

Input tax Credit and Immovable Asset under GST

1. Introduction –

Section 17 of the CGST Act deals with how the Input tax credit can be utilised. Along with this, section 17 provides the clauses to explain the tax credits which are not to be considered by the Assessee while complying with the GST Act. While the First four subsections ie subsections 1, 2,3 and 4 deal with the instances where the assessee is guided as to how and what to take credit, subsection 5 specifically deals with the credits which are blocked for the Assessee and are not available for him. Subsection 5 deals with instances where the Input tax is blocked for the Assessee from availing it.

Now, here is an attempt to put forth the intricacies and explain the provisions of Section 17(5)(d) vis-à-vis the Temporary and Permanent Structures. Although the GST Act deals otherwise on the movable and immovable assets, here, an attempt is made to understand the GST treatment on Temporary and Permanent under immovables assets.

Interestingly Section 17(5) starts with an obstante clause, negating any other contrary / different provision elsewhere. This is a negative clause, which overrules and prevails over any other provision which is contrary to this.

Section 17(5)(d) along with explanation as provided under act is produced here for convenience

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

Explanation. - For the purposes of clauses (c) and (d), the expression "construction" includes re-construction, renovation, additions or alterations or repairs, to the extent of capitalisation, to the said immovable property; Unquote.

Capitalization Test:

- **If the expense is capitalized in the books, ITC is blocked.**
- **If the expense is not capitalized (treated as revenue expense), ITC may be available, subject to the satisfaction of section 16 of the GST Act.**

2. Deliberation –

Now, the important aspects in the above definition are that, this covers both the Services and Goods consumed for construction of an Immovable property. This construction can be on his own ie done by himself or through another person. And the immovable property is to be other than the Plant and Machinery.

Construction of the immovable property needs services like Project Management Consultancy, Professional services of the Architect, Engineer, Expert etc, who will be providing the services which become the input services in the construction of the immovable property, be it Factory, godown, or

any other. This construction also requires the goods like Steel/ cement/ Sand/ Jelly etc. Many a times these goods are supplied with GST. As per 17(5)(d) of the act, the GST paid on these are not to be taken as Credit. Such tax needs to be capitalised and treated as Cost of the Capital Asset, in conformity with the Accounting Standard AS 10, Accounting for Fixed Assets.

ITC on goods and/or services used in construction of immovable property is available only in the following three situations:

- (i) For construction of eligible plant or machinery
- (ii) When the value of goods and/or services is not capitalized [again subject to section 16]
- (iii) When the construction is not on own account [ie for Developers/ Contractors/

An important exception to the definition of Immovable property is the 'Plant and Machinery'. If the tax payer is carrying out works contract activities which are necessary for the installation/ functioning of the Plant and Machinery, then the Input tax which otherwise is not available, can be availed.

Items like lifts, elevators, air-conditioners, and fire safety equipment are specifically excluded from "Plant and Machinery" under GST law and are not eligible for ITC.

ITC Eligibility Under GST – Judicial Rulings (Advance Rulings - AAR)

Asset	ITC Eligibility	Judicial Ruling & Reference	Reason Given by AAR
Lifts & Elevators	Not Available	<ul style="list-style-type: none"> ◆ <i>M/s. The Varachha Co-op Bank Ltd.</i> (AAR Gujarat, 2021) ◆ <i>M/s. Wago Private Ltd.</i> (AAR Maharashtra, 2018) ◆ <i>M/s. Precision Automation and Robotics India Ltd.</i> (AAR Maharashtra, 2018) 	Becomes part of the building and is classified as immovable property under GST, making ITC ineligible under Section 17(5)(d) .
Air-conditioners	Not Available	<ul style="list-style-type: none"> ◆ <i>M/s. The Varachha Co-op Bank Ltd.</i> (AAR Gujarat, 2021) ◆ <i>M/s. Wago Private Ltd.</i> (AAR Maharashtra, 2018) 	Once installed, AC units become part of the building , making them ineligible for ITC under Section 17(5)(d) .
Fire Safety Equipment	Not Available	<ul style="list-style-type: none"> ◆ <i>M/s. Precision Automation and Robotics India Ltd.</i> (AAR Maharashtra, 2018) ◆ <i>M/s. Wago Private Ltd.</i> (AAR Maharashtra, 2018) 	Firefighting equipment is fixed to the building , making it part of immovable property and not eligible for ITC .
Solar Power Plants	Available	◆ <i>IN RE: Giriraj Renewables Pvt. Ltd.</i> (AAR Karnataka, 2018)	Classified as "Plant & Machinery" , directly used for taxable outward supplies (electricity generation) .

			Hence, ITC is allowed under Section 16 of CGST Act.
Modular Partitions & Glass Ceilings	Available	◆ <i>IN RE: Tata Advanced Systems Ltd. (2023)</i>	Not permanently affixed to the building and classified as movable property , making ITC eligible .

Note – Although the above AAR are relating to specific cases, their application/ relevance to the case in hand needs to be justified based on the facts of the individual case. Each AAR is issue and facts based.

Now, this leads us to how Plant and Machinery is treated differently under this.

- An immovable property can be both temporary and permanent structure. Although under the GST provisions, the term "temporary structure" is not explicitly defined, it is conveniently derived from judicial precedents and related legal definitions.
- A temporary structure is generally considered as a non-permanent, movable, relocatable construction intended for short-term use. The classification of such a structure as either movable or immovable property is crucial in determining whether Input Tax Credit (ITC) can be claimed. We understand as we delve further, that,
- Under the GST Act, "goods" are defined as "every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply".
- The terms "movable" and "immovable" property are not defined in the GST Act. And not defined directly under Transfer of property act also. As such, we are considering interpretation under the General Clauses Act 1897. According to the General Clauses Act, Section 3(26) "immovable property" includes "land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth".
- An Immovable property can be Temporary or Permanent in nature.
- It is clear that, an Immovable property which is permanent in nature, is explicitly covered under the provisions of Blocked Credits. I.e, the tax payer is not eligible to take the ITC on the Services and Goods going into the Immovable property which is permanent in nature.
- Now, to look into the temporary immovable properties, The Authority for Advance Rulings (AAR) in many instances [IN RE: M/S. THE VARACHHA CO. OP. BANK LTD. DT July 30, 2021,; IN RE: M/S. PRECISION AUTOMATION AND ROBOTICS INDIA LTD., DT June 30, 2018,; IN RE GIRIRAJ RENEWABLES PRIVATE LIMITED., DT February 17, 2018] has held that the Temporary structures which are fixed strongly in earth or imbedded in earth, or those attached to what is so imbedded in earth, are treated as permanent structures. I.e Lifts and Elevators which are attached to what is strongly imbedded in earth, are treated as Permanent structures. As such, even though they can be treated as Plant and Machinery, because they are part of the permanent structures, they are covered under the provision of Section 17(5)(d). In case of VDM Hospitality Private Limited, AAR held that, Tax payer is in the business of organizing wedding and other functions from its own premises. As per Section 17(5)(d), the structure is permanent in nature as the structure (shamiana/ tent/ pandal) has been erected for permanent enjoyment and applicant does not plan to dismantle and move the structure to some other place.

- In contrast, detachable structures like glass ceilings and partitions which are not permanently attached to the earth, have been allowed ITC as they are considered movable properties.
 - Section 17(5)(d) of the CGST Act prohibits ITC on goods or services used for the construction of an immovable property, even if it is in the course or furtherance of business.
 - Taxpayers must carefully assess the nature of the structure to determine whether it qualifies as movable or immovable property. Structures that are temporarily erected but strongly attached to the earth, such as those for wedding functions, are generally treated as immovable property and do not qualify for ITC. However, structures that are detachable and not permanently fastened, such as glass partitions, may be eligible for ITC as they are considered movable properties.
3. Now, on a different aspect, what if the Tax payer is engaged in the business of dealing in Liquids and Chemicals, stored in storage tanks of Steel. Like the LPG bottling plants, which use bullets -both underground and on the ground for storing the raw materials. What is the treatment under GST act and implications under section 17(5)(d).
- On the face of it, these LPG bullets and tanks which store the LPG and Chemicals are planted inside the earth. Although these can be dismantled and transported, following AAR in VDM Hospitality Private Limited, such planted tanks are immovable assets and attract Section 17(5)(d). If the storage tanks are embedded in the earth and even if can be dismantled and moved, they would be considered part of the immovable property.
 - And Under the Central Goods and Services Tax (CGST) Act, 2017, there are specific provisions that govern the eligibility for claiming Input Tax Credit (ITC) on construction-related expenses.
 - **Section 17(5)(c) and (d) of CGST Act states that the ITC shall not be available for goods or services received by a taxable person for the construction of an immovable property (other than plant or machinery) on their own account, even if such goods or services are used in the course or furtherance of business.**
 - The expression “plant and machinery” includes apparatus, equipment, and machinery fixed to the earth by foundation or structural support that are used for making outward supply of goods or services. However, it excludes land, buildings, or any other civil structures, telecommunication towers, and pipelines laid outside the factory premises.
 - According to Section 17(5)(d) of the CGST Act, ITC would not be available for goods and services used in the construction of such immovable properties.
4. Whenever there is an ITC aspect to be looked into in case of an Immovable Asset, a detailed examination of whether any specific components qualify as plant and machinery is necessary to determine any potential eligibility or ineligibility of ITC.