereon.
- (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.

CAPITAL GOODS

- In Brindavan Beverages V. CCE (2014) 310 ELT 398 (CESTAT), the goods manufactured by assessee were exempt when capital goods were received. Later, assessee decided to manufacture taxable goods also. It was held that in such cases, Cenvat credit is not allowable.
- This view has been confirmed vide letter No.137/120/2008-CX.4 dated 24.06.2008 [12 STR C16], while issuing clarification in respect of aircraft imported by Hindustan Construction Company Limited. (HCCL). The services provided by HCCL were exempt when the aircraft was imported. Subsequently, the services became taxable. It was held that CVD paid on aircraft is not available for Cenvat Credit since credit was not eligible ab initio.

- If capital goods were eligible when received but later became ineligible (as final product was exempted), Cenvat Credit taken is not required to be reversed Brindavan Beverages v. CCE (2008) 232 ELT 475 (CESTAT).
- Eligibility of Cenvat credit of capital goods is with reference to dutiability on the date of receipt of capital goods. If capital goods were not eligible at the time of receipt (since final product was exempt), credit cannot be taken later (when final product became dutiable).

- Spenta International Ltd. v. CCE (2007) 216 ELT 133 (CESTAT 3 Member Bench) followed in GSPL India Transco Ltd. In re (2015) 83 VST 96 (AAR).
- Eligibility of capital goods for Cenvat is to be decided as on date of receipt of capital goods in the factory and not the date of installation – Grasim Industries v. CCE 2004 (176) ELT 265 (CESTAT) – assessee's appeal dismissed by SC – 179 ELT A 38.
- Capital goods used in Trial Run
- Even trial run comes within ambit of 'used' (and depreciation is permissible) V Ramakrishna & Sons v. CIT (1984) 16
 Taxman 433 = 149 ITR 554 (Mad HC)* Asstt CIT v. Ashima
 Syntex (2002) 122 Taxman 230 = 251 ITR 133 (Guj HC)* CIT v.
 Vindhyachal Distilleries (2005) 147 Taxman 127 = 272 ITR 583 (MP HC).

NO CORRELATION WITH PARTICULAR OUTPUT REQUIRED

- There is no correlation of the raw material and the final product; that is to say, it is not as if credit can be utilized only on a final product that is manufactured out of the particular raw material to which the credit is related CCE v. Dai Ichi Karkaria Ltd. 112 ELT 353 = AIR 1999 SC 3234 = 1999 AIR SCW 3205=(1999) 7 SCC 448 (SC 3 member bench) quoted with approval in CCE v. Bombay Dyeing (2007) 10 STT 286 (SC).
- Credit by assessee who is manufacturer as well as service provider – Cenvat Credit of manufacturing activity can be utilized for payment of service tax since there is no such restriction in Cenvat Credit Rules or CBEC manual – CCE v. Nahar Industrial Enterprises Ltd. (2007) 10 STT 117 (CESTAT SMB) – followed in CCE v. Vardhaman Spinning (2008) 14 STT 503 (CESTAT SMB).

- Cenvat credit of input service tax can be utilized for payment of excise duty – S.S. Engineers v. CCE (2015) 317 ELT 597/61 taxmann.com 7(CESTAT).
- Thus, Cenvat on inputs for one product may be used for payment of duty on other product of different Chapter. Such credit can be denied only if one product is fully exempt from duty.

Excess Duty/Tax Paid

 Even if duty was paid at higher rate, buyer is eligible to avail Cenvat credit of entire duty paid Nahar Industrial Enterprizes v. CCE (2007) 210 ELT 38 = STR 385 (CESTAT SMB) * CCE V. Jai Mata Alloys (2008) 232 ELT 462 (CESTAT SMB)

- In CCE v. Pirity Flexpack (2008) 223 ELT 361 (Guj HC DB), assessee paid duty @ 24% against actual rate of 16%. It was held that buyer is eligible for entire Cenvat credit, as the payment of higher duty was not disputed at supplier's end.
- Users cannot be penalized for fault of supplier In J K Industries Ltd. v UOI (2008) 223 ELT 372 (Raj HC DB), supplier was an EOU unit but actually issued normal invoice without following procedures required by EOU. It was held that the buyer is eligible for Cenvat credit and he cannot be penalized for any default committed by seller.

- In CCE v. CEGAT 2006 (202) ELT 753 (Mad HC DB), it was held that the words used are 'paid' and not 'payable'. Thus, once duty is 'paid', Cenvat Credit is available, whether duty was payable or not [rule 3 (1) of Cenvat Credit Rules also use the word 'paid'] same view in CCE v. Ranbaxy Labs Ltd. 2006 (203) ELT 213 (P&H HC DB).
- In CCE v. Pirity Flexpack (2008) 223 ELT 361 (Guj HC DB), assessee paid duty @ 24% against actual rate of 16%. It was held that buyer is eligible for entire Cenvat Credit, as the payment of higher duty was not disputed at supplier's end.

No Reversal if supplier gives reduction in price after clearance

- Excise duty is payable on the basis of price at the time of clearance. Thus, assessable value does not change if supplier gives credit of duty after removal of goods. In view of this, credit is not to be reversed only because the supplier of inputs has given some reduction in prices after removal of goods, unless he claims and gets refund of excise duty paid by him.
- This observation was reiterated by Supreme Court in the case of Dai Ichi Karkaria Ltd. 1999 (112) ELT 353. The Court in para 18 observed as follows:-
- It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] this Court said that a credit under the Modvat scheme was 'as good as tax paid.'

No Time Limit For Utilization of

Credit

• Section 16(4) provides that the taxable person shall not be entitled to take input tax credit in respect of any invoice for supply of goods or services after filing of return under section 39 for the month of September following end of financial year to which such invoice relates or filing of relevant annual return whichever is earlier. The provisions in section 16(4) is only for availment of credit and not for utilization of credit. There is no time limit specified in sections 16 to 18 or section 49 about utilization of credit. Therefore, the credit once availed can be utilized at any point of time.

Defects in Documents

- Tribunal's decisions that Cenvat cannot be denied for minor defects in documents
- Tribunal and Courts have consistently held that Cenvat Credit cannot be denied for minor defects in Invoice.
- In J K Industries Ltd. v. UOI (2008) 223 ELT 372 (Raj. HC DB), CBE&C circulars were noted and it was observed that Cenvat Credit should not be denied for minor defects in invoice same view in CCE v. Varinder Agro Chemicals (2010) 254 ELT 37 (P&H HC DB)* Pearl Drinks v. CCE (2010) 260 ELT 353 (Delhi HC DB) * CCE v. Hindalco Industries (2012) 35 STT 467 = 21 taxmann.com 200 (All. HC DB).

- In CCE v. Stelko Strips (2010) 255 ELT 398 (P&H HC DB), Cenvat Credit was held admissible on strength of private challan where was proper certification of excise duty paid.
- Basic requirement is that duty/tax should have been paid In CCE v. Amal Rasayan Ltd. 1993 (68) ELT 446 (CEGAT), it was held that vital question is the receipt of inputs and their use in the manufacture of final product. When these two conditions are satisfied, Cenvat credit cannot be denied for lapse of any procedural matters - same view in Mangalore Refinery v. CCE (2007) 216 ELT 43 (CESTAT) * CCE v. DNH Spinners (2010) 25 STT 295 (CESTAT SMB) * CCE vs. Sethi Industrial Corporation (2014) 309 ELT 159 (CESTAT SMB).

- Wrong or different address given In CCE v. Jammu Woodplast 2000 (121) ELT 777 (CEGAT SMB), Cenvat was permitted when the only defect was that address of assessee was different, which occurred due to clerical mistake of consignor's staff same view in Om Textiles v. CCE 2006 (199) ELT 47 (CESTAT).
- Invoice in name of Head Office/administrative office Invoice with address of Head Office is eligible for Cenvat Credit – Modern Petrofils v. CCE (2010)29 STT 111 (CESTAT SMB).

• (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 invoice relating to such debit note pertains or furnishing of the relevant annual return, whichever is earlier

AUTHORITY FOR ADVANCE RULING (GST) In Re: Tewari Warehousing Co. Pvt. Ltd. MANU/AR/0020/2019

FACTS

Applicant is engaged in constructing warehouse on lease hold land, using pre fabricated technology. Section 17(5)(c) of CGST Act provide that blocks ITC on inward supplies for construction of immoveable property.

ISSUE

(1) whether the prefabricated supply is of moveable property or immoveable property ?
 (2) whether applicant is eligible to claim ITC?

APPLICANT CONTENTION:

The system is fixed by nuts and bolts and hence the system is moveable property .if a property can be removed without damage and its future enjoyment is not affected such property is not immoveable property [MANU/SC/0237/2010] & [MANU/SC/0846/1998]

•Immoveable property has not been defined under GST and hence the meaning of the same is derived from GENERAL CLAUSE ACT,1897 which says that it includes land benefit raising out of land and things attached to earth or permanently fastened to anything attached to earth.

DEPARTMENT CONTENTION:

If items assembled and attached to earth can not be dismantled without substantial damage the item would be immoveable property [MANU/EXCR/0037/2002] permanently fastened to earth has to be read in context that nothing can be fastened to earth permanently so that it can never be removed [ALLAHABAD HIGH COURT]

RULING: The warehouse being constructed is immoveable property and the ITC therefore is not admissible as credit for such tax is blocked.

- The Gujarat High Court in the case of Mundra Ports and Special Economic Zone Limited vs. CST: MANU/GJ/0260/2015 has observed as under:-
- According to learned counsel for the appellant, this amended definition would apply only to the factory or manufacturer and would not apply to the service provider. According to him, either before the amendment made in the year 2009 or thereafter, the appellant was neither factory nor manufacturer and he has only constructed jetty by use of cement and steel for which he was entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is a service provider.

According to the appellant, his case is squarely covered by the judgment of the Division Bench of the Andhra Pradesh High Court in Commissioner of Central Excise, Visakhapatnam-II Vs. Sai Sahmita Storages (P) Limited, MANU/AP/0510/2011: 2011 (270) E.L.T. 33 (A.P.) wherein in paragraph 7, it has been clearly held that a plain reading of the definition of Rule 2(k) would demonstrate that all the goods used in relation to manufacturer of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT credit. It is not in dispute that the appellant is a taxable service provider on port under the category of port services. Therefore, the appellant was entitled for input credit and the decision of the Division Bench of the Andhra Pradesh High Court squarely applies to the facts of the case and answered the question on which the appeal has been admitted.

The Division Bench of Hon'ble Delhi High Court in the case of **Vodafone Mobile Services Limited & Ors. vs. CST** (31.10.2018) MANU/DE/4088/2018 has observed as under:-

 The learned counsel for the assessees argued that, for instance, there is an emergence of immovable property in the intermediate stage, then too, the credit on input or input service is admissible even if the item is used in an intermediate product which is exempt from payment of duty. Reliance in this regard was placed on the following judgments: Tata Iron and Steel Company v. CCE, MANU/CK/0155/1999: 2000 (117) ELT 669; Madras Aluminum Company Ltd. Vs. CCE, MANU/CC/0305/2000: 2001 (136) ELT 182; Mahalaxmi Glass Works Ltd. v. CEE, MANU/CM/0248/1997: 1999 (113) ELT 558 and the decision of the Andhra Pradesh High Court in CCE, Vishakhapatnam-II v. Sai Sahmita Storages (P) Limited, MANU/AP/0510/2011: 2011 (270) ELT 33 (A.P.)

In Tata Iron and Steel Company (supra), the court observed that a product may be a final product, ipso facto, or that it may be an intermediate one, for another article; therefore, tools cleared on payment of duty were final products; however, those used captively were intermediate goods and entitled to credit. Madras Aluminum Company Ltd. (supra) was a case where the product was used in water boiler for the preparation of softening agents to reduce scale formations and avoid boiler breakdown at the time of steam generation for use as also to reduce corrosive effects of acid, credit was allowed because it aided in "preparation of the machinery for more effective functioning of the machine as eligible inputs. Therefore, no reason is found to deny the credit on these items."

• Sai Sahmita Storages (P) Limited, is, in our opinion, a decision that held that a plain reading of the definition of Rule 2(k) would demonstrate that all goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing an output service are eligible for CENVAT credit.

In the present case, it is not in dispute that the appellant is a taxable service provider providing passive telecommunication service. Therefore, the assessee is entitled for input credit on the weight of judicial authority discussed above. It is also clear that several High Courts in different contexts have taken a view that credit of excise duty and service tax paid would be available irrespective of the fact that inputs and input services were used for creation of an immovable property at the intermediate stage, if it was ultimately used in relation to provision of output service or manufacturing of final products.

 The conclusion of CESTAT, denying the assessee CENVAT credit on the premise that the towers erected result in immovable property, is erroneous and plainly contrary to Solid and Correct Engineering (supra). The towers that are received in CKD condition, are erected at site, subsequently, giving rise to a structure that remains, safe and stable (commercial reasons of use). The fact that in the intermediate stage, an immovable structure emerged, is of no consequence, in the facts of the present case. It is a settled principle of law that entitlement of CENVAT credit is to be determined at the time of receipt of the goods. If the goods that are received qualify as inputs or capital goods, the fact that they are later fixed/fastened to the earth for use would not make them a non-excisable commodity when received. The CESTAT failed to consider the fact in the event antennae and BTS are to be relocated, the assessee also has to relocate the tower and the prefabricated shelters, thereby, implying that the towers and the perfabricated shelters, are not immovable property. Therefore, the CESTAT erred in relying upon the decision of the Bharti Airtel (supra).

- This question of law too, is therefore, answered against the Revenue and in favour of the assessee/appellants.
- The Division Bench of Chhatisgarh High Court in the case of Commr. of C. Ex., C. and S.T., Raipur vs. Vimla Infrastructure India P. Ltd. (14.03.2018 CGHC): MANU/CG/0185/2018
- For dwelling on the issue, definition of 'Input' and 'Input Service' provided under Cenvat Credit Rules, 2004 needs reference:
- (k) "input" means-
 - (i) all goods used in the factory by the manufacturer of the final product; or
 - (ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or

- (ii) any goods including accessories, cleared along with the final product, the value of which is included in the value of the final product and goods used for providing free warranty for final products; or
- (iii) all goods used for generation of electricity or steam for captive use; or
- (iv) all goods used for providing any output service;

but excludes-

- (A) light diesel oil, high speed diesel oil or motor spirit, commonly known as petrol;
- (B) any goods used for-
 - (a) construction of a building or a civil structure or a part thereof; or
 - (b) laying of foundation or making of structures for support of capital goods, except for the provision of any taxable service specified in sub-clauses (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of Section 65 of the Finance Act

- (C) Capital goods except when used as parts or components in the manufacture of a final product;
- (D) motor vehicles;
- (E) any goods, such as food items, goods used in a guest house, residential colony, club or a recreation facility and clinical establishment, when such goods are used primarily for personal use or consumption of any employee; and
- (F) any goods which have no relationship whatsoever with the manufacture of a final product.

Explanation. - For the purpose of this clause, "free warranty" means a warranty provided by the manufacturer, the value of which is included in the price of the final product and is not charged separately from the customer;

- (1) "input service" means service,-
- (i) used by a provider of taxable service for providing an output service; or
- (ii) used by a manufacturer, whether directly or indirectly, in or in relation to the manufacture and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises, advertisement or sales promotion, market research, storage upto the place of removal, procurement of inputs, accounting, auditing, financing, recruitment and quality control, coaching and training, computer networking, credit rating, share registry, security, business exhibition, legal services, inward transportation of inputs or capital goods and outward transportation upto the place of removal;

- but excludes services,-
- (A) specified in sub-clauses (p), (zn), (zzl), (zzm), (zzq), (zzzh) and (zzzza) of clause (105) of Section 65 of the Finance Act (hereinafter referred as specified services), insofar as they are used for-
- (a) construction of a building or a civil structure or a part thereof; or
- (b) laying of foundation or making of structures for support of capital goods, except for the provision of one or more of the specified services; or
- (B) specified in sub-clauses (d), (o), (zo) and (zzzzj) of clause (105) of Section 65 of the Finance Act, insofar as they relate to a motor vehicle except when used for the provision of taxable services for which the credit on motor vehicle is available as capital goods; or

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

The above definition of Input' and 'Input service' would manifest that all goods used for providing any output service excluding Light Diesel Oil, High Speed Diesel or Motor Spirit or any goods used for construction of a building or a civil structure or a part thereof or laying of foundation or making of structures for support of capital goods, except for the provision of any taxable service etc. are treated to be 'Input'.

• Similarly, an 'Input service' would mean any service used by a provider of taxable service for providing an output service includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output services or an office relating to such factory or premises are treated to be 'Input Service'.

• In the case at hand, the respondent has constructed a Railway Siding which is a Low Speed Track distinct from a running line or through route such as a main line or branch line. It is used for marshaling, stabling, storing, loading and unloading vehicles and other goods. The Railway Siding of the respondent are located at Silyari Railway Station and Bhupdeopur Railway Station. In raising construction of the Railway Siding, the respondent has used MBC Sleepers, which, in turn, has been constructed by using MBC Railway Sleepers and RLS Rails.

The respondent was issued show cause notice by the Commissioner on the ground that it has wrongly availed and utilized Cenvat credit and inadmissible Input Service Tax in Central Excise duty paid on Inputs and Capital Goods which have been used for construction of Railway Siding as the goods which were neither the Input Service nor the inputs and Capital Goods for providing "Cargo Handling Services". The Commissioner eventually concluded that the company cannot provide any 'logistic services' viz., "Cargo Handling Services" without the facility of private Railway Side. Hence, it become essential for them to set/construct their own private Railway Side to facilitate smooth loading, unloading of materials like Coal, Iron Ore, Manganese Ore, Bauxite etc. Hence, 'inputs' and 'input services' used in setting up the Railway Private Siding which is further in use of "Cargo Handling Services" is eligible for credit under the Rules, 2004. This view of the Commissioner has been affirmed by the Tribunal.

 Reverting back to the definition and the nature of construction activity carried on by the respondent company for erecting the facility of "Cargo Handling Services" it is to be kept in mind that the 'Inputs' have been used for providing output services which is taxable, therefore, by erecting the Railway Siding, the respondent is providing a taxable service for providing an output service, therefore, it is entitled to avail credit under Rule 2004.

- In taking the above view, we are fortified by the law laid down by the Division Bench of Andhra Pradesh High Court in the matter of Commissioner of Central Excise, Visakhapatnam-II v. Sai Sahmita Storage (P) Limited, MANU/AP/0510/2011: 2011 (270) E.L.T. 33 (A.P.): 2011 (23) S.T.R. 341 (A.P.), wherein it has been held, with reference to definition of 'Input' in Rule 2(k) that all the goods used in relation to manufacture of final product or for any other purpose used by a provider of taxable service for providing output service are eligible for Cenvat credit.
- Yet again, the Gujarat High Court in the matter of Mudra Ports & Special Economic Zone Limited v. CCE & Cus. MANU/GJ/0260/2015 : 2015 (39) S.T.R. 726 (Guj.) has taken the same view by allowing Cenvat credit to the company who has constructed Jetty within the Port Area for providing Port Services.

v. Kanodia Warehousing In MANU/UP/0711/1979 : [1980]121ITR996(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. If the building or structure or part thereof is something by means of which the business activities are carried on, it would amount to a plant but where the structure plays no part in the carrying on of those activities but merely constitutes a place within which they are carried on, it cannot be regarded as a plant.

The Bombay High Court in C.I.T. v. Colour Chem Ltd. MANU/MH/0032/1974 : [1977] 106 ITR 323. While negativing the contention that roads are part of the plant, the Bombay High Court held that the roads within the factory premises are used for the purpose of carrying raw materials, finished products and workers. Therefore, it must be regarded as building or buildings within the meaning of subclause (iv) of section 10(2) of 1992 Act. It was also held that dictionary meaning of the word "building" cannot be confined to a structure or superstructure having walls and roof over it. The roads and roadways are adjuncts of the buildings lying within the factory area linking them together and are being used for carrying on its business by the assessee. Therefore, they must be regarded as forming part of the factory building.

- The Hon'ble Supreme Court in the case of <u>Scientific</u> Engineering House Pvt. Ltd. Vs. Commissioner of Income <u>Tax</u>, 1986(157) ITR 0086 SC relied upon certain following foreign decisions while dealing with the explanation 'Plant' and gave it a wide meaning under the provisions of Income Tax law in the following manner:
- "The classic definition of 'plant' was given by Lindley, L.J. in Yarmouth v. France, [1887] 19 Q.B.D. 647, a case in which it was decided that a cart-horse was plant within the meaning of Section 1(1) of Employers' Liability Act, 1880. The relevant passage occurring at page 658 of the Report runs thus:- "There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, -not his stock-intrade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business."

In C.I.T. Andhra Pradesh v. Taj Mahal Hotel, MANU/SC/0239/1971 : 82 I.T.R. 44, the respondent, which ran a hotel, installed sanitary and pipeline fittings in one of its branches in respect whereof it claimed development rebate and the question was whether the sanitary and pipe-line fittings installed fell within the definition of "Plant" given in Sec. 10(5) of the 1922 Act which was similar to the definition given in Sec. 43(3) of the 1961 Act and this Court held that sanitary and pipe-line fittings fell within the definition of plant.

The Hon'ble Bombay High Court in the case of <u>CIT v.</u>
 <u>Mazagaon Dock Ltd.</u> MANU/MH/0278/1991 : (1991)

 191 ITR 460(Bom) has held that dry dock and wet dock created for ships are to be treated as plant and not building.

In another decision reported in CIT v. Karnataka Power Corporation MANU/SC/0585/2000 : [2001] 247 ITR 268 (SC), the Supreme Court held as follows (headnote): The question whether a building can be treated as plant, basically, is a question of fact and where it is found as a fact that a building has been so planned and constructed as to serve an assessee's special technical requirements, it will qualify to be treated as a "Plant" for the purposes of investment allowance. Held accordingly, that there was a finding by the fact-finding authority that the assessee's generating station building was so constructed as to be an integral part of its generating system. It was "plant" entitled to investment allowance.'

The Supreme Court in CIT Vs. Dr. B. Venkata Rao MANU/SC/1284/1999 : 243 ITR 81, dealing with a question as to whether a building of "Nursing Home" is plant and machinery. In that case, the ITAT has held that the nursing home to be a plant and the same was affirmed by the High Court. In the appeal, the Supreme Court held that since the nursing home is equipped to enable the sterilization of surgical instruments and bandages to be carried on and it was reasonable to assume that nursing home was equipped with operation theater and, therefore, held to be plant and machinery.

 From the careful examination of the catena judgments cited in the preceding paras, it could be said that the "building", "premises", "structure" "roads within the airport or factory", would squarely within the meaning of "plant and machinery" and hence, shall be entitled to "Input Tax Credit notwithstanding the bar laid down in Clause (c) and (d) of Sub-Section (5) of Section 17 CGST Act – of course, in various situations explained in various judgments cited above.

<u>Issues & Solutions of Accumulated Input Tax</u> <u>Credit</u>

- **Inverted Duty Structure** means a situation where the rate of tax paid on inputs is higher than the rate of tax on outward supplies.
- Example:
- Product INPUT< FABRIC > OUTWARD SUPPLY<SHIRTS>
- GST on- INPUT: 12%, OUTWARD SUPPLY:5%

Refund of ITC accumulated on account of Inverted Duty Structure

- As per Section 54(3) of CGST Act, a registered person may claim a refund of unutilized ITC on account of Inverted Duty Structure at the end of any tax period where the credit has accumulated on account of rate of tax on inputs being higher than the rate of tax on output supplies.
- A tax period is a period for which return is required to be furnished.

- The Section further provides that no refund of unutilized ITC shall be allowed
- In cases where goods exported out of India are subject to export duty.
- If the supplier of goods or services or both avails drawback in respect of central tax or claims refund of the integrated tax paid on such supplies.
- In respect of supplies of goods or services or both as may be notified by the Government on the recommendations of the council.

- In respect of services central government has issued **Notification no. 15/2017-Central Tax (Rate) dated 28.06.2017** wherein it notified that refund of unutilised input tax credit shall not be allowed under subsection (3) of Section 54 of the Act, 2017, in case of supply of services specified in sub-item (b) of item 5 of Schedule II (construction services) of the Act.
- In respect of goods, the central government has issued **Notification no. 5/2017- Central Tax (Rate) dated 28.06.2017** as amended by Notification no. 44/2017-Central Tax (Rate) dated 14.11.2017 in respect of which unutilized ITC will not be admissible as refund.

 The Indian Textiles extends from the hand-woven sector on one end to the capital intensive mill sector on the other. Textiles for many decades have been enjoying tax exemption under indirect tax regime. However the Textile sector which was seldom taxed in History, was brought under GST with concessional rate on Fabric **5%** (subject to the condition that no refund of accumulated INPUT TAX CREDIT shall be allowed on account of inverted duty structure) and textile Job work at 5%. Apart from input of Fabric there are various other inputs and input services which are integral part of this industry and list of few such item such as Chemicals, Yarn, Packing material, Various services.

The above mentioned inputs and input services are generally taxed at 18%, whereas the output i.e. fabric is taxed at 5%.

- Due to inverted structure of tax, textile industry faced huge blockage of working capital by way of non-refundable accumulated credit.
- The Government after recognizing the difficulty being faced by the textile industry has now addressed the issue by issuing Notification No. 20/2018-Central Tax (Rate) dated 26.07.2018 which enabled the refund of accumulated credit for textile industry. The aforesaid notification has inserted a proviso in Notification No. 5/2017- Central Tax (Rate) dated 28.06.2017, which reads as under:

- (i) nothing contained in this notification shall apply to the input tax credit accumulated on supplies received on or after the 1st day of August 2018, in respect of goods mentioned at serial numbers 1, 2, 3, 4, 5, 6, 6A, 6B, 6C and 7 of the Table below; and
- (ii) in respect of said goods, the accumulated input tax credit lying unutilised in balance, after payment of tax for and upto the month of July 2018, on the inward supplies received up to the 31st day of July 2018, shall lapse.
- From the above Notification it appears that refund based on inverted duty structure shall be allowed but only on inputs and input services received on or after 1st August, 2018.

• Further, the Accumulated Un-utilized Credit upto 31st July'2018 after adjustment of tax payment for the month of July'18 shall lapse there seems some error on the part of CBIC regarding the such lapse, since the provision seems lacking of basic principle of natural justice.

Blocked Credit in case of Capital-intensive Industry

• Capital-intensive industries refers to industries that require large amounts of investment to produce a good or service, and therefore have a high percentage of fixed assets (property, plant, equipment). Companies in capital-intensive industries are often marked by high levels of depreciation.

<u>Judicial precedent</u>

In Re: A.M. Motors (26.09.2018 - Authority For Advance

Rulings: MANU/AR/0308/2018

Facts:

• 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.

Ruling

- Whether input tax credit on the motor car purchased for demonstration purpose of the customer can be availed as credit on capital goods and set off against output tax payable under GST in the case of a motor car dealer.
- It held that since capital goods which are used in course of furtherance of business are entitled for input tax credit, impugned purchase of demo car being in furtherance of business, input tax paid by applicant on purchase of motor car can be availed as input tax credit on capital goods and set off against output tax payable under GST.

- In Re. Bahl Paper mills Ltd.
- The credit of input tax charged on supply of fixtures and furniture and AC plant would be admissible under the CGST/SGST Act, provided assessee had not claimed depreciation on tax component of cost of capital goods and plant and machinery under provisions of the Income Tax Act,1961.

- Recently Orrisa High Court in **Safari Retreats Pvt. Ltd. v. Chief Commissioner Central Goods and Service tax** on 17.04.2019 gave an remarkable judgment stating that:
- The very purpose of the GST regime was to avoid double taxation and the provisions of Section 17(5)(d) are causing unnecessary burden on the assessee.
- The High Court held that if the assessee is required required to pay GST on rental income arising out of investment (i.e. Construction in present case), he is eligible to have the ITC on the GST paid under Section 17(5)(d).

Refund Related Issues

- The term 'Refund' is given under the Explanation of Section 54 of CGST Act,2017 which is reproduced hereinbelow:
- "refund" includes refund of tax paid on zero-rated supplies of goods or services or both or on inputs or input services used in making such zero-rated supplies, or refund of tax on the supply of goods regarded as deemed exports, or refund of unutilised input tax credit as provided under subsection (3).

 2(82) "output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis;

How to claim refund on unutilized ITC

• Pre-requisites:

GSTR 1 and GSTR-3B has to be filed for the relevant tax period for which you want to file refund application of the accumulated ITC.

- Form to be filed: RFD-01/RFD-1A
- **NOTE:** RFD-01 is an application for online processing of refund under GST. It is to be e-filed on the GST Portal Whereas, RFD-01A is a replica of RFD-01 introduced as a temporary solution till such time the online facility is enabled for claims of refund.

• Time limit to file:

RFD-01A has to be filed within 2 years from the end of financial year in which such claim for refund arises [Explanation to Section 54]

1: Period for which refund claim of ITC Should be filled

- It is possible that input tax credit may be received in a month while exports may be made in a subsequent month. It has been seen that in some months, there will be exports but no input tax credit available. To deal such cases, CBIC vide circular No. 37/11/2018-GST dated 15-03-2018 issued that the refund claim can be filed during 'relevant period' which is different from 'tax period'. Hence, exporter may file refund claim per month or per quarter or by clubbing successive calendar months/quarters. However, such refund claim cannot spread over different financial years.
- Note: The aforesaid principle should also apply for refund of tax due to the Inverted duty structure.

Rejection of Refund due to Typographical Error

This issue has been faced by large no. of people while claiming refund of IGST paid on export but due to some typographical error made in terms of mistake in filling GSTR-1 and GSTR-3B, department straight away reject their claim pertinent to limits has been made to claim refund in case of typographical error vide Circular No. 40/2018 CT dated 24.10.2018 which provides for the alternate mechanism known as Officer Interface to be followed in case of SB005 Error pertaining to invoice mismatch which was available only up to 15.11.2018.

 To overcome this constraint various high court has given relaxation to assesses in following Manner: The division bench of Bombay High court in case of O/E/N India Ltd, Writ Petition No. 2086 of 2018, wherein the petitioner while filling TRAN 1 form made an error due to typographical error/ human error, the Cenvat CREDIT OF Rs.11,10,555/- instead of Rs. 1,11,10,555/- have been claimed. entered the wrong amount of credit on which the Department denied the claim of the petitioner. The High Court on its order directed the Respondents to allow petitioner, to resubmit/rectify its TRAN-1 filed under Section 140 of the Goods and services Act, 2017. The CBIC in response to the directions of the Hon'ble High Court granted relief to the petitioner for rectification of mistake after verification of the bonafides of the claim made by them.

In case of Nav Bharat international Ltd. Vs. CST, Delhi, MANU/CE/0183/2017

• The appellant is engaged in the export of rice and filed refund claims in terms of Notification 41/2007-ST dated 06/10/2007 covering the period from 01/10/2007 to 30/06/2009 with reference to service tax paid on various services availed by the appellant in connection with export of rice. The Original Authority rejected the claims on the ground of lack of supporting evidence and corelation of document submitted by the appellant. It has been held that there is no rejection based on any legal issue and it is found that the appellants have submitted a chart containing details like invoice number, date, shipping bill number, load port details, description of goods, service providers details, tax paid etc. It further held that the lower authorities did not examine all the supporting documents submitted by the appellant. Accordingly, set aside the impugned order and remand the matter to the Original Authority for reconsideration of the appellant claims.

Rejection of Refund of IGST Paid during 1.07.2017 to 30.09.2017 due to claiming higher rate of drawback OR where Higher rate and Lower rate were identical

- CBIC vide circular No. 37/2018 –Cus dated 09.10.2018 issued that during 01.07.2017 to 30.09.2017, exporters were eligible to claim higher rate of duty drawback with condition that they will not claim refund of IGST Paid on exported goods.
- However They claimed higher rate of duty drawback and submitted necessary declaration though they did not realise that amount of refund of IGST is much higher than the duty drawbacks available. Hence, now, they cannot claim refund of IGST.

How to claim refund of unutilized input tax credit

 Refund of unutilized input tax credit is allowed in two scenarios mentioned in sub-section (3) of section 54 of the CGST Act. These two scenarios are zero rated supplies made without payment of tax and inverted tax structure. În sub-rule (4) and (5) of rule 89 of the CGST Rules, the amount of refund under these scenarios is to be calculated using the formulae given in the said sub-rules. The formulae use the phrase 'Net ITC' and defines the same as "input tax credit availed on inputs and input services during the relevant period other than the input tax credit availed for which refund is claimed under sub-rules (4A) or (4B) or both". It is clarified that as the transitional credit pertains to duties and taxes paid under the existing laws viz., under Central Excise Act, 1944 and Chapter V of the Finance Act, 1994, the same cannot be said to have been availed during the relevant period and thus, cannot be treated as part of 'Net ITC'.

GST PORTAL GLITCHES

- Technical Issues in Refunds
- In re: Star rays vs. Union of India (2018) 100 taxmann.com 73(bo.)
- The petitioner paid IGST in respect of goods which had been exported. Due to defect in online system, there was short refund of integrated goods and services tax aggregation to Rs. 8.42 crores as, due to technical difficulties, the reconciliation of the shipping bills and the invoices was not possible.
- The revenue stated that the refund applications would be disposed on the petitioners carrying out the necessary modifications in the GSTR-1 and GSTR-3B.

• Ruling:

• It has been held that the revenue stated that the refund applications would be disposed on the petitioner carrying out the necessary modifications in the GSTR-1 and GSTR-3B forms and communicated same to the revenue authorities.

Refund provisions are covered under section 54 & 55 of CSGT ACT,2017

- Refund of unutilized input tax credit shall be allowed in following cases —
- (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 unutilized 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.
- Provided further that no refund of unutilized 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.

No Refund of Input Tax Credit of transitional credit in TRAN-1 used for exports of goods or services

- The refund of Input Tax Credit is only of 'Net ITC' i.e, input tax credit availed during relevant period thus, refund of Input Tax Credit in TRAN-1 is not available (even if used for export of goods or services or under inverted duty structure) vide CBIC Circular no. 37/11/2018- GST Dated 15-3-2018
- The above view though stands unfair for exporters, reason being upto September 2017, exporters were permitted to have duty drawback of both customs portion and excise portion and hence, some exporters must have got partial relief.

REFUND OF EXPORTS

- In case of zero-rated supply of goods or services or both without payment of tax under bond or letter of undertaking in accordance with the provisions of subsection (3) of section 16 of the Integrated Goods and Services Tax Act, refund of input tax credit shall be granted as per the following formula:
- Refund Amount = (Turnover of zero-rated supply of goods + Turnover of zero-rated supply of services) x Net ITC ÷ Adjusted Total Turnover Where,- (A) "Refund amount" means the maximum refund that is admissible;

AUTHORITY FOR ADVANCE RULING (GST)WEST BENGAL DECIDED ON 28.01.2019

In Re: storm communications Pvt. Ltd.

FACTS

- (1)can a person registered in west Bengal claim ITC for CGST and SGST paid in other states.
- (2)can ITC of one state's CGST be adjusted for payment of another state's CGST.

RULING

• As per section 2(62) input tax in relation to a registered person means CGST, SGST, IGST and UTGST paid on supply made to him. Whereas as per section 25(4) a person having registration in more than one state shall deemed to be a distinct person in respect of each registration. And whereas as per Section 16 only a registered person can claim ITC.

On a combined reading of above provision it can be validly said that:

- registration is valid only in particular state not in whole of India.
- And only a registered person is eligible to claim ITC.
- Hence, a person registered in west Bengal cannot claim ITC for GST paid in other states, and
- further ITC of one state's CGST cannot be adjusted for payment of another state's CGST.

AUTHORITY FOR ADVANCE RULING (GST)WEST BENGAL DECIDED ON 08.01.2019

In Re: GGL Hotel and Resorts Company Ltd.

FACTS

- Whether ITC is available on lease rent paid during preoperative period for the leasehold land on which resort is being constructed to be used for furtherance of business, when the same is capitalised and treated as capital expenditure.
- RELEVANT PROVISION OF GST ACT: Section 17 of the Act inter alia deals with blocked credit. It inter alia provides that "credit shall not be available for goods or services or both received by a taxable person for construction of immoveable 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".

 The expression construction is explained to include reconstruction, renovation, addition, alterations or repairs, to the extent of capitalization, to the said immoveable property.

APPLICANT'S CONTENTION

 On the other applicant contends that the lease rent is capitalized under the head 'Leasehold Land' and not under the head 'building block' and hence the lease rent is not used for construction of resort.

RULING

• ITC is not available to the applicant for the lease rent paid during pre-operative period for leasehold land used in furtherance of business, when the same is capitalized and treated as capital expenditure. Further, it is irrelevant in the context whether lease rent is capitalized under the head 'Leasehold Land' or 'Building Block'. Concepts, Analysis and Insight in respect of Critical issue with respect to Disallowances under Section 17(5)

SECTION 17 - Apportionment of credit and blocked credits.

Section 17(5) of CGST Act,2017, has been amended by CGST (Amendment) Act, 2018 so as to change the criteria for eligibility of ITC on motor vehicles. Some ITC which was not eligible earlier, is now eligible through amendments are to take effect from 1.02.2019 which are as under:

- (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;

SECTION 17(5)(a)

- (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;

1: In Re: Narsingh Transport MANU/AR/0046/2019 FACTS

- Applicant is engaged in providing GTA (goods transport agency) services and avails Input Tax Credit of GST paid on purchase of cars which are further leased by the applicant to other companies on monthly lease rent.
- Whether GST paid on these input goods (cars) can be claimed as Input Tax Credit.

RULING

 Applicant is entitled to claim ITC of GST on cars. However on termination of lease agreement, if vehicle is not leased to other customer, the applicant shall be liable to reverse ITC claimed.

- It is pertinent to mention that ,earlier, disallowances was in respect of all motor vehicles. Now, the disallowance is only in respect of motor vehicles with seating capacity upto 13 persons.
- The ITC on motor vehicle used for transportation of goods was eligible prior to 01.02.2019 and continues to be eligible after 1.02.2019.

- 2: In Re. **Indian Cotton Solutions.Com Pvt. Ltd.** Authority for Advance Ruling, Andhra Pradesh (MANU/AR/0717/2018) it held that:
- "Motor vehicles used as Mobile Cotton Lab for testing of cotton not eligible for ITC credit in terms of Section 17(5) of Central Goods and Service Tax Act, 2017"

Q. Whether input tax credit on motor vehicles admissible?

Ans.

Motor Vehicles for transportation of Goods: Input Tax Credit is admissible for motor vehicles meant for transport of goods

Motor Vehicles for transportation of persons: Input Tax Credit on motor vehicles for transportation of persons having approved seating capacity of not more than 13 persons is not allowed except when they are used for making the following taxable supplies, namely:-

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

Q. Whether tax paid on repairs, maintenance and insurance of Motor Vehicles used for the purpose of business is eligible for ITC?

- Ans. The ITC on repairs, maintenance and general insurance of those motor vehicles is blocked if the ITC is blocked under Section 17(5)(a) of the CGST Act 2017.
- Motor Vehicles for transportation of Goods: ITC on repairing, maintenance and insurance of motor vehicles for transportation of goods is admissible with no restrictions.

 Motor Vehicles for transportation of persons: Thus, ITC on repairing, maintenance and insurance of motor vehicles for transportation of persons carrying more than 13 persons will be admissible. However, for motor vehicles for transportation of persons carrying upto 13 persons will be admissible only if it is used for transportation of passengers, further supply of such motor vehicles and imparting training on driving. [Section 17(5) (ab) as substituted vide the CGST (Amendment) Act, 2018].

Section 17(5)(aa) of CGST Act.

- (aa) vessels and aircraft are not eligible for ITC 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;

- Analysis
- Services of leasing, renting or hiring of vessels or aircraft referred to in clause (aa) are also not eligible for ITC except when used for the purposes specified therein under section 17(5)(b)(i) of CGST Act w.e.f 1.02.2019

Section 17(5)(ab)

- (ab) services of general insurance, servicing, repair and maintenance in so far as they relate to motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa): Provided that the input tax credit in respect of such services shall be available—
- (i) where the motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) are used for the purposes specified therein; (ii) where received by a taxable person engaged— (I) in the manufacture of such motor vehicles, vessels or aircraft; or (II) in the supply of general insurance services in respect of such motor vehicles, vessels or aircraft insured by him;

Section 17(5)(b)

- (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."

ANALYSIS

- It is pertinent to point out here that the services by an employee to the employer in the course of or in relation to his employment is outside the scope of GST (neither supply of goods or supply of services).
- It follows therefrom that supply by the employer to the employee in terms of contractual agreement entered into between the employer and the employee, will not be subjected to GST. Further, the Input Tax Credit (ITC) Scheme under GST does not allow ITC of membership of a club, health and fitness centre [section 17(5)(b)(ii)].
- It follows, therefore, that if such services are provided free of charge to all the employees by the employer then the same will not be subjected to GST, provided appropriate GST was paid when procured by the employer. The same would hold true for free housing to the employees, when the same is provided in terms of the contract between the employer and employee and is part and parcel of the cost-to-company (C2C)."

1: In Re: National Aluminium Company Limited (21.01.2019 - AAAR - Odisha) MANU/AI/0004/2019

FACTS

The issue has arisen for adjudication consequent upon the Appellant-I seeking advance ruling vide application in respect of its entitlement of taking credit of tax paid on input & input services used for maintenance of its township/residential colony, guest house/transit house/training hostel, hospital, horticulture and maintenance & security service in townships claiming that these are used in furtherance of its business.

RULLING

- the ruling of the AAR that the Appellant-I is entitled to input tax credit of the tax paid on inward supply of input and input services for maintenance of guest house, transit house and trainee hostel is found to be not correct. the provision of residential accommodation through transit house/trainee hostel is also a perquisite in favour of the employees and hence tax paid on inward supplies of goods and services for the transit house/trainee hostel cannot be allowed the benefit of input tax credit.
- The guest house of the Appellant-I is used for temporary accommodation of its employees as well as non-employees. Though the provision of guest house may not be treated as a perquisite, it cannot also be treated as an activity integrally related to the business of the Appellant-I.

- That means, the guest house service provided by the Appellant-I to its employees as well as non-employees cannot be treated as an activity in course or furtherance of its business.
- Hence, it has been held that tax paid on inward supplies of goods and services in connection with the guest house cannot be allowed the benefit of input tax credit. To this extent, the appeal filed by the Appellant-II is sustainable and hence allowed.

2: In Re: National Aluminium Company Limited (21.01.2019 - AAAR - Odisha) : MANU/AI/0004/2019

 It has been held that The ruling of the AAR that services availed in relation to plantation and gardening within the plant area including mining area and the premises of other business establishments will qualify for input tax credit is found to be correct. Creation and maintenance of green area/zone inside plant/mining/office premises is a business necessity for controlling pollution as well as atmospheric temperature. It is also a requirement for preventing soil erosion. This is also mandated in various laws under which the Appellant-I conducts its business such as the Forest Conservation Act, the Environment Protection Act, etc. Therefore, such activities are integral to the business activity of the Appellant-I and hence can be treated as activities in course or furtherance of its business.

• (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;

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;

- Section 2(119) of CGST Act, 2017 defines "works contract" which 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.
- Hence, to qualify an activity as "works contract":
- (i) The activities to be undertaken under a works contract may be one or more of the following in relation to any immovable property viz. Building, Construction, Fabrication, Completion, Erection, Installation, Fitting out, Improvement, Modification, Repair, Maintenance, Renovation, Alteration, or Commissioning etc.

- (ii) Such activities shall be in relation to any immovable property.
- (iii) Transfer of property in goods is involved.
- Immovable property is defined in Section 3(26) of the General Clauses Act, 1897 as under:
- Immovable Property shall include land, benefits to arise out of land and things attached to earth, or permanently fastened to anything attached to the earth.

3: In Re: Rambagh palace Hotels Pvt. Ltd. (30.04.2019 - Authority For Advance Rulings) : MANU/AR/0102/2019

RULLING

Building Repair Work

- Q1.1 Whether GST paid on building materials, such as cement, concrete, bricks, cement or marble or stone slabs or tiles, paint, polish and any other building materials meant for repair of building shall be available for ITC?
- *Answer*-ITC will not be available to the extent of capitalization of building materials.

- Q1.2 Whether GST paid on labour supply for carrying out repair of building shall be available for ITC, where material and supervision is provided by the applicant?
- *Answer*-ITC will not be available to the extent of capitalization of GST on labour supply.

• Furniture & Fixture repairing work

- Q3.1 Whether GST paid on wood, board, mica, tapestry, paint, polish and other consumables meant for repair of existing furniture & fixtures shall be available for ITC?
- **Answer**-ITC for GST paid on supply of above mentioned goods will be available in accordance with Section 16 of CGST/RGST Act, 2017.

- Q3.2 Whether GST paid on labour supply for carrying out repair of furniture & fixtures shall be available for ITC, where material and supervision is provided by the applicant?
- *Answer*-ITC will be available for service of labour supply in accordance with Section 16 of CGST/RGST Act, 2017.

Being routine repairs, the amount spent on the above mentioned all scenarios are charged to revenue as per accounting standards.

- Q3.3 Will it make any difference if aforementioned works are carried out in a composite manner as a works contract for carrying out repair and maintenance job on movable furniture & fixtures such as, Sofa, Table, Chairs, Door, Cabinets, etc. where material as well as labour is supplied by a contractor as a composite supply under works contract?
- **Answer**-ITC will be available for GST paid on composite supply of goods (furniture & fixtures) and services (manpower supply) in accordance with Section 16 of CGST/RGST Act, 2017.

- Central Goods and Services Tax (Fourth Removal of Difficulties) Order, 2019 - 29.03.2019 - Ministry of Finance: MANU/GSCU/0021/2019
- The Central Goods and Services Tax (Fourth Removal of Difficulties) Order, 2019.
- For the removal of difficulties, it is hereby clarified that in case of supply of services covered by clause (b) of paragraph 5 of Schedule II of the said Act, the amount of credit attributable to the taxable supplies including **zero rated supplies and exempt supplies** shall be determined on the basis of the area of the construction of the complex, building, civil structure or a part thereof, which is taxable and the area which is exempt.

Section 17(5)(d)

• (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.

4: In Re: Tewari Warehousing Co. Pvt. Ltd. (18.02.2019 - Authority For Advance Rulings) : MANU/AR/0020/2019

- Facts
- The Applicant, stated to be supplying warehousing services, is constructing a warehouse on leasehold land, using pre-fabricated technology. According to the Applicant, it can be dismantled and reconstructed at a different location. He seeks a ruling on whether the input tax credit is admissible on the inward supplies for construction of the said warehouse.

- Immovable property" is not defined under the GST Act. The term 'goods' is defined under Section 2(52) of the GST Act as all kinds of moveable properties 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.
- Property other than goods, money and securities should, therefore, be considered as 'immovable property' under the GST Act.
- However, in the absence of a definitive explanation under the GST Act, recourse is being taken to other allied Acts dealing with "property" to determine the definition of "Immovable property".

RULLING:

• the Applicant is constructing a warehouse that is intended to be used as a permanent structure, and associated with beneficial enjoyment of the land on which it is being built. The technology used for the construction of the warehouse involves the application of pre-fabricated structures and also civil work for supporting the prefabricated structure and developing the floor of the warehouse. The warehouse cannot be conceived without beneficial enjoyment of the civil structure embedded on earth. The warehouse being constructed is, therefore, an immovable property, and the input tax credit is not admissible on the inward supplies for its construction, as the credit of such tax is blocked under Section 17(5)(d) of the GST Act.

- (e) goods or services or both on which tax has been paid under section 10;
- (f) goods or services or both received by a non-resident taxable person except on goods imported by him;
- (g) goods or services or both used for personal consumption;
- (h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and (i) any tax paid in accordance with the provisions of sections 74, 129 and 130.

INPUT TAX CREDIT ON CSR EXPENSES

- 5: In Re: Polycab Wires (P.) Ltd. (02.03.2019 Authority For Advance Rulings) : MANU/AR/0097/2019
- facts
- The applicant is a dealer in electrical goods, cables of all kinds including winding wires, pipes etc. They had supplied electrical items to Kerala State Electricity Board through their distributors spread across the State in connection with reinstating connectivity in the flood ridden areas as part of the "mission reconnect".

ISSUE INVOLVED

- The materials are supplied free of cost as a CSR activity. In order to ascertain the impact of GST on such goods supplied on free of cost, the applicant required advance ruling on the following;
- (i) Determination of GST liability with respect to goods provided free of cost by the Distributors of M/s. Poly Cab Wires Private Limited to KSEB for reinstating connectivity in flood ridden areas; and admissibility of input tax credit in relation to such goods.

RULLING

In order to operationalize the commitment of the applicant to provide goods at free of cost to Kerala State Electricity Board for flood renovation work, the applicant instructed its distributors to provide the goods. The distributors billed the goods to Kerala State Electricity Board and paid GST to Government- In the invoice so issued, the distributor had valued the goods for the purpose of tax and value was shown as discount. In this supply, since the consideration is not wholly in money. Rule 27 of the CGST/KSGST Rules would apply for valuation. After the goods are supplied to Kerala State Electricity Board, distributor would raise claim to the applicant who will reimburse the value to the distributor. This being the case, the distributor would be entitled for input tax credit on the goods supplied to Kerala State Electricity Board on instructions from the applicant.

• (ii) Applicability of Sec. 17(5) of CGST Act, 2018 on CSR expenses.

The applicant distributed electrical items like, switches, fan, cables etc. to flood affected people under CSR expenses on free basis without collecting any money. For these transactions input tax credit will not be available as per Section 17(5)(h) of the KSGST and CGST Act.

AVAILABILTY OF ITC IN MISCELLENOUS CIRCUMSTANCES

- 6: Authority for Advance Ruling, Tamil Nadu (MANU/AR/0315/2018) In Re. Adwitya Spaces Pvt. Ltd.
- **Facts**: The Applicant is in the business of letting out property and is in the receipt of rental income. The letting out is being arranged by a property consultant who charges brokerage for the same.
- **Issue Involved:** Whether applicant is eligible to take Input Tax Credit of the CGST & SGST charged by the Consultant in respect of brokerage services and adjust the same against output tax payable against Renting of immovable property.

- **Basis of Ruling:** Inward supply of Brokerage services not being listed in any clause under Section 17(5) of CGST Act or SGST Act, assessee as a recipient of such service is eligible to take credit.
- **Ruling:** The applicant is eligible to take credit of the CGST & SGST charged by the consultant raised on the applicant for real estate brokerage services for renting of property on a fee basis, subject to the conditions as per Section 16, 17 and 18 of CGST & SGST Act

Analysis and Interpretation: Concept, Analysis and Critical Issues in Relation to Genuinity of Supplies

ssuance of fake invoices

- 1: In Re: Vimal Nayan and Ors. vs. The Principal Commissioner of GST and Central Excise and Ors. (12.02.2019 MADHC) : MANU/TN/1533/2019
- Facts
- The case of the prosecution is that various organised companies/persons registered with the GSTN portal have involved themselves in issuing fake invoices without actual supply of Goods/Services and also receiving fake invoices without receipt of goods and avail input tax credit to cheat the exchequer. In the instant case, it is the specific case of the prosecution that the concerned companies have involved in issue of fake invoices without supply of goods and also received fake invoices without receipt of goods and thereby all the accused persons have committed offences under Section 132(1)(b) and 132(1)(c) of CGST Act, 2017. [CGST Act, 2017 - hereinafter referred as "the Act"].

Basis

• The enactment in question has come into force very recently with a laudable object of one country one tax. Therefore wherever the department finds that certain provisions in the Act is misused by creating fake invoices and input tax credit is being availed without any movement of goods, the same has to be curbed and nipped in the bud to ensure that it does not grow into another mega scam having a direct impact on the economy of this nation. Since the department has collected some prima facie materials, they want to act fast before it becomes a huge racket, failing which the entire economy of this country would weaken and collapse.

• If the petitioners are conducting genuine business through the above said companies, they can easily prove during the investigation the actual movement of goods, which will all be borne out by documents. If the department is satisfied regarding the same, the department will leave out the companies belonging to the petitioners and proceed further with the investigation.

It held that the department must be given the complete independence to investigate the cases since it involves the national interest. The Court by entertaining an Anticipatory Bail Petition and by imposing certain conditions, should not tie the hands of the department in proceeding further with the investigation since what has been unearthed till now is only the tip of the iceberg and there is a long way to go for the department to find out how long this fake invoices have extended their tentacles.

- Hence, it is true that the entire issue is borne out by documents and once the petitioners co-operate for the investigation by submitting all the relevant documents, they should not be unnecessarily arrested.
- However, it is a settled proposition of law that this Court while considering a petition for Anticipatory Bail has to necessarily taking into consideration the nature and gravity of the accusation in a given case. When a case involves serious offences, grant of Anticipatory Bail by itself will cause prejudice to the investigation. Where the accused persons are charged of violation of CGST Act, involving colossal loss of revenue to the exchequer and the investigation is at a very nascent stage, prudence demands that this Court should lay of its hands from the investigation and allow complete independence to the prosecuting agency to proceed further with the investigation.

2: The Hon'ble Apex Court in the case of Maruti Suzuki Limited v. Commissioner of Central Excise, Delhi, MANU/SC/1471/2009 it held that unless the nexus is established between the services rendered and the business carried on by the assessee, the benefit of CENVAT credit is not allowable. In the present case, rendering taxable services at the residential colony established by the assessee for the benefit of the employees, is not an activity integrally connected with the business of the assessee and therefore, the tribunal was not justified in holding that the services such as repairs, maintenance and civil construction rendered at the residential colony constitutes 'input service' so as to claim credit of service tax paid on such services under Rule 2(1) of the CENVAT Credit Rules, 2004."

THANK YOU