



ANALYSIS OF THE ORDER PASSED BY THE AUTHORITY OF ADVANCE RULING, RAJASTHAN IN THE MATTER OF GST UNDER REVERSE CHARGE ON DIRECTOR REMUNERATION

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Recently the Authority of Advance Ruling, Rajasthan in the case of Clay Craft India (P) Ltd has passed a ruling that consideration / fees paid to directors will attract Goods and Services Tax under reverse charge vide entry no 6 of notification no 13/2017 Central Tax (rate) dated 28-06-2017.

Now, under this article we deeply analyze the order of the advance ruling considering various legal aspects and judicial pronouncements also.

Fact of the Case: M/s Clay Craft India (P) Ltd has six directors who are performing their duties and responsibilities as per the law. Each one of the directors is holding charge of procurement, production, quality and accounting etc. activities of the company. They are working as an employee of the company and compensated by way of regular salary and other allowances. The company is deducting TDS under section 192 of Income Tax Act and also PF. The company is paying GST under reverse charge on the commission paid to its directors considering the services provided by its director in the capacity of directors only, other than employee.

Questions raised before the authority:

- a. Whether GST is payable under reverse charge mechanism (RCM) on the salary paid to its Directors?
- b. Whether the situation will be changed if the directors are also part of Directors of other company?

Submission made by applicant:

The applicant has made various submissions to the Hon'ble Authority to reiterate their views. Applicant has quoted the, meaning of supply as defined in section 7 of CGST Act read with schedule III. They have also highlighted the meaning of employee considering the Cambridge Dictionary.

Further the applicant has brought to the notice of the authority the Ministry of Corporate Affairs, earlier it was DCA, vide their letter no 2/19/63-PR dated 29-06-1964, where ministry has clarified that employee of a company also appointed as a director of the company is in the position of director. Therefore, conversely any director working as whole time director would be legally at par with an employee. Applicant has also quoted the relevant section of Companies Act, 2013 to reiterate their views. However, authority has not considered any of their submissions and passed the order.

Order of the Authority:

The authority of advance ruling without considering the submissions made by the applicant has taken the view that the directors are not employee of the company. Further, authority is in the opinion that notification no. 13/2017(Central Tax Rate) dated 28-06-2017 has given the specific entry to the service provided by the director and company is liable to pay tax under reverse charge, pass the ruling as follows-

- a. Consideration paid to the directors by the applicant company will attract GST under reverse charge mechanism as it is covered under entry no 6 of Notification no. 13/2017 (Central Tax Rate).
- b. Situation will remain same as (a) above and will attract GST under reverse charge mechanism.

Our views and comments:

In our views, the authority of advance ruling has not considered the following issues:

○ **Section 7 and section 9 of CGST Act, 2017 –**

- a. Section 7 of CGST Act deals with the meaning of supply. The definition is an inclusive one. The intention of GST law is not to levy any GST on services provided by an employee to the employer in the course or in relation to the employment. The service provided by the employee to the employer is neither a supply of goods nor a supply of service (Schedule III). Consideration with respect to the employment will never fall under GST net.
- b. Section 9 of GST law is the charging section and GST will be levied on supply of goods or services or both. First the activity must be supply of goods or services or both then GST will be levied on that activity, subject to some exemption. Once an activity is neither supply of goods nor supply of services, no GST will be levied on such activity. Consideration for employment is neither supply of goods nor supply of services and no GST will be levied either forward charge or reverse charge basis. The Hon'ble authority of advance ruling has not taken into the consideration of the basic chapter of levy and collection of taxes.

○ **Section 192 of Income Tax Act, 1961 –**

- c. The company is paying the consideration to its directors who are responsible for different managerial and strategic functions of the organization and deducting income tax TDS under section 192 of the income tax act considering the directors as the employee of the company. Even in the given case directors are also filing their individual income tax returns considering the remuneration as income from salary. In this connection it is worthwhile to mention section 192 of the income tax act-
“Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made, on the estimated income of the assessee under this head for that financial year”
Section 192 is applicable only where there is a relation of employee and the employer. Once the relationship is established there should not be any GST on such remuneration or consideration. Employee and employer relationship can also be established from income tax point of view. Authority has not considered this one of the pivotal aspects.

○ **Order of CESTAT, Kolkata Bench –**

- d. Earlier under the service tax regime, service provided by the employee to its employer in the course of employment is not a service and no service tax was leviable. The identical matter is also specified in GST. In this regard Hon'ble CESTAT Kolkata bench in the matter of *M/ Maithan s Alloys Ltd vs. Commissioner of Central Excise and Service Tax, Bolpur in 22nd April 2019* has held that consideration paid to whole time directors would be treated as payment of salaries in as much as there would be employer – employee relationship and in such case the levy of service tax can't be sustained. Although the judgement is in relation to service tax but the principle is equally apply to GST.

○ **Companies Act, 2013 –**

- e. As per the Companies Act, 2013 the whole time director is the key-managerial person and also officer in default. Whatever the remuneration is paid is as like as salary to an employee.

○ **Article 265 of the Constitution of India –**

- f. In exercise of power conferred by sub-section 3 of section 9 of CGST Act, the Central Government has issued Notification 13/2017 Central Tax (Rate), as amended whereby it has prescribed certain supply of services on which the recipient of such supply shall be liable to pay tax under reverse charge. Serial no 6 of the said notification states that services supplied by a director of a company or a body corporate to the said company or the body corporate will be liable under reverse charge. In para a and b above, we have already explained that once it is established that there is an employee and employer relation then no GST would be levied. Further Article 265 of the Constitution of India provides that *“no tax shall be levied or collected except by the authority of the law”*. Both levy and collection of tax shall be provided by statute enacted by a competent legislature. A delegated

legislature, i.e. a rule, notification or regulation cannot provide for levy or collection of tax which is not authorized by the parent statute. Consideration paid to director for providing services can't not be levied to GST unless it is established that such provision of service by the director is not in the course of employment and duly supported by the engagement/ retainership letter. A notification can't override the statute of section 7 of CGST Act.

○ **Conclusion-**

Considering the judgment of Hon'ble CESTAT and relevant provisions of GST law read with article 265 of the Constitution of India, we are in the opinion that remuneration in whatever manner paid to directors are not levied to GST in as much as it relates to employer-employee relationship and TDS under section 192 of income tax act is deducted and duly supported by employment/ engagement letter.

However as per section 103 of CGST Act, the order of the Advance Ruling is binding on the applicant and the jurisdictional officer in respect of the applicant. The applicant may file an appeal before the appellate authority of advance ruling. However, we request GST Council to clarify the issue of GST under reverse charge vide entry no 6 of notification no. 13/2017 dated 28-06-2017 so that tax payer can take a relief.