

GST implications- Reimbursed Electricity charges

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Background

In recent times, there has been spate of notices issued by GST dept demanding GST with interest penalty on the reimbursement of electricity charges, collected by the landlords of commercial buildings as well as by building facility /maintenance service providers. These shocking demands are being issued even when the charges are recovered at actuals based on metered reading, alleging it to be service supplied to tenant.

It is good to recall at this juncture that electrical energy has been identified as goods in Customs Tariff Heading 2716 0000 in the schedule to the Customs Tariff Act, exempted from GST under HSN 2716 00 00 [NN 02/2017-CT entry no 104]. It may also be noted that in the case of usage of electricity, it is regarded as the goods.

Taking cue from above, in other words, GST does not apply to the supply of electricity which is a supply of exempted goods.

The services of transmission of electricity and of distribution electricity is exempted under Notification No. 12/2017 – CT(R). However, the Circular No. 34/8/2018 dated on 1st March 2018 clarifies that the services other than transmission and distribution of electricity are taxable under GST.

The exemption entry covers consideration received for services supplied by way of transmission or distribution and not the services in relation to transmission or distribution. Whether charges such as application fees, rental charges, labour charges for meter services, etc. will be covered under the above-mentioned exemption entry. It is significant that the Hon'ble Gujrat High Court in the case of Torrent Power Ltd. vs. Union of India 2020 (34) G.S.T.L. 385 (Guj.) [19-12-2018] held that, the services in relation to the transmission or distribution of electricity are naturally bundled in ordinary course of business and are treated as single service of transmission or distribution of electricity.

In view of paper writer, the contention can be taken that if the services are provided by the transmission or distribution licensee along with transmission or distribution of electricity which are essential, such as application fee for releasing connection of electricity, rental charges against metering equipment, testing fee for meters, transformers, capacitors, etc., labour charges from customers for shifting of meters or shifting of service lines and charges for duplicate bill are can be considered as naturally bundled and can be treated as composite supply in which the principle supply will be transmission or distribution of electricity. Since the principal supply is exempted, the related services also shall be exempted.

Section 2 (17) and 2 (73) of the Electricity Act defines distribution licensee and transmission licensee as follows:

"distribution licensee" means a licensee authorised to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply.

"transmission licensee" means a licensee authorised to establish or operate transmission lines.

Further, the exemption at entry 25 of notification 12/2017-CT(R) is only eligible if the person is a transmission or distribution licensee under the Electricity Act, 2003, and should engage in the transmission or distribution of electricity. This exemption is not available when supplier is not a licensee under Electricity Act.

Therefore, when electricity charges are being collected from tenants, by developers/facility providers[not being such licensees], in addition to rentals/maintenance, due to confusion, differing practices were being followed. In past, few suppliers charged with GST and others excluding electricity charges collected from tax net, treating as exempted supplied electricity. Wherever GST was being charged, anyhow the recipient tenants were availing ITC of such GST charged when used to make outward taxable supplies by them.

It is significant that there has been a recent circular 206/18/2023 GST issued by the CBIC, clarifying that GST would not be leviable on electricity charges collected by the developers/RWA as pure agent.

In this article, the paper writer has examined the implications of the latest circular and action points based thereon.

Circular 206/18/2023 GST:

Clarifies as under: Extract

At para 3. *Whether GST is applicable on reimbursement of electricity charges received by real estate companies, malls, airport operators etc. from their lessees/occupants.*

.....3.2 *It is clarified that whenever electricity is being supplied bundled with renting of immovable property and/or maintenance of premises, forms a part of composite supply and shall be taxed accordingly. The principal supply is renting of immovable property and/or maintenance of premise, and the supply of electricity is an ancillary supply. Even if electricity is billed separately, the supplies will constitute a composite supply and the rate of the principal supply i.e., GST rate on renting of immovable property and/or maintenance of premise, as the case may be, would be applicable.....*

Paper writer comments:

As per the definition of composite supply, there must be two or more taxable supplies, which are naturally bundled and supplied in conjunction with each other and one of which is a principal supply. Tax treatment would be based on principal/main supply [section 2(30) r/w 8(a) GST law].

Principal supply means the supply of goods or services which constitutes the predominant element of a composite supply and to which any other supply forming part of that composite supply is ancillary. The supply of renting/facilities service could be said to be the principal supply for the following reasons:

- 1. The intention of the Tenant is to avail the renting/maintenance services,*
- 2. A tenant does not avail of electricity, without availing renting services which indicates that the predominant element of supply is that of the renting/ facility service[no optionality].*
- 3. Therefore, in such scenario, renting services of premises along with electricity, and other charges would be treated as composite supply and the principal supply is the supply of renting/facility services, tax treatment based on such principal supply taxed at 18%.*

However exclusion of electricity can be claimed from tax net citing pure agent

The circular clarifies as under:

3.3 However, where the electricity is supplied by the Real Estate Owners, Resident Welfare Associations (RWAs), Real Estate Developers etc., as a pure agent, it will not form part of value of their supply. Further, where they charge for electricity on actual basis that is, they charge the same amount for electricity from their lessees or occupants as charged by the State Electricity Boards or DISCOMs from them, they will be deemed to be acting as pure agent for this supply...

Next we examine when pure agent conditions satisfied

Pure agent concept

The conditions of pure agent, as laid down in rule 33 of the CGST Rules, 2017:

- a. Enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both – **Satisfied when supplier entered an agreement to act as pure agent of tenant for reimbursement of electricity charges.**
- b. Neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply-**satisfied directly supplied to end consumer by electricity co.**
- c. Does not use for his own interest such goods or services so procured – **Yes, satisfied as the supplier does not consume electricity, tenant consumes.**
- d. Receives only the actual amount incurred to procure such goods or services in addition to the amount received for supply he provides on his own account – **Yes, satisfied when supplier does not add any markup, but collects only the actual costs.**

- e. The supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorization by such recipient – **Yes, satisfied when authorization is implicit in the agreement;**
- f. The payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service – **Yes, satisfied when the electricity charges are separately given in invoice issued to tenant.** and
- g. The supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account – **Yes, electricity is in addition to supplies of renting/maintenance by supplier .**

Paperwriter view:

1. In paperwriter considered view, Supplier [such as Landlord/developer] is not supplying electricity to client companies, and when it is not engaged in making any supply of electricity but merely procures directly to end recipient from others, GST levy fails. Example: BESCO directly provided but Supplier pays for it and recovers it.
2. Further, Supplier could cite circular supra para 3.3 also exclude such expenses from GST levy citing satisfaction of spirit of pure agent concept, when costs are recovered at actuals incurred, wherein electricity is supplied by third party vendor such as BESCO to such tenant/recipient company. Therefore, these charges could be excluded from the value of supply consequently, no GST payable.
3. Remember that the circulars have binding effect on the dept officers. Similarly held in Dhiren Chemicals case by SC.
4. Similarly held in Kiran Gems case 2019-TIOL-81-CESTAT-AHM held Electricity reimbursed not part of gross value of renting of immovable property service. In the facts the electricity expenses is supposed to be borne by the tenants (service recipient), therefore, subsequently taking the reimbursement of the same will not form part and parcel of gross value of service of renting of immovable property. Issue is decided in ICC Realty (India) Pvt. Ltd. - 2013-TIOL-1751-CESTAT-MUM , S.B. Developers Ltd. - 2018-TIOL-1866-CESTAT-DEL , Tisel Bio Park Ltd. - 2018-TIOL-2195-CESTAT-MAD and Hotel Lake View Ashok - 2018-TIOL-2891-CESTAT-DEL - following the same, the demand is not sustainable.

Way ahead based on recent circular:

a. Where suppliers[such as Landlord/developer] are collecting and paying electricity charges, on actual:

- Have written authorisation to incur expenses as pure agent of the recipient and collect at actuals, in addition to the taxable services provided to recipient/tenants.
- Have individual meter readings to capture the actual units consumed and recovered at costs incurred[no mark up].
- Ensure that the electricity reimbursement is credited against the electricity expense ledger account. This is to ensure that the intention is made clear that the landlord/developer supplier has no intent to make electricity supplies.
- Do not charge GST on such reimbursements[can taking shelter of latest circular para 3.3].
- Preferred method to intimate dept jurisdictional officer by ack letter+email to official mail id setting out the facts, why not liable to pay GST citing circular. Therein intimate that would not pay GST, seek confirmation to ensure no sustainable demands made at future date for extended periods with interest and penalty.

b. When supplier recovers electricity charges with mark up: GST is leviable on supply of goods/services. A view can be taken that not supplied by Landlord/developer, but by electricity vendor, consequently not liable in hands of Landlord/developer. Also not liable to pay GST, as electricity is exempted supply. Dept could dispute, erring on caution, discharge GST at 18%. The recipient avails ITC.

c. When electricity charges are allocated such as based on floor area: Disputable to claim exclusion, when not at actuals. Conservative view-taxed at same rate applicable to the main supply of renting services 18%.

Conclusion

In this article the paper writer has examined important aspects post the circular on taxability of electricity to GST.

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