

GST on Director's Remuneration : The Conundrum*

Goods and Services Tax (GST) is an indirect tax levied on the supply of goods and services. GST Law in India is a comprehensive, multi-stage, destination-based tax that is levied on every value addition. Is GST levied on Director's Remuneration is a question which is discussed in detail over here.

Directors' remuneration is the process by which Directors of a Company are compensated, either through fees, salary, or the use of the company's property, with approval from the shareholders and board of directors.

But who is a Director? What he does? How is he/she appointed? What is Director's remuneration?

To understand the scope of 'director' and 'remuneration' we need to read the relevant provisions of the Companies Act, 2013.

As per Section 2(34) of Companies Act, 2013 "Director" means a director appointed to the Board of a company.

As per Section 2(54) of Companies Act, 2013 "Managing Director" means a director who, by virtue of the articles of a company or an agreement with the company or a resolution passed in its general meeting, or by its Board of Directors, is entrusted with substantial powers of management of the affairs of the company and includes a director occupying the position of the managing director, by whatever name called.

As per Section 2(94) of Companies Act, 2013 "whole-time director" includes a Director in the whole-time employment of the company;"

As per Rule 2(1)(k) of the Companies (Specification of definitions details) Rules, 2014, "Executive Director" means a whole-time director as defined in clause (94) of section 2 of Companies Act, 2013.

As per Section 2(78) of Companies Act, 2013, 'remuneration' means any money or its equivalent given or passed to any person for services rendered by him and includes perquisites as defined under the Income-tax Act

Under the Companies Act, a General Circular No. 24/2012 dated 09.08.2012 issued by Ministry of Corporate Affairs (MCA) clarifies that "The Non-Whole Time Directors of the company are presently not covered under the exempted list and as such, the sitting fees/commission payable to them is liable to Service Tax. Service tax is payable on the commission/sitting fees payable to Non-Whole Time Directors of the company."

A perusal of the above provisions reveals that the director whether the whole-time director or managing director can also be an employee of the company. Further, the remuneration is wide enough to cover any monetary, non-monetary, fixed or variable component. The directors are appointed to the Board of Directors of the Company and are also accountable for their actions and performance to the Board. That is, the Board has supervisory control over the functions being performed by the Directors.

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As per Schedule III of CGST Act, 2017 certain activities or transactions which shall be treated neither as a supply of goods nor a supply of services.

Section 9(3) and Section 9(4) of the CGST Act, 2017 contains the provisions with respect to Reverse Charge Mechanism in respect of certain services which are notified from time to time. Notification 13/2017 – Central Tax (Rate) dated 28-06-2017 vide entry No. 6 provides for levy of Reverse Charge Mechanism on services provided by a director of the company or a body corporate to the said company or body corporate.

If we read above two provisions, schedule III and notification 13/2017 together, then two questions arise:

1. Whether the Salary or Remuneration paid by the company to its Directors is liable for payment of GST under Reverse Charge Mechanism?
2. In case the above is excluded under Schedule III, what is the relevance of Entry 6 in Notification No 13/2017 – CT?

REVERSE CHARGE MECHANISM (RCM)

In regular circumstances, any supplier of goods and services is liable to pay the Goods and Services Tax (GST). However, when the reverse charge mechanism is applied, the receiver of the goods becomes the party that is liable to pay the taxes.

“**reverse charge**” means the liability to pay tax by the recipient of goods or services or both instead of the supplier of goods or services or both under sub-section (3) or sub-section (4) of section 9, or under sub-section (3) or sub-section (4) of section 5 of the Integrated Goods and Services Tax Act;”

There are two provisions under which GST is payable under reverse charge:

- A) The first one is payable under section 9(3) of CGST Act, 2017. A list of goods and services on which the tax is payable under the said section is notified through notification.
- B) The second provision to pay tax is provided under section 9(4) of CGST Act, 2017 where the registered recipient is liable to pay tax on all purchase of goods or services or both from an unregistered person under GST.

The Central Board of Indirect Taxes and Customs (CBIC) has clarified that GST is applicable on Directors Remuneration on reverse charge basis.

JUDGEMENTS

Some very popular judgements are given below for better understanding of provisions of GST on Director’s Remuneration:

1. **M/s Clay Craft India Pvt. Ltd.** –Advance Ruling No. RAJ/AAR/2019-20/33

M/s Clay Craft India (P) limited filed an application before the Rajasthan bench of the Authority for Advanced Ruling (AAR), for clarification on whether salaries paid to directors would attract Goods and Services Tax.

The company said its directors are working as employees for which they are being compensated by way of a regular salary and other allowances.

“The company is deducting TDS on their salary and PF laws are also applicable to their service. Therefore, in all practical purposes these directors are the employees of the company and are working as such besides being Director of the company,”

In its ruling, the AAR said, "the consideration paid to the directors by the applicant company will attract GST under reverse charge mechanism.

It said that the Central Tax (Rate) notification clearly states that services supplied by a Director of a company will be considered as supply and hence **directors cannot be called an employee.**

"So, as per AAR order, it is very clear that the services rendered by the Director to the company for which consideration is paid to them in any head is liable to pay GST under Reverse Charge Mechanism,"

Companies will have to pay GST on the remuneration they dole out to directors.

2. **M/s Alcon Consulting Engineers (India) (P) Ltd. – Advance Ruling No. KAR ADRG 83/2019 dated 25th September, 2019**

M/s Alcon Consulting Engineers (India) Pvt. Ltd. filed an application for Advance Ruling under Section 97 of the CGST Act, 2017 and Section 97 of the KGST Act, 2017, in FORM GST ARA-01 discharging the fee of Rs.5,000 each under the CGST Act, 2017 and the KGST Act, 2017.

The applicant has sought advance ruling in respect of the following question:

- a) Whether the expenses incurred by the Staff members on behalf of the Company exceeding Rs.5000 a day and then reimbursed periodically are liable to tax?
- b) Whether RCM is applicable on remuneration paid to the Directors?

HELD THAT:- The amount paid by the employee to the supplier of service is covered under the term "consideration" as if it is paid by the applicant himself for the services received by them on behalf of the company. This amount reimbursed by the applicant to the employee later on would not amount to consideration for the supplies received as the services of the employee to his employer in the course of his employment is not a supply of goods or supply of services and hence the same is not liable to tax.

Remuneration to the Directors paid by the applicant –

HELD THAT :- The question before us is not whether this service is taxable or not, but whether this supply of services is liable to tax under reverse charge mechanism.

The services provided by the Directors to the Company are not covered under clause (1) of the Schedule III to the Central Goods and Services Tax Act, 2017 as the Director is not the employee of the Company. The consideration paid to the Director is in relation to the services provided by the Director to the Company and the recipient of such service is the Company as per clause (93) of section 2 of the CGST Act and the supplier of such service is the Director.

Reverse Charge Mechanism – **HELD THAT:-** In the present case, the applicant is the company and is located in the taxable territory and the Directors' remuneration is paid for the services supplied by the Director to the applicant company and hence the same is liable to tax under reverse charge basis under section 9(3) of the Central Goods and Services Tax Act, 2017.

Treatment under Income Tax Act, 1961

The remuneration paid by a company to its directors is subjected to Tax Deducted at Source (TDS) under section 192 of the Income Tax Act, 1961.

The remuneration received by the directors in lieu of managing the affairs of the company in the capacity of employee and taxed as salary in hands of directors.

Also, the remuneration paid by the company to its directors is assessed under the head “Income from Salary” by Department of Income Tax.

Non-Executive Directors are generally the ones who are professionally involved merely in broad business of the Company and is not involved into the day to day activities hence they are not entitled to remuneration but they receive sitting fees to attend the board meeting or commission for providing services to the company or body corporate. The sitting fees paid by the company to its non executive director liable for deduction under section 194J and considered as professional fees and not as Salary.

Conclusion

The government has power under sections 9(3) of CGST Act & under section 5(3) of IGST Act, to notify the levy of GST on Reverse Charge Mechanism basis on goods or services. Vide entry no. 6 of **Notification No. 13/2017- Central Tax (Rate) dated 28th June 2017** & entry no. 7 of **Notification No. 10/2017- Integrated Tax (Rate) dated 28th June 2017**, Government had notified that any services supplied by a director of a company to the said company would be covered under reverse charge. Therefore, after reading Notification No 13/2017 – CT and Schedule III together, we can conclude that any amount paid by a company to its Director which is in the nature of employment contract is not liable for payment of GST. Whereas any amount paid by the company to its Directors in the nature of professional relationship will be liable for Reverse Charge Mechanism.

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