# INPUT TAX CREDIT

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**15.06.2020** **6:00 PM**

# PPT ON INPUT TAX CREDIT


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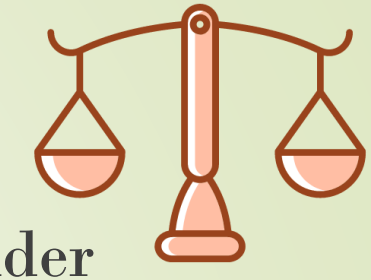
**Date of presentation: 24/05/2020**

# INPUT TAX CREDIT



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- "Input Tax Credit" means credit of 'input tax' as defined under section 2(56) of CGST Act. It was known as Cenvat in pre GST regime.
  - **GENERAL PRINCIPLE OF CENVAT/ITC**
- Credit/Input validly taken cannot be taken away CCE Vs. Dai Ichi Karkaria Ltd 1999(112) ELT 353 SC.
- Eicher Motors Ltd. v. UOI [MANU/SC/0051/1999, Supreme Court held that a credit under the MODVAT scheme was "as good as tax paid".
- Accumulated Cenvat Credit cannot lapse in the absence of statutory provision. CCE Vs. Annapurna Ind. 2010(255) ELT 197 Guj DB.

- Section 2(62) of CGST Act defines 'Input Tax' as follows:
- "Input Tax" in relation to a registered person, means the central tax, State tax, integrated tax or Union territory tax charged on any supply of goods or services or both made to him and includes—
- (a) the integrated goods charged on import of goods;
- (b) the tax payable under the provisions of sub-sections (3) and (4) of section 9; (Reverse Charge of CGST)


- c) the tax payable under the provisions of sub-sections (3) and (4) of section 5 of the Integrated Goods and Services Tax Act; (Reverse Charge of IGST)
- (d) the tax payable under the provisions of sub-sections (3) and (4) of section 9 of the respective State Goods and Services Tax Act; or (Reverse Charge of IGST)
- e) the tax payable under the provisions of sub-sections (3) and (4) of section 7 of the Union Territory Goods and Services Tax Act**, but does not include the tax paid under the composition levy;**

As per rule 43 (1)(b), ITC paid on capital goods can be taken for effecting taxable supplies, shall be credited to the Electronic Credit Ledger and shall be reflected in GSTR-2.

- RP can take **re- credit of ITC** upon payment of full value of Invoice – no time limit prescribed.
- Upon **deduction of LD**, lesser payment is made by Contractor/Buyer and, therefore, **proportionate ITC to be reversed.** GM, Ordnance Factory, Bhandara 2019(106) Taxmann.com 246 AAR.

- Tax paid at a higher rate, full ITC would be eligible. CCE Vs. Jai Mata Alloys 2008(232) ELT 462 Tri.
- **Inter-changeable:** RP who is supplier of Goods and Services, ITC of inwards supply of materials could be used for tax payment of outward supply of services. CBEC Manual. CCE Vs. Nahar Industrial Enterprises Ltd 2007(10) STT 117.
- The Calcutta High Court in the case of Singh Alloys & Steel Ltd. vs. CCE MANU/WB/0305/1993(Cal.) has held that the definition of input does not depend on what ought to be used but what is commercially expedient to use and expression in relation to used in Rule 57A has wide connotation.

# NO ONE TO ONE CO-RELATION IS NECESSARY:

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- There is no correlation of the raw materials and the final product, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. CCE Vs. Dai Ichi Karkaria Ltd 1999(112) ELT SC 353.

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- **Section**16(1) ITC shall be used for providing taxable goods or output services or both
- Inputs or Inputs services **used or intended to be used** in the course or furtherance of business;
- The SC in SAIL Vs. CCE 1996(5) SCC 484 observed " intended for use" as appearing exemption notification mean that the raw naptha was **"intended for use"** in the manufacture of fertilizers and not that it was actually used.
- Md. Yusuf Vs. D AIR 1968 Bom 112: "**In the course of business"** means the way that entire gamut of business activities are conducted.

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- The SC in CIT Vs. Malayalam Plantation Ltd. (10.04.1964 - SC) : MANU/SC/0110/1964 (**Very exhaustive & elaborative)**
- Expression "for the purpose of the business“ may include not only day to day running of a business but also the rationalization of its administration and modernization of its machinery. It may include measure for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title; it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business; it may comprehend many other acts incidental to the carrying on of a business.

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## FUNDAMENTAL REQUIREMENTS FOR AVAILING ITC

- (2):(a) Possession of (i) Invoice (ii) Debit Notes (iii) Tax paying documents i.e. Bill of Entry for IGST;
- (b) received goods (Job Worker) or services - (license Fee) for three years paid in advance.
- (c): tax actually paid to Government (i) cash or (ii) use of ITC/Cenvat;
- (d) Filed Returns under Section 39


- (3) Non claiming of depreciation on tax component on capital goods or plant and machinery, ITC shall not be permissible;
- (4) No credit after furnishing of Return of Sep (following financial year i.e. 20 Oct ) or Annual Return (Dec) whichever is earlier.
- (5): Invoice - not more than one year old – migration from non taxable or exempt regime to taxable regime.

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- Section 17 (1) Full ITC shall be allowable only to the extent input is attributable to his taxable business –
- **(2): ITC can be used for effecting taxable and zero rated supplies**
- **(3): Tax payable on reverse charge basis;**

- No ITC when Tax paid pursuant to proceedings U/s 74, 129 and 130 of CGST Act (New extremely harsh provision - Not there in Pre-GST regime)

# SECTION 16(2)(d) FIRST PROVISION

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- **INTEREST AFTER 180 DAYS OR FROM FIRT DAY ITSELF:**

If payment not made upon 180 day, interest shall become payable from day one – **Rule 37 (3)- Why interest if ITC not utilized.**

- **PAYMENT TO SUPPLIER THROUGH BOOK ADJUSTMENT:**

Payment can be made through book adjustment or setting off debts. ITC cannot be denied. Senco Gold Ltd AA 2019(10) Taxmann.com 143 AAA West Bengal.

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The Delhi High Court Arise India Limited (MANU/DE/3361/2017 wherein the validity of Section 9[2][g] of the Delhi Value Added Tax Act, 2004. The High Court rejected the contention of Department. On appeal, Supreme Court has declined to entertain appeal and disposed off, with observations, in case of collusion between buyer and seller, the Deptt may approach Delhi High Court.

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- The DB Karnataka High Court Onyx Designs vs. CCE : MANU/KA/3893/2019
- ITC cannot be denied to purchaser dealer if the purchaser dealer establishes while purchasing goods, he has paid the amount of tax to the selling dealer. Action to be taken against Selling Dealer by Dept.

The case of **Swyam Software Limited** – Commissioner (Appeal) CST, IP Estate, decided in the month of Feb 2020 allowed the appeal of the appellant – Appeal argued by me.

- The SC in Pratibha Processors Vs. UOI 1996(88) ELT 12 SC, held:-
- Interest is compensatory in character and is imposed on an Assessee who has withheld payment of any tax as and when it is due and payable. The levy of interest is geared to actual amount of tax withheld and the extent of the delay in paying the tax on the due date. Essentially, it is compensatory and different from penalty - which is penal in character.
-

- The DB Karnataka High Court in CCE Vs. Bill Forge Pvt. Ltd. MANU/KA/1284/2011 (INDSWIFT MANU/SC/0140/2011)
- Credit of excise duty in the register maintained for the said purpose is only a book entry. It might be utilized later for payment of excise duty on the excisable product. One is entitled to use credit at any time thereafter when making payment of excise duty on the excisable product. It matures when the excisable product is received from the factory and the stage for payment of excise duty is reached. **Actually, the credit is taken, at the time of the removal of the excisable product**. It is in the nature of a set off or an adjustment. Therefore interest is payable from that date as, by such entry, the Revenue is not put to any loss at all.

- . When once the wrong entry was pointed out, being convinced, the Assessee has promptly reversed the entry. In other words, he did not take the advantage of wrong entry. He did not **take the Cenvat credit or utilized** the Cenvat Credit. It is in those circumstances the Tribunal was justified in holding that when the Assessee has not taken the benefit of the Cenvat credit, there is no liability to pay interest. Before it can be taken, it had been reversed.
- The DB Madras HC in CCE Vs. Vilax Industrial Fab MANU/TN/3137/2014. Rule 14 of the Cenvat Credit Rules as been subsequently amended, wherein it has been clearly stated as "taken and utilised". Therefore, it is quite clear that mere taking itself would not compel the assessee to pay interest as well as penalty.

- The DB of Karnataka High Court CCE Vs. Vilax Industrial Fabrics : MANU/KA/2443/2018, observed:-
- Rule 14 of the CENVAT Credit Rules, 2004 reads as under:
- ----------
- Rule 14. -Where the CENVAT credit has been taken or utilized wrongly or has been erroneously refunded, the same along with interest shall be recovered from the manufacture or the provider of the output service.
- ----------
- The imposition of penalty and interest in the present case has been set aside by Tribunal essentially on the ground that soon upon the mistake being pointed out by the Officer of the Department, the Assessee immediately reversed the Cenvat Credit wrongly availed.
-

# ENTIRE ITC AVAILABLE EVEN IF PART OF INPUT GOES IN WASTE.

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- ITC on entire input is available, even if part of input goes in by-product or waste like sludge which is not taxable. Principal of proportionate apportionment is not applicable. The party is entitled to full ITC. Ruchi Soya Industries Vs. State of MP 2014(70) VST 40 MP.
- There is no time limit specified in Section 16,18 or 49 about utilization of ITC. Time restriction is only for availment/taking.
- **Section 17(5)(h) goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples; and**
- The proviso to Section 18(6) provides refractory, bricks, moulds, dies, jigs and fixtures sold as scrap, GST shall be payable on value as per Section 15(1) as "Scrap" means items is not capable for use for the desired purposes. No reversal of ITC.

# THE FOLLOWING ARE PERSMISSIBLE DESPITE SECTON 17(5)(h)

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- Credit availed as input but actually held to be capital goods, ITC is allowable. Modi Rubber Ltd 2000(119) ELT 197 (Tri Larger Bench.).
- **PROCESS LOSS AND HANDLING LOSS:** There will always some loss during the manufacturing process but the ITC is available on entire inputs which has been put into manufacturing process even if it is not reflected in final products. UOI Vs. Indian Aluminimum Co Ltd 1995(77) ELT 268 SC.
- ITC cannot be denied for **minor defects in documents** . JK Ind. Ltd Vs. CCE 2008(223)ELT 372 Raj/CCE Vs. Varinder Ago Chem. 2010(260)ELT 353 Delhi HC.



- In the process of manufacture, if **input becomes scrap or waste**, credit shall not be denied. It is only where the goods/inputs have been destroyed in full, ITC will not be allowed. **FAQ No. 20 issued by ICAI on GST.**
- **Loss of input by evaporation during manufacturing processing is to be treated as process loss** and ITC on such loss is not required to be reversed. CCE Vs. BOC India 2008( 223) ELT 33 (Guj HC).
- **Fundamental requirements: (a) duty paid (b) receipt of inputs © tax paid on supply of finished goods. CCE Vs. DNH Spinners 2010(25) STT 295.**
- Wrong address of Consignee but no dispute about receipt of goods. Om Textile Vs. CCE 2006(199) ELT 47 Tri.

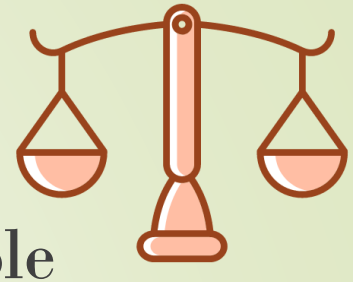

- **Excess process loss is allowable** if evidence of clandestine removal is not available. Rollex Electro Products Vs. CCE 2016( 338) ELT 736 Cestat.

**(BELOW IS NOT PROCESS LOSS – HENCE DENIED)**

- If inputs are short received and there is loss during transit, the goods short received cannot be termed as used in or in relation to manufacture. Hence, ITC denied. Asea Brown Boveri Ltd Vs. CCE 1994(74) ELT 897
- Appellate Authority of AAA, Maharashtra, In re: Maharashtra Sate Power Generation Co Ltd 2018(97) Taxmann.com 408/70 GST 411, held Upon Principal getting Liquidated Damages from Contractor and paying GST on the sum representing LD, Principal is entitled to ITC of GST paid on LD.
- .


- **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:**
- **(A): ITC ON MOTOR VEHICLE, VESSELS, AIRCRAFT:**
- **(a):** ITC for Motor Vehicle for transportation of persons having approved capacity of more than 13 is not blocked and is available.
- Car, bus, truck, lorry considered as Motor Vehicle;


- (b): ITC in respect Motor Vehicle up-to 13 persons shall always be blocked except for following.
- i) : for the purpose of training
- ii) for further supply
- iii) for transportation of passenger
- iv):for car kept for Demonstration/Trial and ITC could
- be adjusted against output tax liability at the time of sale of car.
- Goa and Kerala Authority for Advance Ruling AAR No. GOA/GAAR/07 of 2018-19/4796, dated 26-3-2019 and No. KER/10/2018, dated 26-9-2018 (AAR – Kerala) held that "Input tax paid by a vehicle dealer on the purchase of motor car used for demonstration purpose, can be availed as input tax credit on capital goods and set off against output tax payable under GST."



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- ITC for transportation of goods is always allowable irrespective of tonnage;
- ITC on Special Type of Vehicles modified for use in the factory, internal movement within the factory, vehicle for transportation of gas, fuel, water and other liquid items, concrete mixer, vehicle for construction services ITC would be available on dumpers, work-trucks, and other special purpose motor vehicle.
- The motor vehicle & other conveyances which are used for courier agency, outdoor catering, pandal and shamiana and tour operator is eligible for ITC.


- ITC for Aircraft and Vessels is not allowed but for the following purposes/use:-
- i): Further supply
- ii: For training;
- iii):for transportation of passenger & goods ;

- ITC on Motor Vehicle received on Lease or renting:
- From 1.2.2019, ITC has been specifically prohibited since the tax paid at the time of purchase of Vehicle is not allowed as ITC and, therefore, ITC on Vehicle procured for use on leasing or renting has also been prohibited by the Government.

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- ITC is allowed only when Invoice is in the name of persons availing ITC.
- During pre-GST regime, ITC was allowed even if the **Mobile Phone** was in the name of employee and the company is repaying the amount of bill to the employee and debiting to the expenses of the company.
- The ITC would be allowable even if Mobile Phones are in the name of employees of the company. Wiptech Peripherals Vs. CCE 2009(19 ) STT 306 Tri.

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- **GROUP MEDICAL POLICY & GROUP INSURANCE**
- **HEALTH POLICY, SECTION 38 OF ESI ACT,- MANDATES THAT EMPLOYEES BE INSURED.**
- CCE Vs. Mirco Lab Ltd 2011(270) ELT 156 Kar HC.
- Insurance Policies taken by the employer for the workmen employed by assessee, in terms of MHA order issued under statutory provision. Tax paid on purchase of Mask, Sanitizer, Protective Equipments/Apparatus/Tools, Foods, Transportation, Ambulance, Amount spent on any other measures as per MHA order which is mandatory in nature and hence ITC to be allowed.
- **Hiring Ambulance under Factories Act:**
- Hindustan Zinc Ltd Vs. CCE 2013(288) ELT 406 (Tri)



- **Maintaining of Canteen for Workers under Factories Act:**
- CCE Vs. Hindustan Coca Cola Beverages Ltd 2011(274) ELT 196 Tri Delhi
- A P High Court in Bhimas Hotels (P) Ltd MANU/AP/0244/2017 has held that if Canteen Services is part of (i) package agreed with employee (ii) Section 2(rr) of ID Act define wage to mean all remuneration capable being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to workmen.

- **Maintaining 33% of plant area as green belt as per Ministry Of Environment;**
- India Glycol Ltd GVs. CCE 2013(292) ELT 312 Tri
- **Garden Service (though no statutorily required)** yet would be available as cleaning, servicing, maintenance is environment friendly which adds to the productivity of employees. CCE Vs. Millipore India Ltd 2012(34) STT 86.

- **Keeping factory premises neat & clean is a statutory requirements under Section 11 of Factories Act,**
- NTF India Pvt. Ltd Vs. CCE 2013(30)STR 575 Tri
- **Removal of Waste from factory to treatment plant under under Factories Act.**
- CCE Vs. Lupin Laboratories Ltd 2012( 285) ELT 221
- **Maintenance of Water coolers under Factories Act:**
- CCE Vs. Rotork Control (I) Ltd 2012(277) ELT 217 Tri

- **<u>Technical Inspection & Certification Service of the Instrument under Drugs & Cosmetics Act, 1940</u>**
- CCE Vs. Cadila Healthcare Ltd 2013(30) ELTSTR 3 Guj
- FOOD BEVERAGES:
- (I): Shockingly, no ITC is permissible on Food & Beverages – even not allowable for Business Meet, Annual Meet, Dealers Meet, AGM. Food and beverages served even to the employee would be blocked unless it is a part of terms and conditions of employment;

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- M/s A Ltd supplies the service of Event Management of Dealers Meet where they engage service of Outdoor caterer for supply of food and beverages, hires vehicles for guests. The total charges also includes (i) outdoor catering and (ii) rent-a-cab. And both these forms part of Event Management Service. Event Manager will be entitled to ITC paid on (a) Outdoor Catering and (b) Rent-a-Cab.

# OUTDOOR CATERING

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- Outdoor catering mean supply of food items, drinks etc. at Exhibition Hall, Banquet Hall, Marriage Hall, Pandal/Shamiana blocked except for providing output service. Dealer/Distributors Meet, General Meetings, Annual Meeting, Cultural Meeting for employees, Yoga Meet.
- A Ltd engaged the B Ltd to supply foods for onward supply to C Ltd. A Ltd can avail ITC of tax charged in Tax Invoice raised by B Ltd. However, C Ltd cannot avail ITC on tax charged by A Ltd.

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- **Section 17(C)**
- **(C):** Works contract service when supplied **for construction** of immoveable property (other than **plant and machinery)** except where it is input service for further supply of works contract service;

- **(D):** Goods or services or both received by a taxable person for construction of a immoveable 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.

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- Explanation: for purpose of clause (c)(d), the expression construction includes, re-construction, renovation, additions or alterations, or repairs, to the extent of capitalization, to the said immoveable property.
- In Section 17(5)©, the words used are "works contract" service when supplied for "construction" of immoveable property". The words used are "for" and not " in relation to" –. In my view, the meaning of the word "for" carry restrictive meaning and whereas in Rule 2(l) Cenvat Credit Rule, words are "in or in relation to" which are very wider in nature.

- Hence, under Section 17(5)© , at the best, what would be restricted is (a) construction materials (b) inputs services (c) capital goods by virtue of immoveable property emerges. After emergence of civil structure ( which is admittedly a immoveable property), other inputs such as (a) air-conditioning (b) electrical equipments (c) sanitary items (c) wooden items (d) elevators & lifts (e) DG Sets (f) Fittings, (g) Painting and Polishing and (h) Post Construction activities would be allowable.

- Section 2(119): “Works Contract” means a contract for building, construction, fabrication, completion, erection, installation, fitting out, improvement, modification, repair, maintenance, renovation, alteration or commissioning of any immoveable property wherein transfer of property in goods (whether as goods or in some other form) is involved in the execution of such contract.
- Upon analysis of definition of “Works Contract” in Section 2(119), it split into construction and other 13 items. Needless to say Section 17(5)© deny ITC on inputs and input services only where construction results in immoveable property but, in my view, cannot be stretch to deny the ITC on other 13 activities as clearly spelt out in the definition of works contract. .

- IN RE : M/S RAMBAGH PALACE HOTELS PVT. LTD. (Authority For Advance Rulings) 2019 ACR 192
- AAA in the case of Ram Bagh Palace Hotels (P) Ltd has observed that GST on wood, board, mica, tapestry, paint, polish and consumables meant for repair of existing furniture and fixtures and buying of new furniture and fixtures such as a Sofa, Table, Chairs Doors, Cabinets etc. This activity of supply of goods and repair in relation to furniture and fixtures is a composite supply of goods and services. Hence, ITC on GST paid on supply of goods and services will be available.

- The ITC on building repairs, maintenance, upkeep would depend upon accounting treatment given to expenses. If expenditure treated as a revenue expenditure, ITC would be allowed and **if capitalized, no ITC** would be allowed.

# EXPLANATION BELOW SECTION 17(6): PLANT AND MACHINERY



- Plant and machinery means apparatus, equipment, machinery, fixed to earth by foundation or structural support that are used for making outward supply and includes such foundation and structural supports but excludes:-

- Land, building or any other civil structures;
- Telecommunication towards; and;
- Pipelines laid outside the **factory premises**;

Appellate Authority of AAA in Western Concessions Private Limited (07.10.2019 - AAAR - Maharashtra) : MANU/AI/0071/2019 has observed as under:-

Term- 'premises' has been used adjacent to the term 'factory'. Thus, in a way the term 'factory' is acting as a qualifier to the term 'premises', and premises need not be restricted to the land, rather it can be construed even beyond the land and may extend to establishment like FSRU. Thus, under the present exclusion clause, the **contextual meaning of the premises** will prevail over the literal meaning. In this case FSRU, ( which is away from factory premises) was considered as factory

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## FUNCTIONAL TEST

- The Supreme Court in Scientific Engineering House (P) Ltd v. CIT (1986) 157 ITR 0086 held.
- In deciding whether a 'building' or a structure is a plant, the **functional test** has to be applied. If the 'building' is an apparatus or tool used by the Assessee for carrying on the business or manufacturing activity, then it would be part of the 'plant'. If building has no connection with the business or manufacturing activity, then obviously such a building will not be part of plant.
- CIT v. Hotel Luciya MANU/KE/0580/1998 (Full Bench Kerala High Court) held that for deciding whether a building is plant or not court must apply what is called **'functional tests'** and **hotel building** & **Theatre Buildings** are plant within the meaning of section 43(3) and accordingly entitled to depreciation as applicable to the 'plant' (On appeal, Supreme Court did not intervene).

- The DB of Karnataka HC in J.K. Cement Works vs. The State of Karnataka : MANU/KA/0697/2017
- Whether “building' or a “structure” is a plant, the **functional test** has to be applied. If the 'building' is an apparatus or tool used by the Assessee for carrying on the business or manufacturing activity, then it would be part of the 'plant'. If a building or a part of a building has no connection with the business or manufacturing activity, then obviously such a budding or portion of the building will not be part of the plant. Revisionary Authority has merely proceeded on the basis that decisions relied on by the appellant are not applicable as they were rendered with reference to Income-Tax Act.

- we do not find any good reason to hold that cement used for civil works and laying foundation and erection of plant and machinery by the assessee during the relevant period should not constitute a part and parcel of "plant" and thus, Capital Goods used for manufacturing of cement by the petitioner assessee later on, the petitioner would be entitled to claim input tax credit in respect of the tax paid by it in respect of such cement purchased and used by it during the relevant period, prior to the commencement of its commercial production, for the purpose of erection of the plant and machinery.

- Following observations were made in the case of Karnataka High Court in J.K. Cement Works Vs State of Karnataka : MANU/KA/0697/2017:
- In the following case, disposed of by the learned Single Judge of this Court in Santosh Enterprises v. CIT, MANU/KA/0052/1988MANU/KA/0052/1988 : (1993) 200 ITR 353 (Kar), observed that the Indian Courts as well as English Courts, depending upon the context of income tax law, have treated even the assets like Silos, dry dock built in the ship yard, freezing chamber in the case of cold storage, cinema building, etc. as falling within the definition of 'Plant'.

- **FUNCTIONAL TEST**

- The SC in CIT v. Dr.Venkata Rao MANU/SC/1284/1999: 2000(243) ITR 81(SC) , held if building or structure constituted an apparatus or a tool of the taxpayer by means of which business activities were carried on, it amounted to a "plant", but where the structure played no part in the carrying on of these activities but merely constituted a place wherein they were carried on, the building could not be regarded as a plant.

- The DB Gauhati High Court in Nowrangroy Metals Pvt. Ltd. vs. CIT : MANU/GH/0044/2003, held:-
- When the building in question is an apparatus or a tool of taxpayer as against merely a space only from where the taxpayer carries on business, it can be treated as plant. If a building is an integral part for carrying on the business of manufacture, it would be a plant whereas if the structure plays no part in carrying on any of the activity relating to manufacture, it would merely constitute a place where the business is carried on and it cannot be recognized as Plant.

- When the assessee with a definite purpose, considering the nature of business carried on by the assessee, constructs a building with specific required design keeping in view specified technical requirement, without which the assessee's business cannot be carried out, the building in question would qualify to be treated as plant.

The DB Kerala High Court in State of Kerala vs. Ambuja Cements Ltd. (12.11.2019 ): MANU/KE/5980/2019 held:

- With respect to 'silos', the Tribunal had placed reliance on the decision in Nowrangroy Metals (P) Ltd. V. JCIT (MANU/GH/0044/2003:,C.I.T. V. R.G. Ispat Ltd. MANU/RH/0130/2003 and various other rulings, rendered in the subject of Cenvat Credit. Based on those principle, it was held that, merely because some of the machinery or parts of 'silos' are made out of steel and cement, **it will not fall within the exempted group of civil structure, not eligible for input tax credit.**

- ‘Silos' with various machineries form an integral part of it, need to be considered as plant and the **'steel and cement' used for construction of the 'silo' and the connected machineries, by itself will loss its identity as 'steel and cement', but it gets merged as a final plant with a specific purpose.**
- The above mentioned observations made by the Tribunal are well founded on sound principles, which has got support from the rulings cited above.

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- **ISSUE:** An interesting question of law arises in these Tax Revision Cases; "whether the 'Silos' erected by the assessee along with its connected machineries, which is made up of 'steel and cement' could be treated as a civil structure, thereby making the expenditure incurred for its erection not eligible for input tax credit. “Silos” with various machineries form an integral part of it, need to be considered as plant and the 'steel and cement' used for construction of the 'silo' and the connected machineries, by itself **will loss its identity as 'steel and cement'**, but it gets merged as a final plant with a specific purpose.

## USER TEST

- The SC in CCE Vs. Rajasthan Spinning and Weaving Mills Ltd. MANU/SC/0465/2010 held:-
- Applying the **"user test“,** steel plates and M.S. Channels, used in the fabrication of chimney would fall within the ambit of "capital goods" as contemplated in Rule 57Q. It is not the case of the Revenue that both these items are not required to be used in the fabrication of chimney, which is an integral part of the diesel generating set, particularly when the Pollution Control Laws make it mandatory that all plants which emit effluents should be so equipped with apparatus which can reduce or get rid of the effluent gases.

- The DB Gujarat High Court in CCE vs. Pipavav Shipyard Limited (14.02.2020 - GUJHC) has observed as under:-

- Mr. Joshi is right in submitting that it is impossible to manufacture or repair ships without the aforementioned cranes. Therefore, the HR Plates, MS. Flats, MS. Coils, Wire Ropes, Rail, Welding Electrode, which are used in the fabrication of cranes, are an integral part of the manufacturing process of ships and without these goods, it is not possible to manufacture ships.

- 26. Therefore, the HR Plates, MS. Flats, MS. Coils, Wire Ropes, Rail, Welding Electrode used in the fabrication of cranes which are used for manufacturing ships, are goods used "in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not". In light of this, they are "inputs" and the respondent is eligible to claim the Cenvat Credit on such goods

# (iii) Sec.15(6) EXPLANATION" "PIPELINES OUTSIDE THE FACTORY"

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- M/s Aditya Cement v. UOI, 2008 (221) ELT 362 (Raj.) - Railway track material used for railway line (located outside the factory premises) and railway line was used for transportation of coal, is an integral part of the manufacturing process and hence, qualify as "Capital Goods". The High Court followed Vikram Cement Vs. CCE. 2006(197) ELT 145 (SC),

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- In Vikram Cement Vs. CCE 2006(197) ELT 145 (SC), SC held "inputs need not be used be used within the factory. Explosives used for blasting mines to produce limestone in manufacture of cement, is eligible as "inputs" even if mines are situated away from factory.
- Rule 2(k) Cenvat Credit Rule,2004: Input means: All goods used **in the factory** by the manufacturer of final product; or

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- The DB Madras High Court in CCE vs. JSW Steel Ltd. (13.02.2020) : MANU/TN/1209/2020 “even if the Captive Power Plant (CPP) is located away from main factory of manufacturer of final product, the capital goods for CPP though, not in the same factory premises, yet Cenvat allowable.

## SECTION 17(5)(C): WORKS CONTRACT – WHERE ON OUTPUT SERVICE, GST IS PAYABLE.

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- 6: The AP High Court in CCE Vs. Sai Sahmita Storages (P) Ltd. MANU/AP/0510/2011 where company was providing taxable output service of " storage and logistic services" and Steel and Cement had been used for construction of warehouses without which, storage and warehousing services, not possible.

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- 7: The Gujarat HC Mundra Ports & Special Economic Zone Limited Vs.CCE MANU/GJ/0260/2015 has held as under:-

- **<u>The contention of Party/Assessee</u>**
- Before the amendment made in 2009 or thereafter, appellant had neither factory nor manufacturer, but constructed constructed jetty by use of cement and steel and hence entitled for input credit as jetty was constructed by the contractor, but the jetty is situated within the port area and the appellant is output service provider.

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- Appellant contends his case is covered by DB of AP High Court in CCE Vs. Sai Sahmita Storages (P) Limited, MANU/AP/0510/2011 as per Rule 2 (k) 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.

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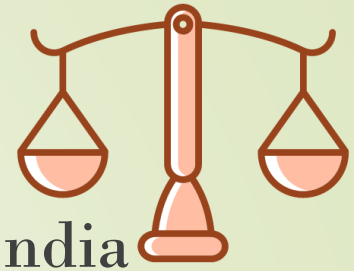
# Contention of Department:

- 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.

- **Findings:** The appellant is entitled to cenvat credit as the Jetty had been let out and the Service Tax paid thereon;



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- The Chhattisgarh High Court in CST. Vs. Vimla Infrastructure India Pvt. Ltd. MANU/CG/0185/2018 has held as under:-
- Construction activity carried on by the respondent company for erecting the facility of "Cargo Handling Services" it is to be kept in mind that the 'Inputs' have been used for providing output services which is taxable, therefore, by erecting the Railway Siding, the respondent is providing a taxable service for providing an output service, therefore, entitled to CCR, 2004.
- Asessee is entitled to Cenvat Credit for construction of “Railway Siding” which is admittedly immoveable property.

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- The Rajasthan High Court in Aditya Cements Ltd. Vs. UOI 2008 (221) ELT 362, held materials used for laying railway track (which is an immovable property emerging at intermediate stage) track was used for transporting of coal to factory, coal was used for manufacture of final product. Held credit allowable.
- 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.

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- DB of Delhi High Court in Vodafone Mobile Services Limited. Vs.CCE MANU/DE/4088/2018 observed that appellant providing telecommunication service. Several High Courts have taken a view that credit of excise duty or 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, cenvat is allowable.

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- In Maruti Suzuki Ltd 2009(240) ELT SC 641, under CCR 12004, cenvat allowable only when inputs used within the factory and SC held electricity used in township cannot be said to be used for manufacture of goods – Cenvat was not allowed. In GST regime, inputs must be used in the course of or furtherance of business and hence, inputs or input services which are used in Township , would increase efficiency of employees and hence ITC of inputs or input services would be allowable as has been held in ITC Vs. CCE 2013(32) STR 288 AP.

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- All Tax paid to Contractor on repair, maintenance, renewals, upkeep of Township would also be allowable as ITC on the basis of above analogy.
- The Karnataka High Court in CCE Vs. ICL Sugars Limited MANU/KA/2891/2011 (Kar.) held that plates, etc, used for fabrication and installation of a storage tank would be admissible for credit. The Revenue's sole contention storage tank was an immovable property and once erected to the earth becomes non-excisable, contention rejected, credit allowed.

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# 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).

- Hence in the light of the above, the assesse may take credit and utilize the same for payment of tax on output service and in future, it is held by the Supreme Court that no ITC is available, the ITC, so utilized, shall have to be reversed with interest but no penalty is imposable. In any event, Department cannot be invoked extended period of limitation and Section 74 cannot be invoked.
- One more option left with the assessee is to take ITC in the Credit Ledger to avoid limitation as provided under Section 16(4), but do not utilize the same. If in future, the SC holds that no ITC is available, the assesseee will have at best reverse the credit without any interest as they have not utilized the ITC.

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- AAA Karnataka in Wework India Management P Ltd Ruling 106/2019 allowed ITC on 14mm Engineered wood and Oak Top Wooden Flooring was allowed.

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- AAA Karnataka in Keshav Cements & Infra P Ltd MANU/_AR/0270/2019 had held in puts and input services (except goods as it's user is not clear from documents submitted) used for setting up solar power plant ( few kms away from the main plant to manufacture cement) for generation of electricity which is exempt but used captivly for the manufacture of finished goods, allowable. Further held that input or inputs answering to the definition of Plant and Machinery as given in 17(5) shall be eligible provided electrical energy is entirely captivly consumed and not sold outside.

- Nipro India Corpn P Ltd AAA Maharashtra 2018(98taxmann.com Page 319).internal finishing work, External Sewerage System, Internal Sewer and venting system, sanitary were and CP fittings, AC Equioments, AC piping work and accessories, Ventilation Fans, Air Distribution System, Automatic Control System, Compressed Air Supply System, Steam Supply System, Process chilled water supply system, purified water supply system, N2 Supply System, Process Waste water supply system, Local Exhaust System, DG Set, Main Feeder Distribution System, Emergency and Exit light system, telephone system, Lan system, PA address system Light Protection System ( except pure civil work) allowed.

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- Appellate Authority for AAA Orissa MANU/AI/0004/2019 ITC has held that for gardening and plantation within plant area ( even at mining area far outside the factory) and other business establishment will qualify for ITC as it control pollution and atmospheric temperature.

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- AAA Uttarakhand MANU/AR/0056/2018 has held that ITC on office furniture & fixtures AC plant is allowable in the view of the judgment of CESTAT, New Delhi Bench in Balkrishna Industries Ltd MANU,/CE/0885/2015. AAR is relying on Cestat judgment and therefore it is completely illogical to ignore the decisions on the same issues, of various High Courts on both Works Contract and Plant and Machinery when definition of Plant and Machinery is now much enlarged.

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- Credit would allowable to the assessee when **the capital goods procured on hire purchase,** lease, loan, hypothecation to bank etc.

- Credit not available as Capital Goods but available as input, credit
- cannot be denied. Modi Rubber Ltd 2000(119)ELT197, Tri LB.
- **MERGER/AMALGAMATION:** The provisions of Section 18(3) CGST Act and Rule 10 of Cenvat Credit Rules are identical and clearly permit the balance of ITC available with the Transferor Companies on the "Appointed date" shall vest with the Transferee Company once the Scheme has been sanctioned by NCLT. An intimation with the copy of the order of NCLT shall be filed with Deptt. CCE Vs. Amar Traders 2008(222) ELT 400 Tri. The Gujarat High Court in Hindustan Coca-Cola Beverages (P) Ltd Vs. UOI 2013(42)SCl 516 has held on merger/amalgamation, unutilized Cenvat Credit automatically gets transferred but no permission.

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- RULE 36(4)
- •Notification No. 49/2019 –Central Tax
- **•Rule 36 –inserted with effect from 09.10.2019**
- •(4) Input tax credit to be availed by a registered person in respect of invoices or debit notes, the details of which have not been uploaded by the suppliers under sub-section (1) of section 37, shall not exceed [10 per cent w.e.f. 01.01.2020] of the eligible credit available in respect of invoices or debit notes the details of which have been uploaded by the suppliers under sub-section (1) of section 37.
- •Circular No. 123/42/2019 –GST dt. 11.11.2019

| Case | Eligible ITC as per books | Eligible ITC reflected in 2A | Permissible ITC (Eligible ITC in 2A + 20%) | Actual ITC which can be claimed |
|---|---|---|---|---|
| I | 10,00,000/- | 6,00,000/- | 7,20,000/- | 7,20,000/- |
| II | 10,00,000/- | 7,00,000/- | 8,40,000/- | 8,40,000/- |
| III | 10,00,000/- | 8,50,000/- | 10,20,000/- | 10,00,000/-* |

- **•How will the said restriction be enforced ?**
- •Self-assessment basis
- **•From which date will the restriction be applicable ?**
- •Apply only on the invoices / debit notes on which credit is availed after 09.10.2019
- **•Which eligible ITC as per books is to be compared with the permissible ITC as per the new sub-rule ?**
- •Import, documents issued under RCM, credit received from ISD etc. is outside the ambit of the sub-rule
- **•Whether the ineligible ITC reflected in GSTR –2A would also be considered for deriving the permissible ITC ?**
- •Restrict availment of ITC beyond 20% of the eligible ITC reflected in GSTR –2A

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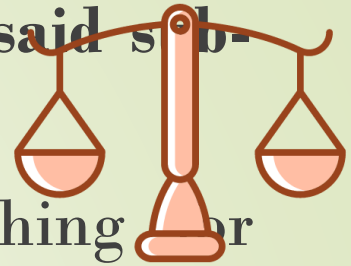
- **•Whether the restriction is to be calculated supplier wise or on consolidated basis ?**
- •Calculation would be on consolidated basis for the given tax period.
- **•On which date the eligible ITC in 2A is to be seen to calculate the permissible ITC ?**
- •Amount of eligible ITC for computing the permissible ITC has to be seen as per GSTR –2A available on the due date of filing of the returns in FORM GSTR-1 of the concerned suppliers.


- **•How to subsequently avail the ITC restricted in a particular tax period ?**

| Tax period | Oct, 19 | Nov, 19 |
|---|---|---|
| ITC as per books | 10,00,000 | 12,00,000 |
| Eligible ITC as per 2A | 6,00,000 | 2,00,000 (for Oct 19) & 9,00,000 (for Nov 19) |
| Permissible ITC | 7,20,000 (6,00,000 + 20%) | 2,40,000 (for Oct 19 – 2,00,000 + 20%) & 10,80,000 (for Nov 19 – 9,00,000 + 20%) |
| Restricted ITC | 2,80,000 | 40,000 (for Oct 19) & 1,20,000 (for Nov 19) |

- **•Whether time dimension is relevant for implementing the said sub-rule ?**
- •Circular indirectly provides for the invoice level matching for computing the restricted ITC and its subsequent availment with 20% tolerance limit.
- **•How to account for ITC flowing from quarterly filers ?**
- •A view can be taken that similar to ISD invoices (as permitted by the circular), even ITC pertaining to quarterly return filers can be fully taken.
- **•In absence of a detailed log of GSTR –2A, how to compute the eligible ITC ?**
- •In absence of any log, how will the tax payer (if forgets to download 2A on 11th) or the department enforce such restriction as the same is qua the eligible ITC as on the due date ?



- **•Vires of the sub-rule**
- •Article 14 of the Constitution of India
- •Sec. 16(1) permits imposition of restriction only qua the tax charged on a particular supply
- •Sec. 43A has not yet been notified.
- •As GSTR –3B is considered as GSTR –3, it shall be deemed that the matching visualized u/s 41, 42 & 43 has been done away with.
- **•Vires of the Circular**
- •CCE v. Ratan Melting & Wire Industries (2008) 231 ELT 22
- •"Subject to" –"conditional upon" K. R. C. S. Balakrishna Chetty & Sons v. State of Madras (1961 AIR 1152)
- •Circular therefore providing for the application of the sub-rule qua every tax period by considering the GSTR –2A on the 11thof the concerned subsequent month is clearly going beyond the provisions of the sub-rule.

# Covid-19

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- •Due to COVID –19 it is quite possible that many suppliers may delay in filing GSTR –1. Also GSTR –1 filing may happen by 30th June whereas GSTR –3B filing will happen before the said date in major cases. Hence the application of the Rule 36(4) on monthly basis for the period February, March, April, May, June, July and August, 2020 would become very difficult.
- •Hence Rule 36(4) has been amended vide Notification No. 30/2020 – Central Tax to provide that the said 10% restriction would be calculated on cumulative basis for the period February, March, April, May, June, July and August, 2020 and not on monthly basis. Therefore ITC restricted, if any, on such cumulative working would be given effect in the GSTR –3B which is filed for the month of September, 2020.



## MEANING OF WORD: PLANT AND/OR MACHINERY

In CIT v. Kanodia Warehousing Corporation MANU/UP/0711/1979 : [1980]121ITR996(All)

Whether building or structure or part thereof, constitutes an apparatus or a tool of the taxpayer or whether it is merely a space where the taxpayer carries on his business. If the building or structure or part thereof is something by means of which the business activities are carried on, it would amount to **a plant.**

- 6: R.C. Chemical Industries v. CIT MANU/DE/0141/1981, Delhi High Court has considered the meaning of "plant" U/Section 43(3) I Tax Act and held “building or concrete structure to qualify for inclusion in the term 'plant', it must be established that it is impossible for the equipment to function without the particular type of structure."

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- 7: Whether roads would include within the meaning of the word "buildings" was considered by various High Courts. In C.I.T. v. Colour Chem Ltd. MANU/MH/0032/1974. Bombay High Court held roads within the factory premises are used for the purpose of carrying raw materials, finished products and workers and hence, regarded as buildings within the meaning of sub-clause (iv) of section 10(2) of 1992 Act.

- In C.I.T. Andhra Pradesh v. Taj Mahal Hotel, MANU/SC/0239/1971: 82 I.T.R. 44, the respondent ran a hotel, installed sanitary and pipeline fittings and question arose whether these fell within the definition of "Plant" given in Sec. 10(5) of the 1922 Act (equal to Sec. 43(3) of the 1961 Act) Court held that sanitary and pipe-line fittings fell within the definition of plant.

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- The Hon'ble Bombay High Court in the case of CIT v. Mazagaon Dock Ltd. MANU/MH/0278/1991 (1991) 191 ITR 460(Bom) has held that dry dock and wet dock created for ships are to be treated as **plant and not building.**

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- CIT v. Karnataka Power Corporation MANU/SC/0585/2000 : [2001] 247 ITR 268 (SC), Where building has been so planned and constructed as to serve as assessee's special technical requirements, it will qualify to be treated as a “Plant”.

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- 12: The ITAT, in an appeal ITA No.7111/Mum/2011, vide order dated 14.3.2014.

- Taxiways and aprons, parking bays cannot be said to be merely concrete structures but are necessary tools for operating/using the Airport and hence plant and machinery.



- The Calcutta High Court in the case of CIT v. Shree Gopikishan Industries (Cal) MANU/WB/0061/2003: 262 ITR 568 and the decision of the Allahabad High Court in the case of CIT v. Kanodia **cold Storage** MANU/UP/0175/1974 : 100 ITR 155:

- **Cold storage** is constructed, has to be damp proof, heat proof and protect stored produce against pests, insects, rats and rodents which is possible with insulation of floors, roofs and doors and insulation and water proofing treatment to maintain cold temperature as per requirements and hence held to be plant.

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- The Punjab and Haryana High Court in the case of CIT v. Yamuna **Cold Storage** MANU/PH/0244/1981 :has held that the **cold storage** is a factory building entitled to depreciation at the rate of 10 per cent.

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- From judgments cited , it could be said that the "building", "premises", "structure" "roads within the airport or factory", would squarely within the meaning of "plant and machinery" and hence, shall be entitled to "Input Tax Credit notwithstanding the bar laid down in Clause (c) and (d) of Sub-Section (5) of Section 17 CGST Act – of course, in various situations explained in various judgments cited above.

# THANKYOU

**CA SANGAM AGGARWAL**

**CA J.K. CHOWDHERY**