

# Institute of Chartered Accountants of India

presentation on

## Issues under Input Tax Credit under GST

Presentation by  
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Goods and services used for construction of immovable property

Goods lost or disposed off by way of gift or a free sample

Availability of ITC where tax not paid by supplier

ITC benefit available under old law but not available under the GST Regime

Time limit for availing ITC

Goods and Services used for personal consumption; ISD or Cross Charge

# ITC on Goods & services used for construction of immovable property

- Goods or Services used for construction of immovable property (other than plant and machinery) on his own account are not allowed to take ITC under Section 17(5)(d)
- Immovable:
  - Elevators/Escalator -
  - AC Plant
  - CC TV Camera
  - Floor tiles
  - Fire fighting system
  - Jetty Construction
  - Breakwater Structure
- Safari Retreats Pvt Ltd - Orissa HC - Read down 17 (5) (d)
- Kamal Cogent Energy Pvt Ltd - Rajasthan HC - Notice issued

# ITC on Goods & services used for construction of immovable property

- “Plant & Machinery” means apparatus, equipment and machinery fixed to earth by foundation or structural support that are used for making outward supply of goods and services or both and includes such foundation and structural support but excludes-
- (i) land, building or any other civil structure (ii) ----- (iii) -----
- The expression “construction” includes reconstruction, renovation, addition or alteration or repair, to the extent of capitalization, to the said immovable property
- Immovable Property -
  - Sec 3 (26) of General Clauses Act -
  - Sec 3 of Transfer of Property Act - “attached to the earth”
  - Sirpur Paper Mills Ltd , Solid &Current Engg Works
  - Attached to earth only for provide stability and to prevent vibration

# Goods lost or disposed off by way of gift or a free sample

- Goods lost, stolen, destroyed, written off or disposed off by way of gift or free sample - 17 (5) (h)
  - Loss of manufactured goods in a factory or during testing - AAR- General Manger Ordinance Factory, Bhandara - Maharashtra AAR
  - Written off - Partial or fully
  - Promotional products or gift - If free item has linkages with taxable supply, ITC should be allowed. If free sample or without any linkages with supply, ITC not allowed. - Circular No. 92/11/2019 - GST dated 7th March, 2019

- GST amount reimbursed to supplier but supplier did not pay GST to Govt - whether ITC in the hands of buyer can be denied-
- Section 16 (2) (c) denies credit in such cases
- Appeal admitted by AP High Court for GST provision
- *On Quest Merchandising India Pvt. Ltd. Vs. Commissioner of Trade - Delhi HC struck down a similar provision under VAT Act as violative of Article 14 and 19 (g). SLP dismissed with rider that it can be used in case only in Fraud cases. - Provision is arbitrary for the reason that it expects the Petitioner to perform the impossible.*

# ITC benefit available under old law but not available under the GST Regime- Examples

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- RCM payment on account of Audit or Adjudication or Voluntary payment post 1.07. 2017 - ITC availment under GST ??
- Customs Provisional Assessment - payment of differential CVD post 1.07. 2017 - ITC availment under GST ??
- EPCG - Differential CVD due to non-fulfilment of export obligation - ITC availment under GST ??
- Transfer of factory prior to 1.07. 2017 but order for transfer of credit issued after that day - ITC availment under GST ??
- Appeals admitted by Gujrat HC on the issue of ITC of duty paid on finalization of Provisional Assessment

# ITC benefit available under old law but not available under the GST Regime- Examples

- Trader can transit ITC only for goods purchased within 12 months - Sec 140 (3)
- Gujrat HC in **FILCO TRADE CENTRE PVT. LTD. (2018 (17) G.S.T.L. 3 (Guj.)** held that restriction of 12 month period for availing tran credit is unreasonable and hence unconstitutional. Bombay HC held contrary. Matter pending in SC
- As per CENVAT Credit Rules, if the payment was not made for the services within 3 months period, the ITC was reversed and subsequently it was allowed to be taken whenever payment was made, without any time limit. However, Sec. 140(9) stipulates a time-period up to 30th September to take credit. If payment is not made by that time, ITC is lost.



- Whether illustrated situations are violative of Fundamental right under Article 14 and 19 and constitutional right under Article 300A.
- Whether provisions of Section 174 of CGST Act (Repeal & Saving) can be invoked to avail credit
- In case of Budhan Choudhry (AIR 1955 Supreme Court 191) seven Judge Bench of the Supreme Court held that Article 14 forbids class legislation but it does not forbid reasonable classification.

- Sec 16 (4) - Due date of filing of return under Section 39 for September or furnishing of annual return, whichever is earlier
- Proviso added by ROD Order extending date to avail ITC by due date of filing return under Sec 39 for the Month of March, 2019
- Gujrat HC in AAP and Company (2019 TIOL HC AHD) held that GSTR 3B is not return under Section 39, hence ITC for 2017-18 can be taken till due date for filing of GSTR 9
- Cases where Annual Return is also exempted like SME having turnover upto Rs 2 Crore

- Goods or services used for personal consumption - 17 (5) (g) -vehicles for personal use, residential colony expenses - National Aluminium Co Ltd -
- Section 24 provides for compulsory registration for ISD

# QUESTION- ANSWER TIME



26-09-2019



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Fate of old provision & ITC by TLC Legal Sushil Solanki