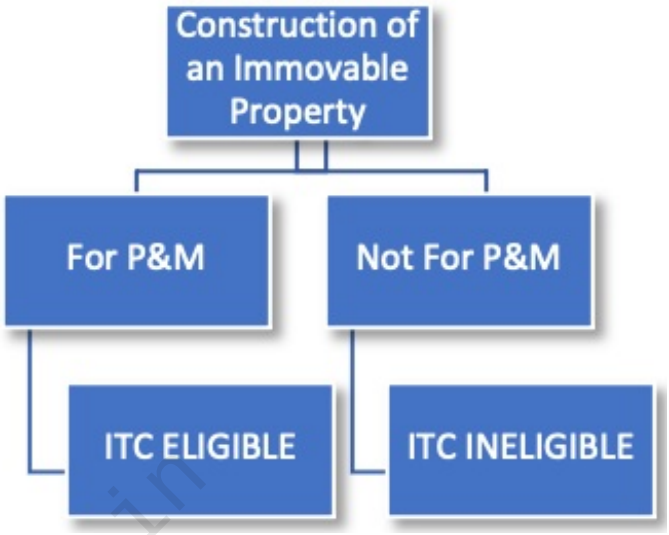
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ITC on Construction of Immovable Property: A road to litigation



Summary: The eligibility of Input Tax Credit (ITC) on construction of immovable property under Sections 17(5)(c) and 17(5)(d) of the CGST Act, 2017 is a contentious issue. ITC is disallowed for goods or services used for constructing immovable property, except for plant and machinery (P&M). The absence of a clear definition of “immovable property” and varied interpretations of “P&M” have led to significant disputes. While ITC is unambiguously ineligible for factory buildings or interior works and eligible for P&M used directly for production, challenges arise in borderline cases like lifts, transformers, or HVAC systems. Judicial precedents under older laws, such as the Central Excise Act, have guided classifications based on tests like object and nature of annexation, permanence, and marketability. However, these classifications often leave room for interpretation. The Delhi High Court’s decision in Bharti Airtel Ltd. v. Commissioner provided clarity by treating telecommunication towers as movable property, allowing ITC. As GST law continues to evolve, reliance on earlier legal frameworks, case law, and the definition of P&M remains crucial for determining ITC eligibility.

(SECTION 17(5)(c) & 17(5)(d) OF THE CGST ACT, 2017)

1. WHAT IS COVERED IN THIS ARTICLE?

Input Tax Credit (ITC) on inward supplies for construction of an immovable property is blocked U/s 17(5)(c) and 17(5)(d) of the Central Goods and Services Tax Act, 2017 (‘Act’) to the extent of capitalisation. However, ITC is available if it is a construction of Plant & Machinery (‘P&M’), even if immovable. The absence of definition of the term ‘**immovable property**’ under the Act coupled with varying interpretations of this term

and '**P&M**' by AARs & AAARs remain a significant concern for claim of ITC. In the coming years, the terms 'construction of an immovable property' and 'P&M' are likely to be subjects of judicial debate in this context. Below, I outline the reasons for raising this concern.

2. WHERE LIES THE POSSIBLE DISPUTE?

The key challenge lies in identifying 'immovable property' and 'P&M' for the purpose of Section 17(5)(c) and 17(5)(d). For the sake of convenience, the said inward supplies are categorised into three broad categories:

Category-1: ITC on inward supplies for construction of a factory building, false ceiling and other interior works forming part of the building, landscaping etc. – ITC is NOT eligible and this is not in doubt.

Category-2: ITC on inward supplies for construction of Plant & Machinery, although immovable, which are used directly for manufacture of taxable goods/provision of taxable services – ITC is eligible and this is also not in doubt.

Category-3: ITC eligibility on inward supplies other than mentioned in Category-1&2 (Example: Lifts, transformer, electrical panel boards/fittings, solar plant, effluent treatment plant, HVAC etc.) is where the challenge lies. Are such supplies movable or immovable property? Are such supplies in the nature of 'P&M'? This Article revolves around these two questions.

3. ITC ELIGIBILITY REVOLVES AROUND TWO TERMS – 'IMMOVABLE PROPERTY' & 'PLANT AND MACHINERY'

As per Section 17(5)(c) and 17(5)(d), ITC shall NOT be available on:

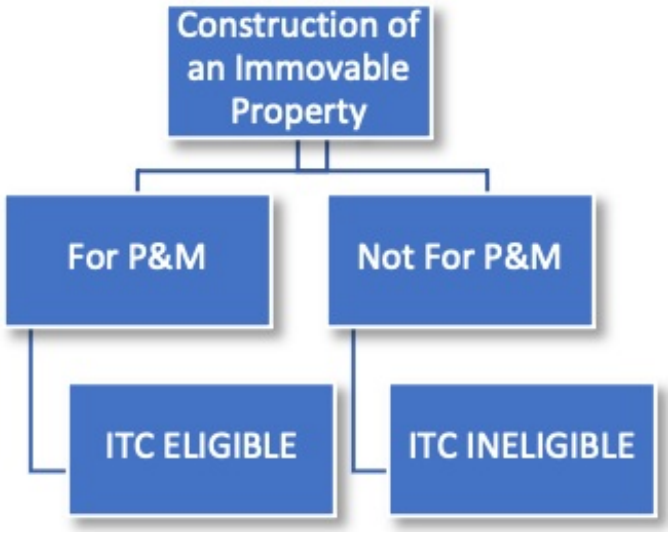
*(c) works contract services when supplied for construction of an immovable property (other than plant **and** machinery) except where it is an input service for further supply of works contract service;*

*(d) goods or services or both received by a taxable person for construction of an immovable property (other than plant **and*** machinery) on his own account including when such goods or services or both are used in the course or furtherance of business.*

** The Finance Bill, 2025 has substituted "plant or machinery" with "plant and machinery", retrospectively, w.e.f. 01.07.2017, to nullify effect of Safari Retreats case [2024] 90 GSTL 3 (SC).*

For the purpose of this article, the provisions of Section 17(5)(c) & 17(5)(d) can be

summarised as under:



4. HOW TO IDENTIFY IF IT IS A CONSTRUCTION OF AN 'IMMOVABLE PROPERTY'?

As mentioned above, ITC on 'construction of an immovable property' is eligible only if it is a P&M. Hence, it is pertinent to ascertain if a construction has resulted in an 'immovable property'. The term 'immovable property' is not defined under the GST law. With no major decisions from the Courts on the subject matter under the GST law, help ought to be sought from the General clauses Act, 1897, Transfer of Property Act, 1882 and judicial precedents.

4.1 Movable and immovable property as per General Clauses Act & Transfer of Property Act

As per Section 3(26) of the General Clauses Act, 1897: *"**immovable property**" shall include land, benefits to arise out of land, and **things attached to the earth**, or **permanently fastened to anything attached to the earth***. Section 3(36) of the said Act defines movable property as *"property of every description, except immovable property"*.

As per Section 3 of the Transfer of Property Act, 1882 **immovable property** does not include standing timber, growing crops or grass. It further says that "attached to the earth" means:

(*a*) **rooted in the earth**, as in the case of trees and shrubs;

(*b*) **imbedded in the earth**, as in the case of walls or buildings; or

(*c*) attached to what is so **imbedded for the permanent beneficial enjoyment** of that to which it is attached.

4.2 Decisions under the Central Excise & VAT laws

It was this term (‘immovable property’) which ran a full round of litigation under the erstwhile Central Excise Act, 1944. Unfortunately, the lawmakers have ‘inherited’ this Central Excise issue to the GST tenure by not defining the term ‘immovable property’. In the context of the erstwhile Central Excise and VAT law, Courts decided on what tantamount to ‘movable’ or ‘immovable’ property. The following are the gist of various decisions of the Courts :

S. No	Parties	Citation
1	Sirpur Paper Mills Ltd vs CCE	1998 (97) ELT 3 (SC)
2	Triveni Engineering & Industries Ltd vs CCE	2000 (120) ELT 273 (SC)
3	CCE vs. Josts Engineering Co Ltd.	2002 (146) ELT 29 (SC)
4	Mallur Siddeswara Spinning Mills (P) Ltd v CCE	2004 (166) ELT 154 (SC)
5	CCE vs. Solid & Correct Engineering Works	2010 (252) ELT 481 (SC)
6	CTO v. Sadulshahar Krai Vikrai Sahakari	(2004) 135 STC 90 (Raj)
7	Jaiprakash Industries Ltd vs CCT	(2010) 36 VST 152 (UTK HC)

- *Nature of annexation:* This test ascertains how firmly a property is attached to the earth. If the property is so attached that it cannot be removed or relocated without causing damage to it, it is an indication that it is immovable.
- *Object of annexation:* If the attachment is for the permanent beneficial enjoyment of the land, the property is to be classified as immovable. Conversely, if the attachment is merely to facilitate the use of the item itself, it is to be treated as movable, even if the attachment is to an immovable property.
- *Intendment of the parties:* The intention behind the attachment, whether express or implied, can be determinative of the nature of the property. If the parties intend that the property in issue is for permanent addition to the immovable property, it will be treated as immovable. If the attachment is not meant to be permanent, it indicates that it is movable.
- *Functionality Test:* If the article is fixed to the ground to enhance the operational efficacy of the article and for making it stable and wobble free, it is an indication that such fixation is for the benefit of the article, such the property is movable.
- *Permanency Test:* If the property can be dismantled and relocated without any damage, the attachment cannot be said to be permanent but temporary and it can be considered to be movable.
- *Marketability Test:* If the property, even if attached to the earth or to an immovable property, can be removed and sold in the market, it can be said to be movable.

The CBEC vide *Order No.58/1/2002-CX dated 15.01.2002*, issued under Section 37B of the CE Act also clarified regarding excisability of plant & machinery erected and installed at site which are in line with the above decisions. However, under GST law, ITC would be eligible even if the Plant & Machinery is immovable after installation/erection.

4.3 Breather from Delhi High Court in the context of Section 17(5)(d)

In a landmark decision the Delhi High Court in *Bharti Airtel Ltd. v. Commissioner [2024] 169 taxmann.com 390 (Delhi)* held that Telecommunication tower is NOT an immovable property for the purpose of Section 17(5)(d) of the Act. The High Court, following the decision of the Apex Court in *Bharti Airtel Ltd. v. CCE 2024 SCC OnLine SC 3374,* held that *'telecommunication towers are liable to be treated as movable'* and that *'telecommunication towers would not fall within the ambit of Section 17(5)(d) of the CGST Act'*.

Therefore, one has to consider the provisions of the General Clauses Act, 1897, the Transfer of Property Act, 1882 and the rationale laid down by the Courts to decide if a property is 'movable' or 'immovable' for the purpose of Section 17(5)(c) and 17(5)(d).

5. HOW TO IDENTIFY IF CONSTRUCTION OF AN IMMOVABLE PROPERTY IS 'PLANT AND MACHINERY'?

5.1 Definition of Plant & Machinery

If an inward supply is for 'construction of an immovable property', which is a 'P&M', then ITC can be availed. Hence, it is paramount to identify what 'P&M' is for the purposes of Section 17(5)(c) & 17(5)(d). The term 'P&M' is defined in Explanation to Section 17 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—

(i) land, building or any other civil structures;

(ii) telecommunication towers; and

(iii) pipelines laid outside the factory premises".

It can be inferred from the definition that **(a)** apparatus, **(b)** equipment, and **(c)** machinery fixed to earth by foundation or **(d)** structural support that are used for making outward supplies are P&M for the purpose of Section 17(5)(c) and 17(5)(d).

5.2 Dictionary meaning of apparatus, equipment, machinery

Apparatus means: *'A set of equipment or tools or a machine that is used for a particular purpose' – Cambridge dictionary;*

Equipment means: *'The set of articles or physical resources serving to equip a person or thing: such as (1) the implements used in an operation or activity, (2) all the fixed assets*

other than land and buildings of a business enterprise, (3) the rolling stock of a railway' – Merriam-Webster dictionary;

Machinery means: *'A group of large machines or the parts of a machine that make it work' – Cambridge dictionary;*

It my view the terms 'apparatus', 'equipment' and 'machinery' are broad enough to cover most of the fixed assets used in a business i.e. HVAC, Transformers, electrical panel boards, firefighting system etc. for the purpose of Section 17(5)(c) and 17(5)(d). The undeniable facts are that **(a)** such goods are used in making outward supplies **(b)** the said inward supplies are not specifically blocked by Section 17(5)(c) and 17(5)(d) and **(c)** such inward supplies do NOT fall within the exclusion list of 'P&M' i.e. land, building, or any other civil structures, telecommunication towers and pipelines laid outside the factory premises. Hence, such inward supplies are P&M eligible for ITC even if considered as immovable.

5.3 Breather from CBIC on P&M

The CBIC clarified in Circular No.219/13/2024-GST [F.NO.CBIC-20001/4/ 2024-GST], dt.26-06-2024 that 'PVC ducts' and 'manholes' are covered "plant and machinery" as they are used as part of optical fiber cables (OFC) network for making outward supply of transmission of telecommunication signals from one point to another. The Circular further clarified that the 'ducts' and 'manholes' have not been specifically excluded from the definition of "plant and machinery" in the Explanation to Section 17 of the Act. This Circular is an important step forward to identify P&M for the purpose of Section 17(5)(c) and 17(5)(d).

6. DECISIONS FROM THE AAR/AAAR ON 'IMMOVABLE PROPERTY' AND 'PLANT AND MACHINERY'

Let us take a look at the decisions by the AARs & AAARs which were rendered in the context of Section 17(5)(c) and 17(5)(d). All the decisions revolve around whether the inward supplies result in 'construction of an immovable property' and/or whether it tantamount to P&M. Many of the decisions of the AAR/AAAR, in my view, cannot be considered as final for multiple reasons (the reasons are given in the Notes alongside with gist of the AAR/ AAAR's decisions below):