

INDIRECT TAX

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GOODS & SERVICES TAX

JUDICIAL UPDATES

ORDERS BY AUTHORITY FOR ADVANCE RULING (AAR)

GST not payable on employee recoveries towards parental insurance and notice pay

Facts of the Case

- M/s. Syngenta India Limited ('Taxpayer') manufactures/sells pesticides, herbicides and various types of seeds. It offers various incentives to its employees as a part of its employment policy, like group insurance policy for its employees, parental insurance policy, etc.
- The employment letter contains various terms and conditions of employment. The taxpayer, in its general employment conditions also mentions the terms and conditions related to work, responsibility, termination, parental insurance, notice pay recovery, etc.

Question Before the AAR

- Whether the GST would be payable on recoveries made from the employees towards providing parental insurance?
- Whether the GST would be payable on the notice pay recoveries made from the employees on account of not serving full notice period?

Contention of the Taxpayer

- The taxpayer submitted that it is engaged in business of crop protection and seed only. The parental insurance scheme is being provided in order to reduce the financial burden of the employees and not to undertake any business activity. Even in case where the said parental insurance scheme would not be provided or facilitated,

the crop protection and seed business of the taxpayer would still be continuing;

- The parental insurance is provided by a third-party insurance company for which, the insurance company is raising an invoice to the taxpayer and charging GST on the same. Therefore, the service of parental insurance is provided by the third-party service provider only;
- Further the taxpayer added that it does not hold a license to carry-out insurance business under the IRDA Act, 1999 and that the taxpayer is neither an "insurance company" nor the taxpayer qualifies as an "insurer". Therefore, the taxpayer cannot be said to be engaged in the business of providing insurance services;
- The taxpayer also explained that these employee benefit schemes are ancillary or incidental. Further, the taxpayer submitted that the parental insurance provided by them is excluded from the scope of supply in terms of clause (a) of section 7(2) of the CGST Act;
- In this regard, the taxpayer also argued that with respect to notice pay recoveries made from employees for not serving the notice period, notice pay recovery made by the taxpayer does not qualify as "consideration" and hence, does not come under the ambit of "supply" under clause (a) of section 7(1) of the CGST Act, 2017.

Submissions by the Tax Authority

- With respect to the first question the tax authority stated that, to provide parental insurance service is not the business of taxpayer. The activity of recovery of cost of insurance premium can't be treated as an activity done in

course of business or furtherance of business. The taxpayer is not rendering any service of health insurance to their employees and hence there is no supply of services in this case also. Recovery of parental insurance premium from employees do not amount to supply of service under section 7 of CGST Act, 2017. Hence concluded that GST is not liable in this case;

- GST is liable on recoveries made from the employees on account of not serving the full notice period. Notice pay is the sum mutually agreed between the employer and the employee for breach of contract. It can be regarded as a consideration to the employer for 'tolerating the act' of the employee to not serve the notice period. In this case GST is applicable @ 18% under the entry of "Services not elsewhere classified" on amount of recovery of notice pay from employee. Such a toleration of act is defined as 'supply of service' in Schedule II of CGST Act 2017.

Observations and Ruling by the AAR

- The AAR noted that the recovery of parents health insurance expenses from employee does not amount to supply of service under the GST Laws. Since there is no supply of services, there is no question of time and value of the supply. The taxpayer cannot claim ITC of GST charged by the insurance company. In this regard, the AAR placed reliance on the case of M/s. POSCO India Pune Processing Centre Private Limited [2019 (2) TMI 63], where they were recovering only 50% premium from their employees and in the subject case entire 100% is recovered from the employees of premium paid by the taxpayer to the insurance company;
- The AAR also referred to the case of M/s. Jotun India Private Limited [2019-TIOL-312-AAR-GST] and compared with the case of POSCO, supra, and observed similarity with the facts of the case of the taxpayer with respect to recovery of premiums from the employees, and found no reason to deviate from the decisions taken in both the said cases;
- The AAR relied on M/s. Bharat Oman Refineries Limited [Advance Ruling No:MP/AAAR/07/2021 dated 8 November 2021], in which it was ruled that "No such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of the employment. Hence, amounts so paid would be chargeable to tax. However, any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act";
- In the present situation where the employee had paid the employer for waiver of notice period, the matter had come up before the Hon'ble Madras High Court in W.P. Nos 35728 to 35734 of 2016 in the case of GE T&D India Ltd Vs Deputy Commr of Central Excise, LTU, Chennai 2020-VIL-39-MAD-ST. The Hon'ble high court applying the CBEC's clarification issued under Service Tax regime observed that "the employer cannot be said to have rendered any service per se much less a taxable service and has merely facilitated the exit of the employee upon imposition of a cost upon him for the sudden exit";
- In the GST era also services provided by an employee to the employer is treated as neither supply of goods or services under Schedule III of the CGST Act. Schedule III pertains to activities or transactions which shall be

treated neither as a supply of goods nor a supply of services;

- The AAR observed that the ratio the decision of the Hon'ble Madras High Court in GE T&D India Ltd Vs Deputy Commr of Central Excise, LTU, Chennai quoted above, is squarely applicable to the present case. Though the said judgment pertains to the Service Tax period no change in the position of law in this regard after introduction of GST also;
- Further, the AAR reproduced section 7 of CGST Act, 2017 and observed that, the levy under CGST Act, 2017 is on "supply" of goods or services or both. The word "such as" used preceding the words sale, transfer, barter, exchange, etc. indicates that the forms of supply shall be those which are enumerated therein or of similar character but not of other dissimilar forms of supply. The expression "such as" indicates the character of the transactions;
- The AAR held as follows:
 - GST would not be payable on recoveries made from the employees towards providing parental insurance; and
 - GST would not be payable on the notice pay recoveries made from the employees on account of not serving the full notice period

[AAR-Maharashtra, M/s. Syngenta India Limited, Ruling No: GST-ARA-25/2020-21/B-05, dated 19 January 2022]

ORDERS BY APPELLATE AUTHORITY FOR ADVANCE RULING (AAAR)

Salary cost recovery from branches subject to GST as facilitation services between distinct units

Facts of the case

- M/s. Cummins India Limited ('Taxpayer') is engaged in manufacture and sale of a variety of diesel engines along with parts thereof and related day-to-day activities;
- The taxpayer submitted that HO provides facilitation services to its branch by way of procurement of common input services from third party vendors on behalf of branch;
- Further, the HO is claiming the ITC of the common services procured;
- Subsequently, the entire common expenses including the cost of the common input services and other administrative expenses like employee salary cost etc. is allocated and recovered proportionately by the HO from the branch to determine the office/plant-wise profitability.

Questions before the AAR

- Whether availment of ITC on common input supplies on behalf of other unit/units registered as distinct person, and further allocation of the cost incurred for same to such other units, qualifies as supply and attracts levy of GST?
- If GST is leviable, whether assessable value can be determined by arriving at nominal value?
- Once GST is levied and ITC thereof is availed by recipient unit, whether the taxpayer is required to register itself as an Input Service Distributor (ISD) for distribution of ITC on common input supplies?

However, AAR failed to clarify certain issues and therefore being aggrieved by the ruling taxpayer preferred an appeal before the AAAR Maharashtra.

Observations & Rulings by AAAR

- Whether GST shall be applicable on taxpayer's activities of providing facilitation services to their branch offices/units by way of availment/procurement of common input services from third party vendors on behalf of their branch offices/units?
 - In view of the wide scope and coverage of the term "supply" and "services", the AAAR is of the opinion that that impugned activities of providing facilitation services by HO to branch would be covered under the scope of 'supply' under section 7(1)(a) of the CGST Act, 2017;
 - Further, the AAAR is of view that cost of common input services (towards vendor expenses) allocated to branch by HO will not attract GST as the said cost is incurred by HO in the capacity of a 'pure agent' of branch. Thus, such cost will be excluded from the value of supply of the facilitation services.
- Whether the taxpayer's HO is eligible to utilize the credit of the tax paid for the common input services received on behalf of its branch offices/units?
 - As per section 16 of the CGST Act, any registered person is entitled to take credit of ITC charged on any supply of goods or services or both, subject to the condition that the goods or services or both received by the registered person should be used or intended to be used in the course or furtherance of business;
 - The AAAR is of the view that the common input services received by the HO are being used or consumed by the branch in the course or furtherance of their business, and not by the HO. Accordingly, HO shall not be entitled to avail and utilize the credit of tax paid to the third-party service vendors for the common input services received by it on behalf of the branch.
- Whether the taxpayer have to be compulsorily registered as an ISD in accordance with section 24(viii) of the CGST Act, 2017?
 - In the given case, the AAAR observed that as per section 2(61) of the CGST Act, "Input Service Distributor" means an office of the supplier of goods or services or both which receives tax invoices towards the receipt of input services and issues a prescribed document for the purposes of distributing the credit having the same Permanent Account Number as that of the said office;
 - Accordingly, the AAAR concluded that HO fulfils the condition of the ISD as provided under 2(61) of the CGST Act, 2017 and is required to mandatorily register itself as an ISD in accordance with section 24(vii) of the CGST Act, 2017.
- Whether the allocation of the cost of the employee's salary by the HO/corporate office to the branch offices would attract levy of GST?
 - The AAAR noted that the employees of the taxpayer's HO are working for the HO and not for the branch. Further, the HO is using all its human resources to facilitate the operational requirements of the branch

by way of procuring common input services on behalf of the branch;

- The AAAR held that the facilitation services, allocation and recovery of any amount including its employees salary cost from the branch offices/units will be subject to GST since the transaction of facilitation services are not effected between the employees and the employer but between the HO and Branch which are distinct units in terms of section 25(4) of the CGST Act, 2017.
 - What will be the valuation of the services provided by the HO to its branch offices/units?
 - The AAAR held that the assessable value of the services provided by the HO to the branch can be deemed to be the 'open market value' since the branches are eligible to full ITC of the value declared by the HO as per the second proviso to rule 28(C) of the CGST Rules, 2017 i.e. value of the tax invoice will be deemed as the 'open market value' of the services.
- [AAAR-Maharashtra, M/s. Cummins India Limited, Order No:MAH/AAAR/AM-RM/01/2021-22, dated 21 December 2021]*

Ruling shall not be given on taxability of an inward supply

Facts of the case

- M/s. Lucknow Producers Cooperative Milk Union Ltd, ('Taxpayer') is a registered co-operative society involved in processing of milk and milk products. They are availing manpower service from agencies under agreement. Also, the taxpayer shifted the responsibility of deposit of these statutory liabilities on the service provider, which is subsequently reimbursed;
- The taxpayer is making payment to the service provider for such manpower service and also for statutory liabilities like EPF, ESIC etc. It discharge tax liability on gross amount i.e. for the service charges as well as statutory liabilities;
- The taxpayer is of the view that the GST shall not be applicable on the value of statutory liabilities. Therefore, the taxpayer approached to the AAR to seek clarification on GST liability on reimbursement of Employee Provident Fund & ESI;
- The AAR held that GST shall be payable at 18% on such reimbursement as it is covered under section 15 of the CGST Act, 2017;
- Aggrieved by the decision of the AAR, the taxpayer approached the AAAR.

Question before the AAR

Whether GST liability on reimbursement of Employee Provident Fund & ESI?

Contention by the taxpayer

- The taxpayer is of the view that the AAR has passed an order without proper appreciation of law as they have ignored the ruling issued by the AAR Karnataka on similar issue;
- The taxpayer contended that reimbursement of EPF & ESI is covered under rule 33 of GST Rules and shall not be subject to tax. The amount of reimbursement has been

made to discharge the legal obligation as a 'pure agent' and not related to consideration payable to the contractor (service provider);

- The taxpayer submitted that the AAR has failed to understand the said service under rule 33 of GST Rules so as to say that contractor is not procuring any additional service from the third party.

Observations & Ruling by the AAAR

- The AAAR examined whether it is covered under the definition of section 95 and the matters or question specified falls under section 97 or section 100 of CGST Act, 2017 in relation to the supply of goods or services or both being undertaken or proposed to be undertaken by the taxpayer;
- The Authority observed that the said supply is outside the purview of mandate given to Advance Ruling Authority/Appellate Authority on Advance Ruling as it is not in relation to the supply of goods or services or both undertaken or proposed to be undertaken by the taxpayer;
- Hence, AAAR rejected the appeal on the ground that the question referred by the taxpayer does not fall within the scope of section 95 of the CGST Act.

[AAAR-Maharashtra, M/s. Lucknow Producers Co-operative Milk Union Ltd order No: 18/AAAR/29/09/2021, dated 29 September 2021]

CUSTOMS

NOTIFICATION

Customs Duty and IGST waiver on goods imported for AFC Women's Asian Cup

- The Central Board of Indirect Taxes & Customs (CBIC) has exempted certain goods from duty including Kelme referee kits, ball boy uniform and match-day bibs, competitions goods shipped using aramex, molten official match balls, Kelme AFC delegations/ volunteers' attire, country flags, sleeves badges, WAC mini-trophy;
- For clearance of goods under exemption, the importer would have to produce a certificate from the Department of Sports, under the Ministry of Youth Affairs and Sports, indicating that the said goods are required in relation to the AFC Women's Asian Cup India, 2022;
- Further, an undertaking have to furnished that all such goods, excluding gift items, souvenirs, and mementoes, shall be re-exported within three months from the date of conclusion of the tournament.

[Notification no:01/2022 dated 18 January 2022]

CIRCULARS

Retention of ISO containers to meet future requirements

- CBIC guides all the field formations to allow extension of time period for re-exports of ISO containers meant for transportation of Liquid Medical Oxygen grade, till 30 September 2022;
- Further, in respect of ISO containers imported on lease by availing IGST exemption, as long as ISO containers are in India under a valid lease and the IGST amount is paid on such lease amount under CGST law, the IGST is not required to be paid on the value of the ISO containers, and in such a situation the need for re-export would not arise.

[Circular no:01/2022-Customs dated 18 January 2022]

Alignment of AEO with CAROTAR 2020

- CBIC has issued circular, aligning Authorized Economic Operator (AEO) with Customs administration of Rules of Origin Under Trade Agreements Rules, 2020 (CAROTAR 2020);
- Earlier, CBIC had relaxed the requirement of AEO/AEO (MSME) to furnish bank guarantee except in specified cases;
- Further the provision regarding procedure to claim preferential rate of duty, and the issuance of CAROTAR, 2020, shall prevail over the specified exemptions and relaxations provided in previous circulars no:33/2016 and 54/2020-customs dated 22 July 2016 & 15 December 2020 respectively, wherein the latter stand suitably aligned to the former.

[Circular no:02/2022-Customs dated 19 January 2022]

FOREIGN TRADE POLICY (FTP)

PUBLIC NOTICE

Addition of area of operation for existing Pre-shipment Inspection Agencies (PSIA)

Directorate General of Foreign Trade (DGFT) has included United States of America (USA) as area of operation of M/s Hamilton Steel Logistics Inc. a PSIA.

[Public Notice no:47/2015-20 dated 18 January 2022]

CIRCULARS

Clarification regarding Steel Import Monitoring System (SIMS)

- DGFT has clarified that re-import of steel for packaging purposes under specific HSNs will not be covered under SIMS as it is not primarily meant for value addition, rather being re-imported for packaging only;
- Further, it has been clarified that SIMS registration is not required if steel/steel item is exported from DTA to SEZ and then imported into DTA from SEZ with or without value addition.

[Circular no:38/2015-20 dated 19 January 2022]

NEWS FLASH

1. “Exempt essential food products from purview of GST”
<https://www.thehindu.com/news/cities/Madurai/exempt-essential-food-products-from-purview-of-gst/article38299799.ece>
[Source: The Hindu, 20 January 2022]
2. “RBI infuses short term liquidity as inter-bank rates rise on GST outflows”
<https://www.livemint.com/economy/rbi-infuses-short-term-liquidity-as-inter-bank-rates-rise-on-gst-outflows-11642772446935.html>
[Source: Live Mint, 21 January 2022]
3. “Budget Expectations 2022: Hike tax benefits, reduce GST rate to enhance insurance penetration”
<https://www.financialexpress.com/money/insurance/budget-expectations-2022-hike-tax-benefits-reduce-gst-rate-to-enhance-insurance-penetration/2412775/>
[Source: The Financial Express, 21 January 2022]
4. “Jewellers urge FM to reduce GST rate, increase PAN card limit to Rs 5 lakh in Budget 2022”
<https://economictimes.indiatimes.com/industry/cons-products/fashion/-/cosmetics/-/jewellery/jewellers-urge-fm-to-reduce-gst-rate-increase-pan-card-limit-to-rs-5-lakh-in-budget-2022/articleshow/88967213.cms>
[Source: Economic Times, 18 January 2022]
5. “Budget 2022: Tech companies hope for GST reconsiderations for electronics”
<https://www.businesstoday.in/union-budget-2022/tech/story/budget-2022-tech-companies-hope-for-gst-reconsiderations-for-electronics-319889-2022-01-21>
[Source: Business Today, 21 January 2022]



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