# SECTION 17(5)(d) GST Act – BLOCKED CREDIT HOW FAR IS IT BLOCKED ?

By

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In this Article, an attempt has been made to amplify and explain the restrictions and prohibitions as contained under Section 17(5)(d) of Goods and Service Tax Act, 2017 (hereinafter called GST Act), which is popularly referred to as "blocked credits". In fact, in my humble view, neither in the previous regime i.e. Pre-GST regime nor in the GST regime, there is any embargo or prohibition as is sought to be canvassed in many quarters in the trade, industry and professional circle, which I will try to explain and submit with the help of various cases rendered by different Hon'ble High Courts. The relevant provisions of Section 16 and 17 of CGST Act, 2017 are reproduced herein-below:-

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**Section 16 Eligibility and conditions for taking Input Tax Credit** (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 service 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 entitled to the electronic credit ledger of such person.

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:-

(d): goods or service or both received by a taxable person for construction of an 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.

Explanation: For the purposes of Clauses ©and (d) the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalization, to the said immoveable property.

2: The Section 17(5)(d) GST Act in laymen's parlance is also called "blocked credit". Hence, the question, therefore, arises for consideration is as to whether, in all circumstances, wherever there is a emergence of "immoveable property", be it either at the "final stage" or at an "intermediate stage", no credit of (a) inputs (b) input service (c) or capital goods shall be allowed ?

3: Generally, it is commonly understood in the trade and professional circle, whenever there is a emergence of immoveable property, no ITC would be allowable by virtue of prohibition contained in Section 17(5)(d). First of all, let us understand, what is the meaning of word "immoveable property", which has not been defined in GST Act but in Section 3(26) of "General Clauses Act" in the following words. In fact, Transfer of Property Act, does not define exhaustively the expression "immoveable property". Hence, we have to fall back upon the definition as given in "General Clauses Act".

**Section 3(26) of General Clauses Act:**

"immoveable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth".

4: Since I would be citing the cases dealing with the definition of (a) inputs and (b) input services and hence, let us understand the meaning of words of "inputs" or "input service" as given in the Cenvat Credit Rules, 2004 (i.e. pre-GST regime). Rule 2(k) of Cenvat Credit Rules, 2004, define "input" – which is inclusive definition, inter-alia, reads as under:-

(k): "input" means:
(i) all goods used in the factory by the manufacturer of the final product; or
(ii)……..
(iii)…….
(iv)all goods used for providing any output service

but excludes:

(A): light diesel oil, high speed diesel oil etc.etc.
(B): all goods used for :-
(i) construction of a building or a civil structure or a part thereof; or
(ii) laying of foundation or making of structures for support

of capital goods;

5: The above is position subsequent to 1.4.2011. A question then arises for consideration as to whether despite a bar and exclusion as contained in (B) (i)(ii), can the Cenvat Credit (now ITC) could be availed on (a) input and (b) input services (c) capital goods used in constructing building or civil structure or part thereof – which undoubtedly is a "immoveable property". Let us try to find answer with the help of many judgments of different Hon'ble High Courts and that of Hon'ble Custom Excise & Service Tax Appellate Tribunal.

5.1: The Hon'ble Supreme Court in the case CCE vs. Solid and Correct Engineering Works MANU/SC/0237/2010 has defined "immoveable property" and has observed as under:-

> Applying the above tests to the case at hand, we have no difficulty in holding that the manufacture of the plants in question do not constitute annexation hence cannot be termed as immovable property for the following reasons:
>
> > (i) The plants in question are not per se immovable property.
> >
> > (ii) Such plants cannot be said to be "attached to the earth" within the meaning of that expression as defined in Section 3 of the Transfer of Property Act.
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> > (iii) The fixing of the plants to a foundation is meant only to give stability to the plant and keep its operation vibration free.
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> > (iv) The setting up of the plant itself is not intended to be permanent at a given place. The plant can be moved and is indeed moved after the road construction or repair project for which it is set up is completed.

6: The Hon'ble High Court of Andhra Pradesh in the case of Commissioner of C. Excise, Visakhapatnam-II Vs. Sai Sahmita Storages (P) Ltd. MANU/AP/0510/2011 has held as under. In the present case, the company was engaged in providing taxable output service of " storage and logistic services" and Steel and Cement had been used for construction of warehouses and godowns.

> 9. There is no dispute, in these cases, that the assessee used cement and TMT bar for providing storage facility without

which, storage and warehousing services could not have been provided. Therefore, the finding of the original authority as well as the appellate authority are clearly erroneous, which was correctly rectified by the CESTAT.

7: The Hon'ble High Court of Gujarat in the case of Mundra Ports & Special Economic Zone Limited Vs. CCE MANU/GJ/0260/2015 has held as under:-

**The contention of Party/Assessee**

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 DB of AP High Court in CCE Vs. Sai Sahmita Storages (P) Limited, MANU/AP/0510/201:2011 (270) ELT 33 (AP) 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 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. It is not in dispute that the appellant is a taxable service provider of 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.

**Contention of Department:**

9. Mr. Ravani has also vehemently urged that since jetty was constructed by the appellant through the contractor and construction of jetty is exempted and, therefore, input credit would not be available to the appellant as construction of jetty is exempted service. The argument though attractive cannot be accepted. The jetty is constructed by the Appellant by purchasing iron, cement, grid etc. which are used in construction of jetty. The contractor has constructed jetty. There are two methods, one is that the appellant would have given entire contract to the contractor for making jetty by giving material on his end and then make the payment, the other method was that the appellant would have provided

material to the contract and labour contract would have been given. The appellant claims that he has provided cement, steel etc. for which he was entitled for input credit and, therefore, in our opinion, the appellant was entitled for input credit and it cannot be treated that since construction of jetty was exempted, the appellant would not be entitled for input credit. The view taken contrary by the Tribunal deserves to be set aside.

**Findings/Ratio of Judgment.**

10. For the reasons given above, this Tax Appeal succeeds and is allowed. The denial of input credit to the appellant by the respondent is set aside. The appellant would be entitled for input credit.

8: The Hon'ble Supreme Court in the case of Jayaswal Neco Ltd. Vs. CCE MANU/SC/0361/2015 has held as under:-

11. In the process, the court also explained that there is no warrant for limiting the meaning of the expression "in the manufacture of goods" to the process of production of goods only. In the opinion of the court, the expression "in the manufacture" takes within its compass, all processes which are directly related to the actual production. It noted that goods intended as equipment for use in the manufacture of goods for sale are expressly made admissible for specification. The court further marked that drawing and photographic materials falling within the description of goods intended for use as "equipment" in the process of designing which is directly related to the actual production of goods and without which commercial production would be inexpedient must be regarded as goods intended for use "in the manufacture of goods".

13. Applying the aforesaid test to the facts of this case, it is apparent that the use of "railway tracks" is related to the actual production of goods and without the use of the said railway track, commercial production would not be possible.

These railway tracks used in transporting hot metal in ladle placed on ladle car from blast furnace to pig casting machine for manufacture of pig iron. Secondly the system also helps in taking hot pigs from pig casting machine to pigs storage yard by the big wagon where hot pig iron are dumped for cooling and making ready for dispatchers. This Railway tracks are also used in handling of raw materials at wagon tippler to stacker reclaimer where stacking and reclaiming of raw material is

taken place and required quantity is conveyed for further processing at stock house.

18. We find from the order of the Commissioner that in spite of taking note of the aforesaid use of the railway tracks and accepting the same as correct, the Commissioner denied the relief to the Appellant on an extraneous ground, i.e. railway tracks were used for other purposes as well, namely, apart from conveying hot metal and hot pigs, it was used for carrying raw materials and finished goods as well. This can hardly be a ground to deny the relief inasmuch as by incidental use of the railway tracks for some other innocuous purpose, it does not lose the character of being an integral part of the manufacturing process. The Commissioner has further observed in his order that the railway track is not utilized directly or indirectly for producing or processing of goods or bringing about any change for manufacture of final product. This conclusion, obviously, is completely erroneous and amounts to misreading of the process. Such an error has occurred because the Commissioner did not keep in mind the principle of law laid down by this Court in M/s. J.K. Cotton Spinning & Weaving Mills Co. Ltd.'s case.

The Supreme Court held that "Railway Track" meant for movement of materials raw materials can be said to be used in the "manufacturing process".

9: The Hon'ble High Court of Chhattisgarh in the case of C&ST. Vs. Vimla Infrastructure India Pvt. Ltd. MANU/CG/0185/2018 has held as under:-

7. 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 Sleeper, which, in turn, has been constructed by using MBC Railway Sleepers and RLS Rails.

8. 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 Handing Services". The Commissioner eventually concluded that the Company cannot provide any 'logistic services' viz., "Cargo Handling Services" without the facility of "Private Railway Side.

9.1: The Hon'ble High Court dismissed the appeal of the Department while holding that the Respondent/assessee is entitled to Cenvat Credit for construction of "Railway Siding" which is admittedly immoveable property.

10: The Hon'ble CESTAT in the case of Milroc Good Earth Property & Developers Ltd. Vs. CCE & ST., Goa Manu/CM/0082/2019 has held as under:-

> Appellant had availed credit in respect of input services primarily of advisory nature and of consultancy service other than the construction service and discharged the service tax on the services provided in the hotel like (i) accommodation in hotels (ii) restaurant service, (iii) health club and fitness centre service and (iv) other taxable service, other than the 119 listed services. He also filed the list of services along with the Appeal memo, on which the Appellant has availed the Cenvat Credit.
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> 9. I have gone through the list of services on which the cenvat credit has been availed by the Appellant, the agreement as well as the invoices and I am of the view that none of these services are related to construction. These are the services which normally performed after the construction activity is over and therefore provisions of Section 65B ibid are not attracted in the facts of this case. The hotel construction is not the end activity of the appellants. Rather their end activities are providing various taxable services like accommodation, restaurant services, spa services and other related services in the said Hotel and they have availed credit in respect of these services which are other than construction service. They have, therefore, fulfilled the conditions specified in Rule 2 (1) ibid and thus the appellant is entitled to the credit of the same under the provision of Rule 3(1) ibid. The argument of Revenue that the services have been utilized for construction of the Hotel which is not excisable and therefore credit is not admissible, is unfounded. According to me, the credit in issue has been availed on input services which have been used for providing

the output services i.e. the services mentioned above and hence I find that the reasoning by the lower Authorities is devoid of any merit.

11: The Hon'ble Division Bench of Delhi High Court in the case of Vodafone Mobile Services Limited and Ors. Vs. CCE MANU/DE/3088/2018 has held as under:-

> Aditya Cements Ltd. Vs. Union of India 2008 (221) ELI 362, a decision of Rajasthan High Court, considered whether the asessee was entitled to avail the credit on materials used for laying railway track (which is an immovable property emerging at intermediate stage) that was used for transporting of coal to the factory. The coal so transported was used for the manufacture of dutiable final product. The High Court held that the assessee was entitled to avail credit on material used in laying railway track materials. Ispat Industries Limited Vs. Commissioner of Central Excise 2006 (195) ELT 164, was a case where the High Court allowed credit of duty paid on angles, channels, plates, etc. which were used in erection, installation and commissioning of the machinery (immovable). The Revenue's appeal against this judgment was rejected by order dated 19.07.2007 in Central Excise Appeal No.187 of 2006, by the Supreme Court, In Llyods Steel Industries v. Commissioner of Central Excise Manu/CM/0668/2004: 2004 (64) RLT 732, the High Court allowed credit of cement and steel used for construction of foundation that were not excisable goods. The Revenue's appeal against the judgment was dismissed. Commissioner of Central Excise Vs. ICL Sugars Limited MANU/KA/2891/2011 (Kar.) was a Karnataka High Court decision, rejecting the Revenue's appeal holding that plates, etc, used for fabrication and installation of a storage tank would be admissible for credit. The Revenue's sole contention to deny credit was that the storage tank was an immovable property and once erected to the earth becomes non-excisable. Negating this contention, the High Court allowed the credit.
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> 68. On the basis of the above reasoning, the Tribunal had denied Cenvat Credit to the assessee on the premise that the towers erected result into an immovable property, which is erroneous and contrary to the judgment of the Supreme Court in the case of Solid and Correct Engineering (supra). The towers which are received in CKD condition, are assembled/erected at the site subsequently giving rise to a structure that remains immovable till its use because of safety,

stability and commercial reasons of use. The entitlement of CENVAT credit is to be determined at the time of receipt of goods. The fact that such goods are later on fixed/fastened to the earth for use would not make them a non-excisable commodity when received. Therefore, this question is answered in favour of the assessee and against the Revenue.

72. 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. 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.

73. 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 re-located, the assessee also has to relocate the tower and the pre-fabricated shelters, thereby, implying that the towers and the pre-fabricated shelters, are not immovable property.

**POST GST REGIME:**

12: The Orissa High Court in the case of Safari Retreats (P) Ltd Vs. Chief Commissioner of Central Goods & Service Tax, 2019-TIOL-1088-HC-Orissa-GST, held on 17.4.2019 that if the assessee is required to pay GST on rental income arising out of investment (i.e. construction in the present case), he is eligible to have the ITC on the GST paid under Section 17(5)(d).

13: Even otherwise, there is no legal, valid and justifiable reason for not allowing the ITC of various (a) inputs, (b) input services and (c) capital goods which have gone into the construction of immoveable property which has been let out for providing output service on payment of rent or license fee and the GST is paid thereon.

14: In my humble view, Section 17(5)(d) of GST Act, prohibit the taking of ITC of various construction materials which have gone into construction of (i) Administrative Building (ii) Township for residence of Staff and Worker (iii) Shed and Rest Rooms for persons who brought raw materials to the factory except where it is mandatorily required viz. in Sugar Industry (iv) Civil Construction for parking of Vehicles and (v) other civil construction which is totally unrelated to the manufacturing process. In other cases, in view of various judgments of different Hon'ble High Court and that of CESTAT, the assessee shall be entitled to ITC. In one case only, the Department had filed an appeal before the Hon'ble Supreme Court but there is no stay.

15: Hence, I am of the firm view that that the assessee is entitled to ITC on various materials, input services and capital goods which had been used in emergence of immoveable property but said immoveable property had been used either (i) manufacture of goods and (ii) provision of output service which is taxable and tax has been paid thereon. Therefore, there is absolutely no reason as to why the assessee should not take credit of tax paid on (i) inputs (ii) input service and (iii) capital goods which had gone into construction, fabrication and erection of immoveable property.