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### CBIC CLARIFIES APPLICABILITY OF GST ON DIRECTORS' REMUNERATION

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The Central Board of Indirect Taxes and Customs (CBIC) has issued a circular dated 10 June 2020 (Circular), clarifying the applicability of goods and services tax (GST) on the remuneration paid to whole time directors and independent directors. Services rendered by an employee to his/her employer in the course of, or in relation to, his/her employment are not exigible to GST, and therefore, the moot issue was whether services provided by directors are in the course of employment or not.

The uncertainty in the industry stemmed from the conflicting advance rulings issued by the tax authorities in the cases of *M/s. Alcon Consulting Engineers (India) Pvt. Ltd.* [Advance Ruling No. RAJ/AAR/2019-20/33 dated 20 February 2020] and *M/s Clay Craft India Pvt. Ltd.* [Advance Ruling No. KAR ADRG 83/2019 dated 25 September 2019] where the authorities ruled that GST is payable on directors' remuneration, and the ruling in the case of *Anil Agarwal* [Advance Ruling No. KAR ADRG 30/2020 dated 4 May 2020] where the tax authority opined that the salary paid to an executive director shall not be subject to GST as such services would have been provided in the course of employment.

#### Clarification

The Circular has clearly distinguished between directors who are also employees of the company and others who just serve as directors and are not employees of the company. In this context reliance is placed on the definition of 'whole time director' under Section 2(94) of the Companies Act, 2013 ('Companies Act') and provisions concerning appointment of 'independent director' under section 149(6) of the Companies Act read with Rule 12 of Companies (Share Capital and Debentures) Rules, 2014. A 'whole time director' includes a director in the whole-time employment of the company, while an 'independent director' cannot be an employee of the company while serving as a director. Relying on these differences, the CBIC has concluded that:

- *If a director is not engaged as an employee of the company, services provided by such director are liable to GST. The company (as a recipient of such services) is required to discharge GST on a reverse charge basis in such cases as per Notification No. 13/2017- Central Tax (Rate) dated 28 June 2017.*
- *In case a director is a 'whole time director' and is also engaged in the capacity of an employee, then such person may be entitled to remuneration in a dual capacity, that is, salary for services provided as an employee, and sitting fees for the services rendered as a director. In such cases:*

- Any sum paid as salary on which Tax is Deducted at Source ('TDS') under Section 192 of the Income Tax Act 1961, would not be subjected to GST as that is consideration received for service rendered by an employee to an employer in the course of employment, which falls within Schedule III of the CGST Act;
- Any sum paid as sitting fees which is subjected to TDS under Section 194J of the Income Tax Act 1961, will also be subjected to GST, as it is consideration received for services provided by a director to the company. The company is required to discharge GST on a reverse charge basis in such cases as per Notification No. 13/2017- Central Tax (Rate) dated 28 June 2017.

## Comments

While there was clarity on the taxability of services rendered by directors who are not employees of the company, the issue regarding taxability of services rendered by a 'whole time director' remained vexed under the erstwhile service tax regime and continued to be so under the GST regime. In the case of **Allied Blenders & Distillers Pvt. Ltd. vs Commissioner of CST [2019 (24) G.S.T.L. 207 (Tri. - Mumbai)]** and **PCM Cement Concrete Pvt. Ltd. vs Commissioner [2018 (9) G.S.T.L. 391 (Tri.-Kolkata)]**, the Central Excise and Service Tax Appellate Tribunal ('CESTAT') concluded that all remuneration received by whole time directors was received in the capacity of an employee and accordingly, no service tax was applicable. The decision in **PCM Cement Concrete Pvt. Ltd.** has been challenged by the revenue department and is pending before the Supreme Court.

The Circular seems to have streamlined the view regarding taxability of remuneration received by directors on the basis of the tax treatment of such sums under the Income Tax Act, 1961. However, it fails to independently analyse the role of a 'whole time director' as an employee and also runs contrary to the decision of the Hon'ble Allahabad High Court in the case of **Sardar Harpreet Singh vs Commissioner of Income Tax [1990 SCC Online All 929]** where it was held that merely on basis of nature of tax deduction at source under the Income Tax, an employer-employee relationship between director and company cannot be decided. It is the agreement entered into between the company and the director that should reveal the nature of the relationship.

Given that the Companies Act also mandates maintenance of contract of service or written memorandum setting out terms of employment of a whole time director, perhaps the CBIC should have relied on such 'contract of service' instead of applicability of TDS provisions under the Income Tax Act, 1961 to determine the nature of relationship between the company and the whole time director and the capacity in which remuneration is being paid.

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