

GST UPDATE NO 61ST ON SECTION 17(5) VERSUS RATE NOTIFICATION: -

GST was implemented with the idea of 'seamless flow of input tax credit' so that there is no cascading effect of taxes. However, the reality is always far different from the promises and so is the case with admissibility of input tax credit (ITC). The present update seeks to discuss the restrictions and exceptions to the provisions contained in section 17(5) of the CGST Act, 2017, particularly with respect to supply of goods and services contained in clause (i) of the section 17(5)(b) of the CGST Act, 2017.

Before proceeding to the analysis, it is pertinent to reproduce the provision contained in section 17(5)(b)(i) of the CGST Act, 2017 as follows:-

(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:—

(b) [the following supply of goods or services or both—

*(i) **food and beverages, outdoor catering, beauty treatment, health services, cosmetic and plastic surgery, leasing, renting or hiring of motor vehicles, vessels or aircraft referred to in clause (a) or clause (aa) except when used for the purposes specified therein, life insurance and health insurance:***

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;

It is worth noting that the input tax credit on supply of food or beverages, outdoor catering, renting or hiring or motor vehicles is restricted except when the said supply of goods or services is used by registered person for making an outward taxable supply of same category of goods or services. For example, if a person engaged in providing renting or hiring of motor vehicles procures the motor vehicles on hire from another service provider, then the restriction

contained in the section 7(5)(b)(i) shall not apply. However, it is worth mentioning that the rate notifications prescribing GST rates have condition of non-availment of ITC with respect to certain services. The relevant entries are reproduced hereunder for the sake of convenient reference as follows:-

Notification no. 11/2017-Central Tax (Rate) dated 28.06.2017:-

S.NO.	CHAPTER SUB-HEADING NO.	DESCRIPTION OF SERVICES	CGST RATE	CONDITION
7.	9963 (Accommodation, food and beverage services)	(ii) Supply of 'restaurant service' other than at 'specified premises'.	2.5%	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken.
7.	9963 (Accommodation, food and beverage services)	(iv) supply of 'outdoor catering', at premises other than 'specified premises' provided by any person other than- (a) suppliers providing 'hotel accommodation' at 'specified premises', or (b) suppliers located in 'specified premises'.	2.5%	Provided that credit of input tax charged on goods and services used in supplying the service has not been taken.
10.	9966 (Rental services of transport vehicles with operators)	(i) Renting of any motor vehicle designed to carry passengers where the cost of fuel is included in the consideration charged from the service recipient.	2.5%	Provided that credit of input tax charged on goods and services used in supplying the service, <u>other than the input tax credit of input service in</u>

				<i><u>the same line of business</u> (i.e. service procured from another service provider of transporting passengers in a motor vehicle or renting of a motor vehicle has not been taken.</i>
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It is found that the provision contained in serial no. 10 of the notification is in consonance with the provision contained in proviso to section 17(5)(b)(i) thereby allowing ITC in case of renting of motor vehicle if the service provider is in same line of business. However, there is no such exception in the rate notification for restaurant services or outdoor catering services. Consequently, the question arises is whether the ITC in case of canteen facility/outdoor catering services availed by the employer and provided by the said employer to its employees on back to back basis is available due to exception carved out in proviso to section 17(5)(b)(i) or is restricted by way of condition under rate notification. In nutshell, there is conflict between the rate notification and the proviso to section 17(5)(b)(i).

It is observed that the rate notification no. 11/2017-Central Tax (Rate) dated 28.06.2017 is being issued in exercise of the powers contained in-

- Section 9(3) of the CGST Act, 2017-REVERSE CHARGE
- Section 9(4) of the CGST Act, 2017-REVERSE CHARGE
- Section 11(1) of the CGST Act, 2017-POWER TO GRANT EXEMPTION
- Section 15(5) of the CGST Act, 2017-VALUE OF TAXABLE SUPPLY
- **Section 16(1) of the CGST Act, 2017-ELIGIBILITY AND CONDITIONS FOR TAKING ITC**

- Section 148 of the CGST Act, 2017-SPECIAL PROCEDURE FOR CERTAIN PROCESSES

In our opinion, the provision contained in proviso to section 17(5)(b)(i) overrides the rate notification no. 11/2017-Central Tax (Rate) dated 28.06.2017 as the section 17(5) of CGST Act, 2017 overrides section 16(1) of the CGST Act, 2017. The rate notification has reference of section 16(1) of the CGST Act, 2017 and so the restriction imposed by the rate notification does not has precedence if the proviso to section 17(5)(b)(i) allows credit on account of supply of food or beverages or outdoor catering if used for providing same category of supplies. Therefore, if the employer is paying GST in view of provision contained in entry no. 2 of Schedule I of the CGST Act, 2017, ITC of the canteen facility procured from third party is available as per proviso to section 17(5)(b)(i) of CGST Act, 2017.

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