



# Issues in Blocked Credit

IDT Study Circle Meeting of CTC

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# Case Study 1: Works Contract Service

*Relevant Provisions:*

*Section 17(5)(c) of CGST Act, 2017*

*Section 17(5)(d) of CGST Act, 2017*

*Section 2(107) of CGST Act, 2017*

# Case Study 1: Works Contract Service

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## Facts of the Case:

- Panda Ltd., authorized car dealer wants to renovate its existing car showroom
- The Contractor has given quotation of Rs. 1,25,00,000/- with item-wise price break-up of various works to be undertaken (BOQ- Industry terminology)
- Panda Ltd. is going to capitalize entire cost in its books of accounts
- The contractor is of the view that entire activity is a composite supply of works contract service in relation to immovable property and HSN 9954 should be shown in invoice

## Issues to Discuss:

ITC implications from Panda's perspective vis-à-vis the work being undertaken by the Contractor.

# Case Study 1: Works Contract Service

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## Works to be undertaken by the Contractor:

- Demolition and dismantling work
- Construction of concrete partitioning walls so as to make cabins
- Centralised Air Conditioning System (compressor fixed to the floor by way of foundation) and carrying out incidental ducting and piping activities
- Cubicles for providing seating space to its employees
- Vitrified tile flooring
- Luster paint on walls
- Concealed electrical works

# Case Study 1: Works Contract Service

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## Works to be undertaken by the Contractor:

- Outdoor lighting and switches
- Carpentry work including tables, chairs and door frames
- Plumbing and Sanitary work
- Data and Networking
- Fire alarm and detection system
- Fire fighting system
- CCTV, TV & HDMI

# Case Study 1: Relevant Provisions

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## **S. 2(30)- Composite Supply**

“Composite supply” means a supply made by a taxable person to a recipient consisting of two or more taxable supplies of goods or services or both, or any combination thereof, which are naturally bundled and supplied in conjunction with each other in the ordinary course of business, one of which is a principal supply.

## **S. 2(74)- Mixed Supply**

“Mixed Supply” means two or more individual supplies of goods or services, or any combination thereof, made in conjunction with each other by a taxable person for a single price where such supply does not constitute a composite supply.

## **S. 2(119)- Works Contract**

“Works Contract” 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 execution of such contract

# Case Study 1: Relevant Provisions

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## Section 17(5) of CGST Act, 2017

**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:**

(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

(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.

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 capitalization, to the said immovable property.

# Case Study 1: Relevant Provisions

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## Definition of Plant and Machinery

**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-

- (i) land, building or any other civil structures;
- (ii) Telecommunication towers; and
- (iii) Pipelines laid outside the factory premises.



# Case Study 1: S. 17(5)(c) & (d)- Conditions

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**Condition 1(a):** Works Contract Service, Goods or Services received shall result in creation of Immovable Property; OR

**Condition 1(b):** Activities should be repair, renovation, addition, or alterations (which are undertaken for an existing immovable property) whose cost is capitalised in the books of accounts.

**Condition 2:** The resultant creation of Immovable Property be on his own account

**Condition 3:** Immovable property should not be plant & machinery, as defined in Explanation to Section 17(6) of CGST Act, 2017

# Case Study 1: Immovability Test

Act	Definition
Section 3(26) of the General Clauses Act, 1897	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.
Section 2(z) of the Real Estate (Regulation & Development) Act, 2016	Immovable property includes land, buildings, rights of ways, lights or any other benefit arising out of land and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, standing crops or grass.
Section 3 of the Transfer of Property Act, 1882 defines the term 'attached to the earth'	<p>(a) Rooted in the earth, as in the case of trees and shrubs. However, the Act also says that the term "immovable property" does not cover standing timber, growing crops or grass.</p> <p>(b) Imbedded in the earth, as in the case of walls or buildings.</p> <p>(c) Attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached.</p>

# Case Study 1: Immovability Test

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**Key deciding factors for movability and immovability test are as under:**

1. Degree of permanency of the attachment to the earth
2. Intent of the use of the goods / property is essentially of immovable in nature
3. Cannot be detached from earth without causing substantial damage to it
4. Identity of the goods as such post removal is lost

# Case Study 1: Nipro India AAR

## Nipro India Corporation Pvt. Ltd. [2018 (18) GSTL 289 (AAR-GST)]

Work	Decision of Member	Work	Decision of Member
Building Works	Not Eligible	LAN System	Eligible
Plumbing Works	Not Eligible	Fire Alarm System	Eligible
Gardening Water Supply System	Not admissible as not used for business	Electrical Works	Eligible
Sanitary Ware & CP Fittings	Eligible	Telephone System	Eligible
Fire Protection Work	Not Eligible as not P&M	Lightning Protection System	Eligible
Air Conditioning Work	Eligible	Demolition Work	Not Eligible



# Case Study 2: CSR Activity

## *Relevant Provisions:*

*Section 17(1) of CGST Act, 2017*

*Section 17(5)(h) of CGST Act, 2017*

*Section 2(17) of CGST Act, 2017*

# Case Study 2: CSR Activity

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## Facts of the Case:

- Seva Ltd. is engaged in the business of supplying irrigation equipment and solutions
- In furtherance of its CSR obligations, it incurred expenses worth INR 2 Crores in relation to floor training to underprivileged children enrolled with a charitable organization
- These expenses were towards providing proper uniforms and equipment to the children, supervision of children, canteen services etc.

# Case Study 2: CSR Activity

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## Issues to discuss:

- Whether Seva Limited is eligible to avail and utilize ITC towards expenses incurred in relation to the floor training to the underprivileged children being expenses incurred in the course or furtherance of business? The nature of expenses being Uniforms, Training expenses, catering, etc.
- Would your answer change in any manner, if the actual expenditure incurred is more than 2% of the average net profits of the company made during the three immediately preceding financial years?

# Case Study 2: Legal Aspects

Law	Provisions	Impact
Section 17(1) of CGST Act, 2017	It provides for reversal of credit availed on non- business activities	Positive
Section 17(5) of CGST Act, 2017	It does not block credit on CSR activities specifically	Positive
Section 135 of the Companies Act, 2013	It requires Companies with net worth of Rs. 500 crore or turnover of Rs. 1000 crore or a net profit of Rs. 5 crore or more to spend at least 2% of the average net profits of the company made during the three immediately preceding financial years	Positive
Rule 4(1) of Companies (Corporate Social Responsibility Policy) Rules, 2014	It states that CSR spends exclude 'activities undertaken in pursuance of the normal course of business of the Company' . Further, the CSR activities shall be undertaken by the company, as per its stated CSR Policy, as projects or programs or activities (either new or ongoing), excluding activities undertaken in pursuance of its normal course of business.	Negative



# Case Study 2: Legal Aspects

Law	Provisions	Impact
Explanation 2 to Section 37 of Income Tax Act, 1961	It provides the deeming fiction that CSR Expenditure shall not be allowed as expenditure for the purposes of business of the assessee. It reads as under: “Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession.”	Negative

# Case Study 2: Advance Ruling

Citation	Observations of the Court
Dwarikesh Sugar Industries Ltd. [2020-TIOL-305-AAR-GST]	<ul style="list-style-type: none"><li data-bbox="741 339 2390 501">• Held that Input Tax Credit (ITC) shall be available on expenses incurred to comply with the requirements of Corporate Social Responsibility (CSR) under Companies Act, 2013 (CSR Expenses)</li><li data-bbox="741 511 2390 725">• The companies are compulsorily required to undertake CSR activities in order to run its business and accordingly, it becomes an essential part of his business process as a whole. Therefore, the said CSR activities are to be treated as incurred 'in the course of business'.</li><li data-bbox="741 735 2390 949">• AAR considered the decision of Hon'ble CESTAT Mumbai in the case of M/s <b><i>Essel Propack Limited</i></b> to conclude CSR activities are an essential part of business process and therefore are to be treated as incurred 'in the course of business'.</li><li data-bbox="741 959 2390 1343">• AAR agreed with the applicant that clear distinction needs to be drawn between goods given as gift and those provided/ supplied as a part of CSR activities. While the gift is voluntary and occasional, CSR is obligatory and regular in nature. CSR expenditure to be incurred are mandatory under the Companies Act. It is the company's obligation to incur such expenses in order to be in compliance with the law. Since, CSR expenses are not incurred voluntarily, they do not qualify as gifts and ITC can be claimed on the same.</li></ul>



# Case Study 3: Make-up expense of an Artist

*Relevant Provisions:*

*Section 17(5)(b)(i) of CGST Act, 2017*

# Case Study 3: Make-up expense of an Artist

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## **Facts of the Case:**

- A TV serial production house is producing a TV series for a TV channel.
- The copyright in the program will be with the TV channel.
- TV producers have availed the services of make-up artist to undertake make-up of various artist taking part in the shooting of the program.

## **Issues to discuss:**

- Whether producer can avail ITC of GST charged by the Make-up artist?
- Whether the said expenses can be considered as eligible for credit in view of the fact that the same is part of the composite supply to the TV channel?

# Case Study 3: Provisions & Definitions

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## Section 17(5)(b)(i) of CGST Act, 2017

Foods and beverages, outdoor catering, **beauty treatment**, health service.....

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

## Section 65(17) of the Finance Act, 1994

“**beauty treatment**” includes hair cutting, hair dyeing, hair dressing, face and beauty treatment, cosmetic treatment, manicure, pedicure or counselling services on beauty, face care or make-up or such other similar services.


# Case Study 3: Provisions & Definitions

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## Section 2(l) of CENVAT Credit Rules, 2007

“Input Service” means..... but excludes.....

Services which are 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.**



# Case Study 4: Health Services & Personal Consumption

*Relevant Provisions:*

*Section 17(5)(b)(i) of CGST Act, 2017*

*Section 17(5)(g) of CGST Act, 2017*

# Case Study 4: Personal Consumption

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## **Facts of the Case:**

A company has incurred some expenses for ensuring hygiene and to comply with safety standards on account of COVID pandemic.

## **Issues to discuss:**

Whether GST paid on following expenses can be claimed as ITC?

- Masks/ Sanitizers for office staff use
- Masks/ Sanitizers for visitors
- Vaccines purchased from pharma company which will be inoculated by the in-house paramedic team to staff & their family members
- Mediclaim insurance



# Case Study 4: Provisions & Definitions

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**Section 17(5)(g) of CGST Act, 2017:**

Good or services or both used for personal consumption

## Personal

- Black's Law Dictionary- 'personal' means 'of or constituting personal property'
- Can this be extended to the personal consumption of employees? Or restricted to owners of business i.e. proprietor, partner, etc
- Can employee be argued to be representative of the company?

## Consumption

- Black's Law Dictionary- 'consumption' means 'the use of thing in a way that thereby exhausts it'
- Goods or services can be 'consumed' by a human being only
- The term 'in respect of' at the opening of section narrows down the scope of ineligibility

# Case Study 4: Provisions & Definitions

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## Section 17(5)(b)(i) of CGST Act, 2017:

Food and beverages, outdoor catering,.... Health services,... life insurance and health insurance.

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 to its employees under any law for time being in force.

## Mandatory Vs. Obligatory

Mandatory- It is required or commanded by authority or law

Obligatory- Imposing obligation, morally or legally binding



# Case Study 5: Gift to Employee's

*Relevant Provisions:*

*Section 17(5)(h) of CGST Act, 2017*

*Schedule I of CGST Act, 2017*

*Schedule III of CGST Act, 2017*

# Case Study 5: Gift to Employee's

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## Facts of the Case:

- A Company is celebrating its 100<sup>th</sup> Anniversary for which they have distributed gold coins to all its employee's
- Cost of 1 gold coin which weighs 5 grams is Rs. 15,000/-
- The company has claimed ITC of GST charged on these gold coins

## Issues to discuss:

- Can company claim ITC of gold coins which are gifted to its employee's?
- What would be the position if the expenditure towards Gold is treated as part of perquisites in Income Tax and included in salary cost of the respective employee?
- Whether answer will be different if the offer letter with the employee specifies that Gold Coin will be given to employee based on performance?

# Case Study 5: Provisions & Definitions

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Section 17(5)(h) of CGST Act, 2017:

Goods lost, stolen, destroyed, written off or **disposed of by way of gift** or free samples

**Gift-tax Act (18 of 1958)**

*Gift means transfer by one person to another of any existing movable or immovable property **voluntarily and without consideration** in money or money's worth.*

**Sonia Bhatia v. State of UP [(1981) 2 SCC 585]**

*A 'gift' is commonly defined as a voluntary transfer of property by one to another, **without any consideration or compensation** therefor. A 'gift' is a **gratuity and an act of generosity** and not only **does not require a consideration, but there can be none; if there is a consideration for the transaction it is not a gift**. A gift is a transfer which does not contain any element of consideration in any shape & form. Love, affection, spiritual benefit and many other factors may enter in the intention of the donor to make a gift but these filial consideration cannot be called or held to be legal considerations as understood by law.*

**Australian High Court Ruling- Commissioner of Taxation (Cth) v. McPhail [(1968) 41 ALJR]**

To constitute a 'gift' the property should be transferred voluntarily and not as a result of a contractual obligation



# Case Study 6: Goods Destroyed

*Relevant Provisions:*

*Section 17(5)(h) of CGST Act, 2017*

# Case Study 6: Goods Destroyed

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## Facts of the Case:

- ABC Ltd. has a trading division where it deals in supply of packing materials which is purchased from a manufacturer
- During the month of June 2021, the division had sent a truckload of packing materials to Pune, by issuing invoice, e-Way bill, etc for which the customer paid the consideration in advance
- Due to heavy rains, portion of the packing materials were damaged and became non usable by the customer and he returned the same
- To the extent of the returned quantity, the trading division claimed insurance on the damaged goods, which was accepted to the extent of 75% of the value of damaged goods
- The trading division also sent back the damaged goods to the manufacturer who procured the same at 25% of the sale price on which GST was also paid, as manufacturer could use the same in manufacturing process

# Case Study 6: Goods Destroyed

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## Issues to discuss:

ITC implications vis-à-vis ABC Ltd. and the customer:

- Transfer of property in goods has not taken place at the time of destruction of goods
- Transfer of property in goods has taken place at the time of destruction of goods
- Because insurance amounts have been received which includes input tax component, can they claim ITC?
- Will answers change, if insurance amounts have been received without input tax component?



# Case Study 6: Provisions & Jurisprudence

Section 17(5)(h) of CGST Act, 2017:

Goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples

Citation	Observations of the Court
Pragna Dyechem Pvt. Ltd. [2013 (294) ELT 117 (Tri-Ahmd)]	Cenvat Credit Rule requires the assessee to reverse the Cenvat credit taken on the inputs contained in the finished products only and there is no specific provision to say that the amount should not have been claimed from the insurance company. In the absence of any specific provisions in the rules, the Id. Commissioner has erred in observing that the company can be deemed to have utilized the amount from insurance company for payment of duty of other final products. It is to be noted that even if the goods are destroyed, the appellants would have lost the entire value of the goods which would include raw materials, used labour and overheads for manufacture etc. Further, the Cenvat credit is available to the appellants, once the raw materials are used. In such a situation, if such Cenvat credit is required to be reversed and if appellant receives compensation from the insurance company, it cannot be said to be unjust enrichment or cannot be said to amount to utilization of the amount for payment of duty of other final products. The loss of duty liability on the raw materials used has only been compensated by the insurance company on the basis of premium paid.
TATA Advance Materials Ltd. [2012 (26) STR 600 (Kar)]	Capital goods destroyed in fire after payment of duty on them and availment of credit. Payment by Insurance company inclusive of Central Excise duty, could not render credit claimed by assessee as irregular. Assessee had paid insurance premium for which it got compensated. It is not a case of double payment or irregular availment of credit. Reversal required only when its availment was irregular.



# Thank You

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