GST on Employee Recoveries

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GST has introduced quite a few concepts which are new or unheard by Indian taxpayer. Few are levy of tax on stock transfer of goods, taxation of gifts distributed to employees etc. In terms of Section 7 read with schedule I to **CGST Act 2017**, there are specified activities which would be subject to GST even though there is no consideration in return for such activities / supplies. One such activity is supply of goods/ services to related persons which includes employees and to distinct person which can include branches/ warehouses with separate GSTIN.

After introduction of GST, there were lot of confusion on taxability of perquisites/ gifts to employees. To clear this, press release dated 10th July 2017 was issued by CBIC. It was clarified that gift has not been defined in the GST law and in common parlance, gift is made without consideration and it is voluntary in nature made occasionally. Accordingly, common facilities such housing, gym etc., would not get taxed. Gifts exceeding the value of Rs.50,000/- per annum per employee would get taxed in the hands of employer being supplier of such gift. Even perquisites cannot be levied to tax as services by an employee to the employer in the course of or in relation to his employment is outside the scope of GST (neither supply of goods or supply of services) being covered in schedule III. When there is no recovery of any amounts from employees, there could not be any GST impact.

GST on supplies

Services by an employee to the employer in the course of or in relation to his employment would not be treated as either supply of goods or supply of services in terms of Schedule III to CGST Act 2017. Therefore, any payments made by an employer to employee in terms of employment contract should not suffer GST. The issue would arise when there are supplies which are made to employees outside the terms of employment for which consideration is received by employer other than in form of 'employment services. It is important to note that services by an employee to employer is outside the purview of GST and not vice versa.

Free common facilities not taxed

Considering the press release dated 10th July 2017, common facilities provided commonly to employees without any recover would not be subject to GST as they cannot be considered as gifts:

1. Telephone / mobile services

2. Internet services

3. Education reimbursement for employees' children

4. Transport facilities

5. Membership of gym, health club etc.

6. Subscription to journals

7. Canteen facilities

8. Coffee / tea and other beverages during office hours

9. Training facilities

10. Parking services

11. Insurance for self and family

12. Uniform including shoes

13. Joining bonus

14. Access to furniture and other infrastructure

15. Office tours / trips

The list can continue to cover all such common facilities for which there is no recovery from employees.

GST when recoveries made

It may so happen that for some of the facilities provided, employers recover amount from the employees. Such recoveries could be concessional. For example, Rs.5 recovered from employee for a meal actually costing Rs.50. Question which arises here is if, Rs.5 recovered is subject to GST or not. Insurance, telephone, transportation and housing facilities provided at concessional rates could be other examples.

GST law being new in India, there are many issues for which finding actual solution may not be an easy task. Reference to European VAT laws which has inspired Indian GST law could give us some idea on interpreting few provisions. The judgment of European Court of Justice (ECJ) delivered its judgment in *Astra Zeneca UK Limited v HMRC (Case C-40/09)* could be of relevance here. In this case, the court held that partial salary sacrifices by employee towards the vouchers issued by employer is consideration giving rise to VAT. When there is recovery of any amount from employees towards any supplies (unless exempted), such supplies could be treated as supply by revenue department.

Valuation for payment of GST

The transaction between employee and employer is treated as related party transaction and therefore, transaction value would not be applicable for levy of GST. Rule 28 of **CGST Rules 2017** would be applied for valuation of supply when the transaction is

between related parties. According to Rule 28, the value of supply which should be considered by employer on recoveries from employees should be as below:

a) open market value

b) if open market value not available, value of like kind or quality goods or services

c) if value is not determinable according to a) or b) above, then cost of services + 10% or residual method should be adopted.

Open market value could be adopted which could be value paid by the employer to the original supplier. Considering earlier example, the value on which GST payable by employer would be Rs.50 though only Rs.5 being recovered from employees.

Input tax credit

Unless restricted under Section 17(5) of CGST Act 2017, GST on inward supplies can be claimed by employer when GST being paid on recoveries. ITC on canteen can be claimed where it is a statutory requirement. However, restrictions under rate notification to be considered. Services such as canteen, rent-a-cab can be subject to lower rate of 5% GST subject to non-availing of credit on inward supplies. It is wise to undertake cost benefit analysis for the taxpayer before deciding on recovering any amounts. Consider following example for canteen service where having canteen is statutory requirement and Rs.5 being recovered from employees:

Cost of meal	**GST by vendor @ 5%**	**Partial recovery amount**	**GST payable on recovery (No ITC on inward) @ 5%**	**Net tax cost to employer (4.5+4.5 – 5) + 90**
90	4.5	5	4.5	94

If there is no recovery made, then employer's cost would be Rs.90 as Rs.4.5 charged by vendor is eligible for credit in this case. Such non recovery could also boost the morale of employees. Considering, the category of supply and rate of tax, such analysis to be made.

Notice pay recovery

Notice pay recovery is very common in entities which is recovered when employee does not serve in the notice period. Taxation of such amounts is in question from service **tax regime.** The major view is that such recovery is towards tolerating the act or a situation by the employer which was considered as declared service in service tax. In GST law, such toleration has been specifically stated to be a service in schedule II to CGST Act 2017. It is essential to understand if there is a supply which should normally be a positive act by the employer.

It is very interesting to note that UK VAT law which is very close to our GST law does not levy tax on termination of contract subject to condition that the contract originally contains a clause allowing the parties to terminate early in lieu of compensation for losses arising from termination. However, levy could get attracted where no such clause exists in original agreement, and separate agreement reached to terminate. This may not be applicable in India as our GST law does not provide for such exemption in the law. Introduction of similar clause in Indian GST law could solve this issue. For the time being, it would be safe to assume that GST is payable and consider the tax factor in employment agreement for recovery from employees. Those who are risk seeking could rely on the order of Commissioner (Appeals) in case of *M/s.Gujarat State Fertilizers & Chemical Ltd* (2016) wherein it was held that the cessation of employment should also be treated as employment service not liable for service tax.

Conclusion

GST council is taking all necessary measures to simply the law though introduction of GST was not planned well. Failure of IT infrastructure also added to the injuries of tax payer. There have been numerous press releases, tweets, circulars to clarify and clear the confusion. It is time to clarify issues such as taxability of notice period recovery. There have been few advance rulings as well which are adding to the confusion. In few rulings, canteen recoveries are held as taxable whereas recoveries towards insurance amounts held as not liable for GST. Taxpayers and professionals are clueless in such cases.

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