



**GST
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Articles

GST ON DIRECTOR'S REMUNERATION — ONGOING CONUNDRUM & CLARIFICATION

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Much water has flown down the Ganga in the last three years of the GST regime and many grey areas have created ripples of dispute in the trade making the new tax regime in the country unpopular. One such area which has attracted considerable attention across the country is the leviability of GST on remuneration paid by companies to the directors. In respect of statutory provision as laid down under *Section 9(3) of CGST Act, 2017 and Notification No. 13/2017-C.T. (Rate), dated 28-6-2017*, prescribe that services supplied by the Director of a company to the said company shall be chargeable to tax under reverse charge mechanism. However, conflicting decisions delivered by AARs across the country has made the issue of taxation of transactions between director and company cloudier and uncertain.

Before going into the nitty-gritties of GST provision, let us understand the definition of director as specified in the Companies Act, 2013. In terms of Section 2(34) of the Act, a director means a person appointed to perform the duties and functions of the director of a company in accordance with the provision of the Companies Act, 2013. There are two types of directors known in the trade as "Executive" and "Non-executive" Director.

An executive director can be a whole time director of the company i.e. a person who devotes his whole time of working hours to the company and has a significant personal interest in the company as a high source of income.

On the other hand, the non-executive director is a director who is not a whole time director, he does not get involved in the day-to-day work but is involved in planning and policymaking exercises of the company.

Even as a director is a trusted authority of a company but there is nothing that forbids him from being an employee of any other company, since, Companies Act, 2013 does not clearly specify or prohibit the same.

Coming back to the GST laws, it is worthwhile to mention that Schedule-III under CGST Act, 2017 specifies activities which shall neither be constituted as supply of goods nor supply of services within the purview of GST. Therefore, no

GST is leviable on such activities as they do not fulfil the condition of being a supply to be charged under Section 9 of CGST Act. *In terms of the relevant entry under the said Schedule-III, the services provided by the employee to the employer in the course of or in relation to his employment is kept out from the purview of GST applicability.* On the backdrop of the aforesaid provision, the question that has been haunting the trade is, whether remuneration paid to director by the company is leviable to GST?

Meanwhile, the conflicting decisions made by the AARs across the country led to confusion and uncertainty on the trade in respect of the issue of applicability of GST on the remuneration paid by a company to the director. One such prominent decision of Rajasthan AAR in the matter of *M/s. Clay Craft India Pvt. Ltd.* - 2020 (35) G.S.T.L. 580 (A.A.R. - GST - Raj.) created much uproar in the trade. In the aforesaid matter, it was decided that the remuneration paid to directors in relation to services provided by them to company not covered under clause (1) of the Schedule-III to CGST Act, 2017 as directors not being the employee of the Company, liable to tax under reverse charge mechanism in terms of Serial No. 6 of Notification No. 13/2017-C.T. (Rate) and Section 9(3) of CGST Act, 2017. On the contrary, in the matter of *Anil Kumar Agrawal* [2020 (36) G.S.T.L. 596 (A.A.R. - GST - Kar.)] a differing view was taken by the Karnataka AAR. The aforesaid difference in opinion in deciding the cases on the instant issue has created havoc in the trade resulting in instability and ambiguity to the hilt.

In the light of the above *scenario*, the trade and industry sought clarification from the Government in order to attain clarity on the issue. The C.B.I. & C. finally issued *Circular No. 140/10/2020, dated 10-6-2020* [2020 (37) G.S.T.L. C10] in order to clarify the GST applicability on the remuneration of director. The said circular provides clarification based on the following two parameters;

- Leviability of GST on remuneration paid by companies to the independent directors defined in terms of Section 149(6) of the Companies Act, 2013 or those directors who are not the employees of the said company; and
- Leviability of GST on remuneration paid by companies to the whole-time directors including Managing Director who are employees of the said company.

It is clarified that directors who are not the employees of the company, the services provided by them to the Company, in lieu of remuneration as the consideration for the said services, are clearly outside the scope of Schedule-III of the CGST Act. Thus, it is clarified that the remuneration paid to such independent directors, or these kind of directors, who are not employees of the said company, is taxable in hands of the company, on reverse charge basis.

On the other hand, in respect of GST applicability on remuneration paid by companies to the directors, who are also an employee of the said company, the instant circular premised its position paying reliance on the relevant provision of the Income-tax Act. Specifically, the manner of determination is placed on tax deduction at source provisions ('TDS') under the Income-tax Act, 1961. Accordingly, it is clarified that the portion of directors' remuneration declared as 'salaries' in the books of the company, and subjected to TDS under Section 192 of the Income-tax Act, would be treated as consideration for services by an employee to the employer in relation to his employment as per Schedule-III of the CGST Act, 2017 and such services are not liable to tax under GST.

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2020]

INPUT TAX CREDIT ON CASH CARRY VANS

J11

After HC's order to hear and decide on the matter, the AAAR concurred with the company's submission that what is being transported is not the 'money' but 'goods', as they cannot use it for any purpose and hence, the same cannot be used as legal tender at any stage of the performance of the services rendered by them. Therefore, it inferred that the subject money transported in cash carry vans by them, ceases to be anything except goods under the factual matrix.

The AAAR thus concurred with asseesee's contentions and allowed input tax credit on purchase and fabrication of cash carry vans, a specially designed vehicle for transportation of cash/currency in terms of RBI guidelines. The AAAR considered money as goods and not legal tender (other goods) for purpose of transportation and its nature being goods while being transported. Department's contention that money be treated differently from other goods was held to be devoid of any merit and hence not tenable, being erroneous and absurd.

[Continued from page J6]

Under the emergent circumstances, it is of utmost importance to ascertain in every particular case, the basis and the nature of the contract entered into by the director with the company. In this respect, another bout of confusion may crop up regarding determination of exact nature of contract of engagement of directors. It can be said that the instant circular has served the intended purpose to some extent, however, the role of agreement or contract entered into between the company and the director, would be focal point or the churning pot in deciding the nature of exact relationship and consequently, the treatment the relationship should be given under the GST law.

In conclusion, it is hoped that the instant circular would bring in much required clarity on the issue, at the same time the trade and industry should act responsibly in deciding the issue of taxability with due care and caution in order to avoid flooding of disputes in the days to come.
