



## **Hon'ble Supreme Court Judgment on ITC Availability for Construction Services in Safari Retreats Pvt. Ltd. Case: A Comprehensive Analysis**

In a landmark ruling, the Hon'ble Supreme Court in the case of M/s. Safari Retreats Private Limited {Diary No. 37367/2019}, upholds the constitutional validity of Section 17(5)(d) of CGST Act, 2017 and allowed ITC on construction services when the immovable property is essential for providing taxable services, aligning with the broader objective of GST to avoid tax cascading.

**READ THE DETAILED ANALYSIS :**

## Back drop of the Writ Petition

- The first respondent, engaged in constructing a shopping mall, faced challenges in claiming ITC on GST paid for goods and services used in the mall's construction. While it was collecting GST on rental income from tenants, it could not set off the ITC accumulated during construction due to Section 17(5)(d) of the CGST Act, 2017 which bars ITC on goods and services used in the construction of immovable property.
- The first respondent filed a writ petition in the Hon'ble Orissa High Court, challenging the constitutional validity of Section 17(5)(d) and sought the right to avail ITC on the grounds that this restriction violated Articles 14 and 19(1)(g) of the Constitution.
- The Orissa High Court held that Section 17(5)(d) must be read down, allowing the assessee to claim ITC for GST paid on construction materials and services, aligning with the purpose of ITC to avoid tax cascading. The court emphasized that denying ITC on such expenses would defeat the core purpose of the GST regime, which is to avoid multiple layers of taxation.
- Numerous writ petitions were filed challenging the restrictions in Section 17(5)(c) and (d) of the CGST Act, arguing that businesses should be allowed to avail credit for GST paid on the construction of properties that generate taxable rental income. The petitioners claimed that the exclusions imposed by these provisions were unconstitutional and sought relief by way of reading down the provisions or declaring them void.

## Legal issues framed by the court

These issues revolve around the interpretation of specific provisions of the Central Goods and Services Tax (CGST) Act, 2017:

- Whether the definition of “plant and machinery” in the explanation to Section 17 of the CGST Act, 2017 applies to the expression “plant or machinery” used in Section 17(5)(d) of the CGST Act, 2017?
- If the definition does not apply, what is the meaning of “plant”?
- Whether clauses (c) and (d) of Section 17(5) and Section 16(4) of the CGST Act, 2017 are unconstitutional?



# Analysis of Clauses (c) and (d) of Section 17(5) of the CGST Act, 2017 by the Hon'ble Apex Court

Clauses (c) and (d) of Section 17(5) of the CGST Act, 2017 deal with the ineligibility of input tax credit (ITC) in certain scenarios related to the construction of immovable property.

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

Clause (c) focuses on **works contract services** for constructing immovable property. A works contract is defined under Section 2(119) to include various construction-related activities like building, installation, improvement, and renovation where goods are transferred. Under this clause, **ITC is not available** when works contract services are used to construct immovable property. However, **exceptions** exist:

- **Plant and machinery construction:** ITC is allowed for works contract services used to build plant and machinery, as defined in the explanation to Section 17.
- **Further supply of works contract services:** ITC is available when the works contract service is used as an input for providing works contract services further.

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

Clause (d) addresses scenarios where goods or services are used for constructing immovable property on the **taxable person's own account**, and ITC is **not available** in these cases. However, there are two key exceptions:

- If the construction involves **plant or machinery**, ITC is allowed.
- When the immovable property is not constructed for personal use but for purposes such as leasing or selling, ITC can be claimed.

The difference between clauses (c) and (d) lies in their scope. Clause (c) applies to works contract services, while clause (d) applies when a taxable person constructs immovable property on their own account. Both have exceptions for plant and machinery but differ in how they define the nature of the immovable property being constructed.



- **Plant and Machinery:** Defined as apparatus, equipment, and machinery fixed to the ground used for outward supply. Importantly, it excludes land, buildings, telecommunication towers, and external pipelines.
- **Own Account Construction:** In clause (d), construction is considered on a person's "own account" when it is for personal use or business purposes, not when the property is intended for sale or lease.

## Analysis of the expression "plant or machinery" as used in Section 17(5)(d) of CGST Act, 2017

- **Key Issue:** The court is determining whether the term "plant or machinery" in Section 17(5)(d) should be interpreted in the same way as "plant and machinery," which is defined in the explanation to Section 17 for Chapters V and VI of the CGST Act.
- **Legislative Intent:** The Assistant Solicitor General (ASG) argued that the use of the word "or" in Section 17(5)(d) might be a drafting error, suggesting that "or" should be read as "and." The court disagreed, noting that the Model GST Law initially used "plant and machinery," but the legislature deliberately chose to use "plant or machinery" in Section 17(5)(d) when enacting the CGST Act. Since no legislative correction has been made, the court concluded that this distinction was intentional and should be respected.
- **Different Meanings:** The court further explained that the terms "plant and machinery" and "plant or machinery" have different meanings. If "or" was replaced with "and," it would negate the legislative intent of using two different expressions. While the explanation in Section 17 defines "plant and machinery" as including equipment fixed to the earth, "plant or machinery" suggests that either a plant or machinery alone can be sufficient in certain cases, such as when dealing with immovable property.
- **Commercial Meaning of 'Plant':** Since "plant" is not specifically defined in the CGST Act, the court relied on its ordinary commercial meaning. The court reviewed previous decisions, such as *Solid and Correct Engineering Works* and *Taj Mahal Hotel*, which clarified the meaning of "plant" and its interpretation in various contexts, emphasizing that it should be understood broadly.

Renting or leasing immovable property is deemed to be a supply of service, and it can be taxed as output supply. Therefore, if the building in which the premises are situated qualifies for the definition of plant, ITC can be allowed on goods and services used in setting up the immovable property, which is a plant.

### Key Findings of the Hon'ble Supreme Court:

- **Building as 'Plant' for ITC Purposes:** The court clarified that the term "plant or machinery" used in Section 17(5)(d) differs from the definition of "plant and machinery" in the Act's explanation. A factual determination using the functionality test is necessary to decide if a building, such as a mall or warehouse, qualifies as a plant based on its role in the business. If construction is essential for carrying out activities like renting or leasing the building, it may be considered a plant and could be eligible for ITC.
- **Construction Not for 'Own Account':** Construction undertaken for sale, lease, or licensing to others is not considered to be on the taxable person's "own account," which would typically restrict ITC claims. Therefore, ITC can be allowed in these circumstances.
- **Functionality Test for Classification as 'Plant':** The court underscored that a functionality test must be applied to assess whether a building or immovable property can be treated as a 'plant' in each individual case, considering the actual use of the property.
- **Application of Section 17(5)(d) – Exemptions for Malls, Warehouses, etc.:** Under certain factual conditions, properties such as malls and warehouses (excluding hotels and cinemas) may qualify as 'plant' under Section 17(5)(d) of the CGST Act, making them eligible for ITC on their construction.
- **Remand to High Court:** The cases were remanded to the High Court of Orissa to apply this functionality test to determine whether the mall in question qualifies as a plant under the CGST Act.

## The constitutional validity of clauses (c) and (d) of Section 17(5), as well as Section 16(4) of the CGST Act

The Hon'ble Supreme court upheld the constitutional validity of clauses (c) and (d) of Section 17(5), as well as Section 16(4), of the CGST Act.

- **No Discrimination or Unconstitutionality:** The court found no discrimination or arbitrariness in clauses (c) and (d) of Section 17(5) or Section 16(4) of the CGST Act. The arguments alleging violation of Article 19(1)(g) and 300A were not substantiated. Just because provisions could have been drafted differently does not render them unconstitutional.
- **Input Tax Credit (ITC) Eligibility:** Sub-section (4) of Section 16 sets a deadline for availing ITC, stating that registered persons are not entitled to claim ITC after the 30th of November following the end of the financial year, or after filing the relevant annual return, whichever is earlier. This provision was not found to be discriminatory or arbitrary.



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