



महेन्द्र रंगा
MAHENDRA RANGA
मुख्य आयुक्त
CHIEF COMMISSIONER



विकसित भारत
अभियान
1947 TO 2047

भारत सरकार
वित्त मंत्रालय
मुख्य आयुक्त कार्यालय
सीजीएसटी एवं केन्द्रीय उत्पाद शुल्क
जयपुर
GOVERNMENT OF INDIA
MINISTRY OF FINANCE
OFFICE OF THE CHIEF COMMISSIONER
CGST & CENTRAL EXCISE
Jaipur

7th November 2024
D.O. No. GCCO/TECH/MISC/440/2023

Dear *Colleagues,*

'SAMVAAD' : November 2024

“कुछ न रहेगा, बात रहेगी
होगा प्रात, न रात रहेगी
सब जागें तब सोना सुख से
तात, न हो चंचल तू
जल, रे दीपक, जल तू!”

This inspiring stanza by *Rashtrakavi Shri Maithilisharan Gupt* reminds us of the enduring power of hope and inspires us for service and sacrifice. The message is especially resonant during the festival of Diwali/ Prakash Diwas. Let's carry this spirit into our lives and ignite the light within us.

2. On October 18, 2024, Shri Sanjay Malhotra, Revenue Secretary, engaged in an interactive session with senior officers of the Zone, to discuss key priorities and challenges. The session, held in Udaipur, was also graced by Shri Shashank Priya, Member, CBIC. During the session, the Revenue Secretary stressed the need for a tax friendly approach by becoming tax-mitras for genuine trade & industry. He highlighted the importance of resolving older appeals with significant revenue impact, advocating direct monitoring by the Commissioner (Appeals). The RS expressed satisfaction with the Zone's grievance redressal efforts and encouraged continued outreach initiatives. The discussion included a focus on timely pension disbursement, infrastructure development, and notable initiatives like SAMVAAD and Gyan-Sangrah. It is imperative that we imbibe the message of the Revenue Secretary, ensuring meticulous compliance.

3. This month's revenue has rebounded from ₹1,778 crores in September 2024 to ₹2,162 crores in October 2024, marking the second highest revenue collection of the current financial year. Compared to the same month last year, this represents a 9% increase, aligning with the national growth rate. The year-to-date growth rate stands at 10.5%. However, there are areas where we need to focus to curb evasion.

4. The CIU has been proactively identifying potential tax evasion schemes and providing inputs to Commissionerates. We have identified the modus operandi of

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reporting B2C sales as B2B sales, prompting searches and inspections of cement dealers across the Zone. The drive resulted in detection of ₹5.06 crores in potential tax liabilities, with recovery of ₹2.03 crores. However, much needs to be done about these investigations to take them to logical end. We also need to undertake monthly monitoring of the tax payment patterns. Following the CIU's input, CGST, Jaipur and CGST, Jodhpur investigations have uncovered fake firms engaged in fraudulent ITC transactions. These fictitious firms passed on a startling ₹19.91 crores worth of ITC. Further, based on CIU input, a search at M/s Joint-Stock Company Industrial Association Vozrozhdenie by CGST, Alwar revealed that they had received a mobilization advance of ₹39.20 crores on which requisite GST was not paid. Following an investigation, the taxpayer deposited GST of ₹5.98 crores. Subsequent assessments led to an additional payment of ₹1.08 crore plus interest, bringing the total to ₹7.38 crore.

5. I have been emphasizing the importance of thorough scrutiny of refunds, especially those arising from the inverted duty structure. Demonstrating expertise in detecting fictitious refunds, CGST Jaipur uncovered wrong availment of ITC without the actual receipt of goods and subsequent claims for refunds under the inverted duty structure. The taxpayer voluntarily deposited ₹1.48 crores out of a total detection of ₹1.6 crores.

6. It is pertinent to mention that in an ongoing investigation by CGST Alwar, M/s Onevolt Energy Private Limited has reversed an additional ₹12 crores of ITC. This brings the total reversed ITC to ₹14 crores so far.

7. In a significant breakthrough, DGGI, Jaipur has dismantled a network of fake entities involved in passing on fraudulent ITC. In the first case one Manoj Jain was found to have issued fake ITC worth ₹23 crores through bogus bills / e-way bills for marble and granite. In the second case M/s. Wheels Polymers Pvt. Ltd., Bhiwadi, availed fake ITC amounting to ₹19.65 crores using invoices from eight non-existent firms. These firms reported receiving goods from entities that had no inward supplies at L-2 or L-3 stages. Confessing the charges, M/s Wheels Polymers reversed ₹5 crores from their Cash ledger.

8. I am delighted to inform that on October 4, 2024, CGST, Jodhpur inaugurated an Urban Circular Forest (UCF) in Kuchaman City under the Swachhta Action Plan for FY 2024-25. This initiative was executed in association with M/s. Bargad Sarkshan Foundation, with the objective of enhancing local ecology and promoting environmental awareness. The UCF, situated outside Kuchaman City's Sports Stadium, spans approximately 30000 Sq.Ft. area. Over 11,000 saplings from more than 100 native species have been planted using a sustainable afforestation method that incorporates organic waste and uses only 30% of the typical water requirement. This project, which includes fencing and a drip irrigation system, anticipates the growth of a dense urban forest within two years. Over 500 children participated in this community-driven endeavor, joining hands to create a greener, more sustainable future while learning about the importance of ecological conservation through workshops and seminars. My sincere compliments to Shri Rajesh Kumawat, Inspector who has spearheaded the project and officers of CGST, Jodhpur.

9. It is heartening to share that we have extended appointment letters to six candidates for the post of Havaldar on compassionate grounds on 29.10.2024. All these candidates have joined the department. This initiative should provide succor to the families with new hopes. We also need to devise some social mechanism for the families of those left out and especially for studies of the wards. I wish the staff and officers of Jaipur Cadre to take an initiative in this regard. I am willing to provide my services for the initiative.

10. CGST, Alwar have launched a new campaign named “**Pahal – Ek Kadam Unnati Ki Aur**” for better communication, coordination and collaboration with the taxpayers. This initiative has brought together top trade and tax professional associations, as well as major taxpayers from various areas for in-depth discussions. As part of this innovative experiment, the department has honored leading trades and associations with saplings, continuing their efforts to understand their concerns and solve their problems. Following the first series of this program in Alwar, the second event was organized in Behror on 09.10.2024. The initiative was met with overwhelming support, with a large number of trade associations participating in meaningful discussions. I urge all other Commissioners to adopt similar practices.

11. I am thrilled to share that Master Surya Prasad Ananth, son of Shri S. Anantha Krishnan, Commissioner of CGST Jodhpur, showcased his exceptional talent in the 33rd All India G.V. Mavalankar Shooting Championship (Rifle) 2024, held in Thiruvananthapuram. He qualified in the 10m Rifle event's Sub-Youth category. He is now gearing up to compete in the 67th National Shooting Championship Competitions, scheduled to take place in Bhopal. We wish Surya all the best for his future endeavors.

12. In this month’s “Gyan Sangrah”, we bring you two engaging articles that reflect the commitment and depth of knowledge of our officers:-

- (a) *Seizure of cash by GST Officers under Section 67 of CGST Act, 2017* – By Shri Sunil Kumar Verma, Superintendent, CGST & CX, Alwar; and
- (b) *Blocked ITC of tax paid on goods or services received by a taxable person for construction of an immovable property on his own account* – By Devi Dutt Sharma, Superintendent, CGST Division-E, Behror.

These articles are rich in information and offer readers an abundance of valuable insights. I also appeal to other officers to share their experiences.

13. As the end of October, we honored the superannuation of five of our colleagues viz. Shri Rukmanand Swami & Shri Sita Ram Chauhan, both Superintendents; Shri Heera Lal, ASI, Shri Subhash Godiwal & Shri Bhagwan Lal Acharya, both Head Hawaldars. We extend our best wishes for their next innings. We pray for joy, good health and the relaxation they have truly earned.

Till next month,

Yours *Sincerely*

(Mahendra Ranga)
Chief Commissioner

To:- Team Jaipur Zone.

Copy for information to:-

- (i) OSD to the Chairman, CBIC, New Delhi.
- (ii) PS to the Member (GST & Zonal Incharge), CBIC, New Delhi.
- (iii) Commissioner of Commercial Taxes, Rajasthan, Jaipur
- (iv) Pr. ADG/ ADG, NACIN/ DGGI, Jaipur.

ज्ञान संग्रह

नवम्बर, 2024

GYAN SANGRAH

NOVEMBER, 2024

Seizure of Cash by GST Officers under Section 67 of the CGST Act, 2017

*By – Sunil Kumar Verma, Superintendent,
CGST & CX, Alwar*

The CGST Act has been made applicable to make provisions for levy and collection of tax on intra-State supply of goods or services or both by the Central Government and for matters connected therewith or incidental thereto. To detect possible evasion or contraventions of provisions or for investigation searches are conducted. During the courses of searches, besides incriminating documents, seizure of cash have been affected by the GST officers. There appears doubt whether the GST officers can seize cash/currency during search under the provisions of CGST Act, 2017 or not.

2. Before reaching to any conclusion, it would be appropriate to refer relevant provisions as mentioned below: -

CGST ACT, 2017

2(41) “document” includes written or printed record of any sort and electronic record as defined in clause (t) of section 2 of the Information Technology Act, 2000 (21 of 2000);

2(52) “goods” means 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;

(75) “money” means the Indian legal tender or any foreign currency, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any other instrument recognised by the Reserve Bank of India when used as a consideration to settle an obligation or exchange with Indian legal tender of another denomination but shall not include any currency that is held for its numismatic value;

2(101) “securities” shall have the same meaning as assigned to it in clause (h) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956);

2 (102) “services” means anything other than goods, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

[**Explanation.** --For the removal of doubts, it is hereby clarified that the expression “services” includes facilitating or arranging transactions in securities;]

2(117A) “virtual digital assets” shall have the same meaning as assigned to it in clause (47A) of Section 2 of the Income Tax Act, 1961 (43 of 1961);]

67. Power of inspection, search and seizure. --(1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that--

- (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or
- (b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

67(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

67(10) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to search and seizure, shall, so far as may be, apply to search and seizure under this section subject to the modification that sub-section (5) of section 165 of the said Code shall have effect as if for the word "Magistrate", wherever it occurs, the word "Commissioner" were substituted.

3. Provisions of Power to Search and Seizure provided in tax statutes are investigation tools and restraint on evasion of taxes. Such powers are within the constitutional frame work and cannot be considered as violative of Article 19 of Constitution of India. Power of search and seizure in any system of jurisprudence is an overriding power of the state to provide security and that power is necessarily regulated by law. Powers to seize and confiscate are quite drastic powers, such that authority exercising the same should have reasons to believe that goods were liable for confiscation. The retention of Seized items such as goods, documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceeding under the GST provisions. The above provisions reveal that the term 'goods' in CGST Act, appeared to be borrowed/ taken from The Sale of Goods Act, 1930 [Section 2 (7)].

4. The issue whether the cash can be seized in search proceedings by the proper officer under CGST Act or whether the term "goods" or "things" includes cash have been raised before various courts and there are conflicting views on the issue. The detail of some of such case laws is as under:

4.1 The Madhya Pradesh High Court in WP(C) 8204/ 2020 in the case of Kanishka Matta Vs. Union of India and Others) in order dated 26.08.2020 has Madhya Pradesh

High Court has decided the matter whether expression "things" covers within its meaning the cash or not. The Court opined that the CGST Act, 2017 has to be seen as a whole and the definition clauses are the keys to unlock the intent and purpose of the various sections and expressions used therein, where the said provisions are put to implementation. Section 2(17) defines "**business**" and Section 2(31) defines "**consideration**". In the considered opinion of this Court a conjoint reading of Section 2(17), 2(31), 2(75) and 67(2) makes it clear that money can also be seized. **The Court find that the word "thing" includes money.** In this case it was alleged that the seized amount was related to **sale proceeds of Pan masala.** The Court find that the authorities have rightly seized the amount from the husband of the petitioner and unless and until the investigation is carried out and the matter is finally adjudicated, the question of releasing the amount does not arise.

4.2 **The Delhi High Court in it's Order dated 19.01.2023 in the case of Arvind Goyal CA Vs Union of India and others in W.P.(C) 12499/2021** has held that the principal questions that requires to be addressed is whether cash can be seized by the officers under Section 67(2) of the GST Act. Prima facie, a plain reading of Section 67(2) of the GST Act indicates that the seizure is limited to goods liable for confiscation or any documents, books or things, which may be "useful for or relevant to any proceedings under this Act". Clearly, cash does not fall within the definition of goods. And, prima facie, it is difficult to accept that cash could be termed as a 'thing' useful or relevant for proceedings under the GST Act. The second proviso to Section 67(2) of the GST Act also provides that the books or things so seized would be retained by the officer only so long as may be necessary "for their examination and for any inquiry or proceedings under the Act.

4.3 **The Kerala High Court in Order dated 24.03.2023 in WA No. 514 OF 2023 in the case of SHABU GEORGE Vs State Tax Officer (IB)** had observed that the findings recorded by the Intelligence Officer (relying on Section 67(2) of the CGST Act, 2017 which authorises seizure of things), that '*it is suspicious that this much amount of money kept in the house as idle and not deposited at bank*', were wholly irrelevant. According to the High Court, the findings could have only been justified **had the officer been an officer attached to the Income Tax department.**

In the above case, on 31.07.2023, the Supreme Court has dismissed the SLP(C) No. 016409 / 2023 filed by the Revenue against the above referred Kerala High Court's decision dated 24.03.2023 holding that in **an investigation aimed at detecting tax evasion under the provisions of the GST, cash cannot be seized especially when** it is the admitted **case that the cash did not form part of the stock** in trade of the assessee's business. (*State Tax Officer (IB) v. Shabu George* (SPECIAL LEAVE PETITION (CIVIL) Diary No(s). 27670/2023).

4.4 **The Gujarat High Court in Order dated 26.10.2023 in R/Special Civil Application No. 26222 of 2022** in the case of **Bharatkumar Pravinkumar And Co. Versus State of Gujarat** has clarified that **cash does not qualify as "goods"** for the purpose of seizure proceedings under GST.

4.5 The Delhi Court in the case of **Deepak Khandelwal Proprietor M/s Shri Shyam Metal v. Commissioner in W.P.(C) 6739/2021** decided on 17.08.2023 has addressed the controversy whether the proper officer has power to seize the currency and other valuable assets under Section 67 of the Act, even though he has no reason to believe that the same are liable for confiscation. The controversy, essentially, relates to interpretation of Section 67 of the Act. The Court has held that power under Section 67 of the CGST Act cannot be read to extend to enable seizure of assets on the ground that the **same were not accounted for**. The provision of Section 67 is also not to seize assets for recovering tax. According to the Court, **the word 'things' cannot be read expansively to include any and everything** notwithstanding that the same may not yield and / or provide any material useful or relevant to any proceedings under the Act. It was thus of the view that only those goods, which are subject matter of or are suspected to be subject matter of evasion of tax, are liable to be seized. The Court further directed to release the silver bars and Indian currency, which were seized from the residential premises during search only on the ground that it was 'unaccounted wealth'.

4.6 The Delhi High Court in the case of **Rajeev Chhatwal vs Commissioner of Goods & Services Tax in W.P.(C)5880/2021** decided on 24.08.2023 has ordered to remit the seized currency of Rs. 15,92,000/ with accrued interest.

4.7 The High Court of Delhi in Order dated **17.11.2023 in W.P.(C) 8713/2023 in the case of Gunjan Bindal & Anr V/s Commissioner of Goods & Services Tax** has allowed the appeal and ordered to remit the amount of ₹14,50,000/- along with accrued interest, which was seized/detained/resume under Section 67 of the Central Goods and Services Tax Act, 2017.

Recently on **21.10.2024, the Hon'ble Supreme Court** in Special Leave Petition (Civil) Diary No. 44061/2024 (filed by Commissioner of CGST Delhi West & Ors against above mentioned Order dated 17.11.2023 of Delhi High Court, in has observed that there is a conflict between the interpretation adopted by the Delhi and Madhya Pradesh High Courts and thus ordered to issue notice on the application seeking condonation of delay as well as on the Special Leave Petition.

5. In view of the above, conflict between the interpretation adopted by the Delhi High Court and the Madhya Pradesh High Court, the definitions provided under CGST Act, it can be said that:-

- (i) Cash (Indian currency) is clearly excluded from the definition of the term 'goods' as the same is squarely covered within the definition of the word 'money' as defined in Sub-section (75) of Section 2 of the Act.
- (ii) Money and securities have also been specifically excluded from the ambit of 'goods'.
- (iii) The term 'things' includes cash has also not attained finality as the ground of seizure is not similar in all the cases and seizure has been upheld being related to sale proceeds and pendency of investigation.
- (iv) There is no stay against the Orders by which seized currency have been released.

- (v) The proper officer should refrain from seizing the case without proper and reasonable belief and effecting seizure in routine manner, and unless it represents the sale proceeds of clandestinely removed goods or suppressed services.
- (vi) the matter of undisclosed or un accounted money attracts the provisions of Income Tax Act.
- (vii) There is difference between “anything” and “things”.
- (viii) The power of any authority or proper officer to seize any ‘thing’ while functioning under the provisions of a taxing statute must be guided and informed in its exercise by the object of the statute concerned.
- (ix) The Supreme Court is set to consider the issue as to whether authorities can seize "cash" under Section 67 of the Central Goods and Services Tax Act, 2017.

(Disclaimer: The above views or content do not necessarily reflect those of the individual, Department or Government and it is not intended to be used for legal advice or professional advice.)

Blocked ITC of tax paid on goods or services received by a taxable person for construction of an immovable property on his own account

*By – Devi Dutt Sharma, Superintendent,
CGST Division-E, Behror*

The terms “plant” or “machinery” used in clause (d) of sub-section (5) of section 17 of the CGST Act, 2017 have been recently interpreted in judgment dated 03.10.2024 pronounced by Hon’ble Supreme Court in the case of **M/s Safari Retreats Private Limited** to hold that a building may also be classified as a “plant” for the purpose of availment of ITC by applying the functionality test.

A.1. Hon’ble Supreme Court’s judgment dated 03.10.2024

2. While holding that challenge to the constitutional validity of clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act, 2017 is not established; and remanding the writ petitions to the High Court of Orissa for limited purpose of deciding whether, in the facts of the case, the shopping mall is a “plant” in terms of clause (d) of Section 17(5), **Hon’ble Supreme Court** has held vide **judgment dated 03.10.2024** in Civil Appeal No. 2948 and 2949 of 2023 [Titled Chief Commissioner of CGST *versus* **M/s Safari Retreats Private Limited & Ors.**] that:-

(i) The expression “**plant or machinery**” used in Section 17(5)(d) cannot be given the same meaning as the expression “**plant and machinery**” defined by the explanation to Section 17; and

(ii) The question whether a mall, warehouse or any building **other than a hotel or a cinema theatre** can be classified as a plant within the meaning of the expression “**plant or machinery**” used in Section 17(5)(d) is a **factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business.**

A.2. Functionality Test

3. The guiding principle as explained in paragraph 65 of the said judgment dated 03.10.2024 is as follows:-

“If the construction of a building was essential for carrying out the activity of supplying services, such as renting or giving on lease or other transactions in respect of the building or a part thereof, which are covered by clauses (2) and (5) of Schedule II of the CGST Act, the building could be held to be a plant. Then, it is taken out of the exception carved out by clause (d) of Section 17(5) to sub-section (1) of Section 16. Functionality test will have to be applied to decide whether a building is a plant. Therefore, by using the functionality test, in each case, on facts, in the light of what we have held earlier, it will have to be decided whether the construction of an immovable property is a “plant” for the purposes of clause (d) of Section 17(5).”

B.1. Facts in the Writ Petition- Mall constructed for letting out

4.1. M/s Safari Retreats Private Limited (“**petitioner**” before High Court) had filed a Writ Petition (C) No. 20463 of 2018 before the Hon’ble High Court of Orissa seeking a declaration that Section 17(5)(d) of the CGST Act **does not apply to the construction of immovable property intended for letting out on rent**. A prayer in the alternative was made that in the event it is held that the bar under Section 17(5)(d) is applicable even to the construction of immovable property intended for letting out, **a declaration be issued that Section 17(5)(d) is violative of Articles 14 and 19 (1)(g) of the Constitution of India**.

4.2. It was the claim of the petitioner that he is engaged in the **construction of a shopping mall for the purpose of letting out premises in the malls to different tenants**. Vast quantities of material, inputs and services are required for the construction of the malls in the form of cement, sand, steel, aluminium, wires, plywood, paint, lifts, escalators, air-conditioning plants, electrical equipment, transformers, building automation systems etc., and also consultancy services, architectural services, legal and other professional services, engineering services and other services including the services of a special team of international designers specialised in the construction of Malls. The petitioner has accumulated input credit of GST by the purchase/supply of goods and services consumed and used in the construction of the shopping mall and, therefore, he was desirous of availing the Input Tax Credit (ITC) accumulated against the rental income received by it upon letting out the mall premises.

B.2. Judgment of Hon’ble High Court of Orissa

5.1. The Hon’ble High Court decided the writ petition vide judgment dated 17.04.2019 reading down the provisions of section 17(5)(d) by holding as follows:-

“In that view of the matter, in our considered opinion **the provision of Section 17(5)(d) is to be read down** and the narrow restriction as imposed, reading of the provision by the Department, is not required to be accepted, inasmuch as keeping in mind the language used in (1999) 2 SCC 361 (supra), the very purpose of the credit is to give benefit to the assessee. In that view of the matter, **if the assessee is required to pay GST on the rental income arising out of the investment on which he has paid GST, it is required to have the input credit on the GST**, which is required to pay under Section 17(5)(d) of the CGST Act.”

5.2. Judgment dated 03.10.2024 of Hon’ble Supreme Court has set aside the high Court’s judgment by holding that challenge to constitutional validity of clause (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act is not established but a mall, warehouse or any building can be classified as a plant within the meaning of the expression “plant or machinery” used in section 17(5)(d) if the functionality test is satisfied.

C. Effect of the Hon’ble Supreme Court’s judgment

6. Accordingly, the judgment dated 03.10.2024 upholds the validity of the restriction imposed by clause (d) of sub-section (5) of section 17 of the CGST Act, 2017 on availability of ITC of tax paid on goods or services received by a taxable person for construction of an immovable property on his own account. However, since ITC for construction of plant or machinery on his own account is not restricted by the said clause (d), ITC shall be available

if a building can be classified as a “plant” which is a factual question required to be decided by applying the functionality test as enunciated in the said judgment dated 03.10.2024. **Thus, in effect, ITC will still not be available beyond the construction of plant (or machinery) but “plant” can also include a building if it is classified as a plant by applying the functionality test.**

D. ITC provisions concerning “Immovable Property”/ “Plant and Machinery”

7. Availability of ITC of tax paid on goods or services or both is determined, mainly, in terms of the provisions of section 16, 17 and 18 of the CGST Act, 2017. The basic framework of ITC as per the said sections, with special reference to plant and machinery, can be summarized as follows:-

(A) ITC of tax paid on inward supply of goods or services which are used or intended to be used in the course or furtherance of business is available in terms of section 16 of the CGST Act, 2017;

(B) Goods can be of two types, either input goods or capital goods. Section 2, clause 19, defines capital goods as “goods, **the value of which is capitalised** in the books of account and which are used or intended to be used in the course or furtherance of business”. Since the value of plant and machinery is also capitalized the same also qualify to be capital goods;

(C) Section 17(5) of the CGST Act, 2017 provides that ITC shall not be available in respect of **“Works Contract Service when supplied for construction of an immovable property [clause (c)] and “goods and services received by a taxable person for construction of immovable property on his own account [clause (d)]**;

(D) As per paragraph 5 of Schedule- III to the CGST Act, 2017, Sale of **Land** and Sale of **Building** after obtaining the completion certificate are neither a supply of goods nor a supply of service;

(E) Both land and building are naturally immovable property whereas as per the explanation to section 17, “Plant and Machinery” consisting of apparatus, equipment and machinery becomes immovable property when the same is **fixed to earth by foundation or structural support; and**

(F) “Plant and Machinery” or “Plant or Machinery” has been carved out of the purview of clause (c) or (d) of section 17(5) for allowing ITC with reference to construction. Since plant and machinery is **originally movable property** in the form of **goods** in common parlance and **capital goods** in terms of the CGST Act and, thus, ITC is available in respect thereof. However, because of the exclusion of immovable property in clause (c) and (d), construction involving plant and machinery fixed to earth being immovable property got excluded and, therefore, the exception brings the goods and services used in such construction back to the coverage of ITC.

E. Observations in judgment dated 03.10.2024 and the stand taken by the Department

8.1. As per the above-said legal provisions, ITC of tax paid on works contract services supplied for construction of an immovable property or tax paid on goods or services

received by a taxable person for construction of an immovable property on his own account is not available because no GST is charged on supply of an immovable property (i.e. a building in so far as construction is concerned). However, ITC of tax paid on works contract service or inward supply of goods or services involved in construction relating to plant and machinery is available as the cost of such construction forms part of the cost of capital goods.

8.2. However, Hon'ble Supreme Court has held vide the judgment dated 03.10.2024 that the expression "**plant or machinery**" used in Section 17(5)(d) cannot be given the same meaning as the expression "**plant and machinery**" defined by the explanation to Section 17 and that a building can also be classified as a plant and the question as to whether any building can be classified as a plant within the meaning of the expression "**plant or machinery**" used in Section 17(5)(d) is a **factual question which has to be determined keeping in mind the business of the registered person and the role that building plays in the said business**. Some of the observations of Hon'ble Supreme Court in the said judgment with regard to the said conclusion are as follows:-

- (A) **Para 25(1)**: When a word used in a taxing statute is to be construed and has not been specifically defined, it should not be interpreted in accordance with its definition in another statute that does not deal with a cognate subject. It should be understood in its commercial sense. **Unless defined in the statute itself, the words and expressions in a taxing statute have to be construed in the sense in which the persons dealing with them understand**, that is, as per the trade understanding, commercial and technical practice and usage.
- (B) **Para- 34**: There is hardly a similarity between clauses (c) and (d) of Section 17(5) except for the fact that both clauses apply as an exception to sub-section (1) of Section 16. Perhaps the only other similarity is that both apply to the construction of an immovable property. **Clause (c) uses the expression "plant and machinery", which is specifically defined in the explanation. Clause (d) uses an expression of "plant or machinery", which is not specifically defined.**
- (C) **Para- 35**: XXXXX The explanation defines the meaning of the expression "plant and machinery". However, as stated earlier, the expression "plant or machinery" has not been defined under the CGST Act. It is pertinent to note that clauses (c) and (d) do not altogether exclude every class of immovable property from the applicability of ITC. **In the case of clause (c), if the construction is of "plant and machinery" as defined, the benefit of ITC will accrue. Similarly, under clause (d), if the construction is of a "plant or machinery", ITC will be available.**
- (D) **Para- 43**: XXXXX **If it was a drafting mistake, as suggested by learned ASG, the legislature could have stepped in to correct it.** However, that was not done. In such circumstances, **it must be inferred that the legislature has intentionally used the expression "plant or machinery" in clause (d) as distinguished from the expression "plant and machinery",** which has been used in several places. As the expression "plant or machinery" appears to be intentionally incorporated, it is not possible to accept the contention of the learned ASG that the word "or" in clause (d) should be read as "and". If the said contention is accepted, there will not be any difference between the expressions "plant and machinery" and "plant or machinery". This will defeat the legislative intent.

- (E) **Para- 45:** Now, the question which arises is what meaning should be given to the expression “plant or machinery”. **When the legislature uses the expression “plant and machinery,” only a plant will not be covered by the definition unless there is an element of machinery or vice versa. This expression cannot be read as “plant or machinery”.** That is so clear from the explanation in Section 17, which says that plant and machinery means apparatus, equipment and machinery fixed to the earth by foundation or structural support that are used for making outward supply of goods or services or both. The expression includes such foundation and structural support fixed to the earth. However, the definition excludes land, buildings or any other civil structure.
- (F) **Para- 46:** The expression “plant or machinery” has a different connotation. **It can be either a plant or machinery.** Section 17(5)(d) deals with the construction of an immovable property. **The very fact that the expression “immovable property other than “plants or machinery” is used shows that there could be a plant that is an immovable property.** As the word ‘plant’ has not been defined under the CGST Act or the rules framed thereunder, its ordinary meaning in commercial terms will have to be attached to it.
- (G) **Para- 52:** The word ‘plant’ used in a bracketed portion of Section 17(5)(d) cannot be given the restricted meaning provided in the definition of “plant and machinery”, which excludes land, buildings or any other civil structures. **Therefore, in a given case, a building can also be treated as a plant, which is excluded from the purview of the exception carved out by Section 17(5)(d) as it will be covered by the expression “plant or machinery”.** We have discussed the provisions of the CGST Act earlier. To give a plain interpretation to clause (d) of Section 17(5), **the word “plant” will have to be interpreted by taking recourse to the functionality test.**
- (H) **Para- 56:** XXXXX Each mall is different. Therefore, in each case, fact-finding enquiry is contemplated. Thus, in the facts of the case, we will have to send the case back to the High Court to decide **whether, on facts, the mall in question satisfies the functionality test so that it can be termed as a plant within the meaning of bracketed portion in Section 17(5)(d).** The same applies to warehouses or other buildings except hotels and cinema theatres.

8.3. In so far as a building which is used as a hotel or a cinema theatre is concerned, the instant judgment refers to an earlier judgment of Hon’ble Supreme Court in the case of *Anand Theatres* in the matter of claim of additional depreciation under the Income Tax Act for a building used as hotel or theatre by considering the building as an apparatus or a tool, wherein the claim was rejected by holding that:-

“To differentiate a building for grant of additional depreciation by holding it to be a “plant” in one case where the building is specially designed and constructed with some special features to attract the customers and a building not so constructed but used for the same purpose, namely, as a hotel or theatre would be unreasonable.”

8.4. The instant judgment also refers to another judgment of the Hon’ble Supreme Court in the case of *Karnataka Power Corporation*, involving the question as to whether a power generating station building is a plant, wherein the observation in *Anand Theatres* was held to be limited to the case of hotels or cinema theatres and it was held as follows:-

"This observation is, in our view, limited to buildings that are used for the purposes of hotels or cinema theatres and will not always apply otherwise, The question, 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"

F. Rationale in denial of ITC of tax paid in relation to construction

9.1. In the instant case the Hon'ble High Court had observed that **"if the assessee is required to pay GST on the rental income from the mall, it is entitled to ITC on the GST paid on the construction of the mall** and the narrow interpretation given by the Department to Section 17(5)(d) would frustrate the very object of the Act.

9.2. One of the submissions by the Department before Hon'ble Supreme Court was that the **"Union legislature cannot levy tax on land and buildings and the ITC chain is broken once a building comes into existence by using goods and services."** However, the argument stands rejected.

G. GST Council's decision regarding levy of GST on sale of land and building

10.1. The issue of levy of GST on sale transactions of land and building was discussed in the 7th GST Council Meeting dated 22nd & 23rd December 2016 as **"Agenda Item 2A - CST Treatment of Land and Building (Real Estate)"** and finally it was **decided not to introduce GST on land and building at this stage** and agreed that this issue could be revisited after a year or so of the implementation of GST.

10.2. Some of the excerpts of the minutes (from the discussion between members taken from paragraph 10) relevant to taxability of transactions in immovable property and availability of ITC of tax paid on items used in construction of buildings are as follows:-

"The Secretary to the Council introduced this agenda and explained that **in Section 2(49), the definition of 'goods' included only movable property.**

"In view of this, **the Secretary to the Council proposed that GST could be imposed on supply of land and building** and the rate could be 12% or 18% with a provision to block refund if there was an incidence of duty inversion between input tax and the output tax on the final supply."

"The Secretary to the Council stated that another important consideration for introducing this agenda item was that **if sale of property was considered as a supply and tax was charged at the rate of 18%, it would complete the ITC chain** and there would be greater incentive to buy tax paid inputs like cement, steel, sanitary fittings, tiles, etc.

"The Commissioner (GST) CBEC stated that **if tax was imposed on re-sale of property, say, a hotel, this would help in claiming ITC** and lowering the cost of business for the buyer of the hotel. He also stated that charging GST on re-sale of property would also capture the value addition over a period of time."

"He also added that **the definition of goods in the Constitution did not include**

land and building.”

“The Hon'ble Chairperson summed up the two broad viewpoints namely that incidence of tax was likely to go up and the other that the tax amount would remain the same due to availability of ITC on inputs used as construction material.”

10.3. From the minutes aforesaid it appears that “building” was considered to be out of the scope of the definition of “goods” and no ITC was intended to be allowed on inputs used in construction of building.

H. Use of the terms “foundation” and “structural support” in the definition

11. A similar situation involving use of the term “or” at one place and the term “and” at another place in a single paragraph obtains in the definition of the expression “plant and machinery” in section 17 itself where “foundation” and “structural support” have been put together differently in the same paragraph as follows:-

“Explanation.--For the purposes of this Chapter and Chapter VI, the expression plant and machinery means apparatus, equipment, and machinery **fixed to earth by foundation or structural support** that are used for making outward supply of goods or services or both and **includes such foundation and structural supports** but excludes XXXXX”.

Use of the term “foundation or structural support” in the ‘qualification clause’ and use of the term “foundation and structural supports” in the ‘includes’ part of the definition may also pose similar problem of interpretation.

I. Determination of the factual question by applying the functionality test

12. Since the Hon'ble Supreme Court has directed that the factual question as to whether a mall, warehouse or any building can be classified as a plant within the meaning of the expression “plant or machinery” used in section 17(5)(d) has to be determined keeping in view the business of the registered person and the role that building plays in the said business, many questions based on the factual as well as legal aspects of individual cases concerning the availability of ITC may arise as the instant interpretation was not there in the statutory provisions until the judgment dated 03.10.2024 was pronounced.

13. Some of such situations that may have to be dealt with in such cases for claim of ITC on construction of building proposed to be classified as plant are as follows:-

(A) A building being constructed is initially proposed to be let out and ITC is claimed but after completion of construction the building is actually sold as an immovable property;

(B) After completion of construction, the building comprising of multiple units is put to different uses including letting out, sale as property, use for own business purposes and possession as immovable property for future sale as property;

(C) Depreciation of value of the building is claimed under the Income Tax law treating the same as part of land and building while ITC is claimed under GST Act;

(D) In cases where a complex set of machinery is installed in the building as a composite plant, whether the building can be termed separately as a plant distinct from the composite plant and machinery;

(E) Whether a given building sought to be covered by the term “plant” in clause (d) will also be covered by the term “plant and machinery” in clause (c);

(F) In the case of supply of service by way of renting of a building it may always be claimed that construction of the building was essential for carrying out the activity of supplying services by way of renting or giving on lease making it tough to determine the factual question based on functionality test;

(G) Similarly construction of a building by a taxable person on his own account for use in carrying out the business activities involving taxable supplies of goods or services or both can also be claimed as essential for carrying out the activity of supply of services or goods, as the case may be; and

(H) Availability of ITC under clause (d) on goods and services received for construction if the construction on own account is covered by the definition of “plant and machinery” instead of “plant or machinery”.

14. Any question that may arise during the course of examination of a given case for claim of ITC will have to be examined in the light of legal position as contained in section 17(5), clause (c) and (d), of the CGST Act, 2017 with reference to the interpretation now made especially because the challenge to constitutional validity of clauses (c) and (d) has not been established and Hon’ble Supreme Court has only prescribed a broad parameter of functionality test without giving any definition of the term “plant” and leaving the factual question open for determination on the basis of merits of each case.

(The write-up is simply intended to share the personal experience of the writer with the colleagues and the views expressed therein may not necessarily represent the stand taken by him on the provisions of law in his official capacity.)