



Remuneration to Directors under GST

Presentation by

DK Gandhi

Advocate

Director & Co-Founder

VSG LawVision Attorneys LLP

(Delhi-NCR; Uttarakhand, Jharkhand, Uttar Pradesh, Chandigarh)

Ph: 9810216801

The Controversy



- ▶ A Recent controversy has arisen after the Decision of AAR Authority, Rajasthan given in case of **Clay Craft (P) Ltd.**
- ▶ The point under consideration before the Ld. Authority for Advance Ruling ("AAR") was whether the remuneration of directors is exigible to GST and is company liable to pay such GST under reverse charge.
- ▶ We now move to discuss the exigibility of Director's remuneration under GST.

Companies Act, 2013


Under the Companies Act, 2013 , there are two type of Directors --

(i) *Working Directors* like

- (a) Managing Director,
- (b) Whole time Director, and
- (c) Executive Director (who is member of the Board) and

(ii) *Non-Executive Directors* like

- (a) Nominee Directors
- (b) Independent Director
- (c) Ordinary Director who only attends Board Meeting of a company:

- 
- ▶ The **working directors** are appointed under a Letter of Appointment and/or under Board Resolution containing the terms of appointment including terms for payment of salary, remuneration, allowances, benefits, perks and other facilities etc.hence, any amount spent or interest accrued over it not liable to GST.
 - ▶ **Clause I of Schedule III** attached to CGST Act, 2017, which clearly holds that services by employee to employer in the course of employment are neither supply of services nor goods. clause I clearly, inter-alia, says that activities specified in Schedule III shall not be treated as “supply”.

History

- ▶ Press release by the Ministry of Finance dt.10th July 2017 clearly says that services by employee to employer is outside the purview of GST.
- ▶ In pre GST regime, Para 2.9.1 of Service Tax Education Guide 2012 issued by Ministry of Finance also guided that service provided by the employee to employer are outside the purview of “Services”.
- ▶ FAQ released by CBIC (Question no.23 after promulgation of GST) clearly holds that services by employee to employers shall be treated neither supply of services nor goods.

PCM Cement Concrete Pvt. Ltd. vs. CCE, Siliguri MANU/CK/0096/2017: 2018 (9) GSTL 391 (Tri-Kol) CESTAT, Calcutta

- ▶ It was observed that consideration paid to whole/full time directors would be treated as payment of salaries in as much as there would be employer - employee relationships and in such cases, there cannot be any levy of service tax.

Pre-GST regime

- ▶ Variable components of commission, the Department had raised demand of service tax under reverse charge mechanism on the said remuneration paid to the whole time directors, in terms of Notification no. 30/2012-ST : MANU/DSTX/0070/2012, dated 20.06.2012, as amended.
- ▶ It was the case of the Department that the said remuneration paid to the directors would constitute 'service' liable to service tax in the hands of assessee under reverse charge mechanism.

Maithan Alloys Ltd. vs. CCE and ST,
Bolpur (02.11.2018 - CESTAT - Kolkata) :
MANU/CK/0094/2018 Cestat Kolkatta

Held : Where the whole time directors who are entitled to variable pay in the form of commission are 'employees' and payments actually made to them are in the nature of salaries and the same shall not be subject to Service Tax.

however.....

If the Director is paid any other amount, (which is not incidental to his employment and beyond the terms of employment), the said amount is liable to GST.

- ✓ Consultancy Charges
- ✓ Commission - which is not part of or incidence of Employment

Also.....

- ▶ The Director has to raise a taxable Invoice for having in case he Provides the taxable services (such Consultancy, Commission) and shall be required to charge GST at the rate of 18% on forward charge basis and the GST would be payable by him and paid to the Government. .\
- ▶ In case of director Providing accommodation on rent, to company, in his individual capacity, he is required to pay GST and company need not pay on R.C.M basis.

Working Directors, Nominee, Independent, Ordinary, & Part Time Directors

Taxable Remuneration to these directors

- ▶ The Company shall have to pay GST, under Section 9(3) of GST Act at the rate of 18% on
 - ▶ Sitting Fees
 - ▶ Commission
 - ▶ Guarantee commission on reverse charge mechanism.

Circular No.24/2012 Dt. 9.8.2012

- ▶ Ministry of Corporate Affairs issued the circular vide which it was clarified that Non Whole time Directors are not covered under the exemption list and hence sitting fee and commission payable to them is liable to Service Tax.

AAR Rajasthan Raj/AAR/2019-20/33

Clay Craft (P) Ltd

- The Rajasthan AAR has merely picked up the words from the Central Tax Notification notifying rate of tax.
- It has held that since the notification talks of rate of tax hence salary paid to whole time director is taxable.
- The Rajasthan AAR has ignored the elementary principle that charging section determines taxability of subject and not the notification notifying rate of tax.

AAR Rajasthan Raj/AAR/2019-20/33

Clay Craft (P) Ltd

- The Rajasthan AAR has ignored the fact that there are various types of Directors and all cannot be liable to GST
- Section 123 of CGST Act, states that any ruling rendered by AAR is binding only to the applicant who sought ruling and not to others. It is a judgment in persona and not a judgment in rem.

AAR Rajasthan Raj/AAR/2019-20/33

Clay Craft (P) Ltd

- ▶ Rajasthan AAR ignored the in re : Alcon Consulting Engineers (I) Pvt. Ltd. wherein it was held that remuneration paid to the Director of the Applicant company is liable to tax under reverse charge mechanism under sub-section (3) of Section 9 in the hands of the Applicant company as it is covered under Entry No. 6 of Notification No. 13/2017-Central Tax (Rate), dated 28-6-2017. Further, provisions of Companies Act, 1956, Employee Provident Fund scheme, 1952, were highlighted by the Applicant to substantiate his case.

Tata Engineering & Locomotive Co. Ltd. v. Collector of Central Excise, 2006 (203) E.L.T. 360 (S.C.),

- ▶ Ld. AAR, Rajasthan following the said decision without specifically disproving the submissions of the contentions held that Directors are not employees of the Company and GST should be paid under reverse charge on any payment to the directors.
- ▶ The above judgment giving mere conclusion without reasoned speaking order by AAR is violative of Principal laid down in Tata Engineering & Locomotive Co. Ltd. v. Collector of Central Excise, Pune reported in 2006 (203) E.L.T. 360 (S.C.), the Hon'ble Supreme Court, **held that it is not sufficient in a judgment, to give conclusions alone, but it is necessary to give reasons.**



Thankyou

Presentation by

DK Gandhi

Advocate

Director & Co-Founder

VSG LawVision Attorneys LLP

(Delhi-NCR; Uttarakhand, Jharkhand, Uttar Pradesh, Chandigarh)

Ph: 9810216801