

HYDERABAD CHAPTER OF ICSI

CRITICAL ASPECTS OF GST **ROLE OF CS** **GST UPDATES**

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- ✘ Section 7 of CGST Act, “Supply”
- ✘ (a) all forms of supply of goods or services or both
- ✘ (b): for consideration
- ✘ ©: in the course or furtherance of business;
- ✘ Schedule-I talks of supplies without consideration;
- ✘ Schedule III: Certain activities or transaction which are neither supply of goods nor service and hence not taxable at all.
- ✘ Clause I of Schedule-III: Services by an employee to the employer in the course of or in relation to his employment.

- ✘ Section 2(52) Goods means

- ✘ (a) every kind of immovable property except;
- ✘ (b) Money;
- ✘ © Securities; but includes
- ✘ (d) Actionable claim or growing crops, grass and things attached to or forming part of land but agreed to severed before supply;
- ✘ Section 2(102) Services: means anything other than goods, money or securities;
- ✘ Explanation: It is clarified that “services” include facilitating or arranging transactions in securities;

- × **Issue 1:** Recovery of any amount towards medical insurance, food canteen services & recovery of salary already paid.
- × **Answer:**
- × **Medical insurance** – According to Authority of Advance Ruling of Maharashtra in case of POSCO India, Recovery of parent's health insurance expenses from employees does not amount to supply of service under GST law. Therefore, GST shall not be applicable on such recovery by employers

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- × **Recovery of Insurance Premium:** The recovery of premium amount from employee and subsequent deposit it with insurance Company cannot be treated as supply of service in the course of furtherance of business. Therefore, **GST shall not be applicable** on such recovery by employers.

- × Food Services or Recovery of Charges– According to AAR of Kerala in case of Caltech polymers (P) Ltd., this transaction is included in the term supply and hence **it is taxable.**
- × A P High Court in Bhimas Hotels (P) Ltd MANU/AP/0244/2017 has held that if Canteen Services is part of (i) package agreed with employee (ii) Section 2(rr) of ID Act define wage to mean all remuneration capable being expressed in terms of money, which would, if the terms of employment, express or implied, were fulfilled, be payable to workmen.
- × Recovery of salary already paid– This transaction does not fall under the definition of supply and hence it not liable for GST it is just a recovery from employee if there is any breach of terms of contract.

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- ✘ Whether salary paid to partner by the Partnership Firm is subject to GST?
 - ✘ The Company has provided Car, Laptop, Mobile to officers of the rank of GM & above, No GST is payable as it is not supply but tools have been provided.
 - ✘ Stipend to Trainee/Apprentice is not subject to GST.
 - ✘ Transaction in sale and purchase of Securities is outside the purview of GST.

✘ **Issue 2:** Recovery of any amount towards Health club/ Gym, Crèches facility, Car Parking facility, T-shirts/ Diaries ,Books/ Journals subscription, Group medi-claim/ Personal accident insurance taken for all employees.

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✘ **Answer:** As per press release issued by CBIC on 10 July 2017, If services are provided free of charge to all the employees by the employer then the same will not be subjected to GST, provided appropriate GST was paid when procured by the employer

- ✘ **Issue 3:** Sale of used assets like laptop/desktop to employees.
- ✘ **Answer:** Sales of above items by company as a welfare measure for employees was held as incidental to main business and **hence taxable supply under Section 7.**
- ✘ **Issue 4:** Recovery for loss of assets.
- ✘ **Answer:** Definition of supply covers this transaction and hence GST shall be applicable on such types of recoveries on **OPEN MARKET VALUE** due to related party transaction as employee is held to be “Related Party”.

- ✘ **Issue 5:** Bonus given to employees like Diwali Bonus, Festive Offer.
- ✘ **Answer:** As per Press Release issued by CBIC on 10 July 2017, Gifts upto a value of INR 50,000 per year by an employer to his employee are outside the ambit of GST. However, gifts of value more than INR 50,000 made without consideration are subject to GST, when made in the course or furtherance of business. As far as statutory bonus under the Payment of Bonus Act, no GST shall be payable. **Cash Reward not subject to GST.**

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- ✘ **Housing:** GST will not be applicable if free housing for the employee is mentioned in the terms of the contract between the employer and employee and is a part of the cost-to-company (C2C).
 - ✘ **GST: NO**

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- ✘ **Meals:** There isn't such thing as a free lunch, but top companies often offer their employees meals at a subsidised rate. GST will not be applicable if the caterer supplies food directly to employees, and an invoice (subsidised) is raised to the company. However, this needs an agreement to this effect to be signed between the company and the caterer.
GST: NO

✘ **Cab service:** It's common to provide cab pick ups-and-drop offs or at least drops if employees work late shifts. However, this will also invite GST under the new regime. Cab facility is a related party transaction and the employee is not eligible to claim input tax credit. However, let be part of terms of employment.

✘ **GST:** YES

Vehicles: Cars for official and personal use are often given to senior staff. Employers will have no GST liability in this case as it is not considered a “supply” under the new tax regime. Cars leased by the company from a dealer and given to employees will also be exempt from GST.

GST: NO

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- ✘ **Garage Sale:** If your company is selling off old laptops at throwaway prices, think twice before you pick one up. The sale of used laptops /printers/office supplies comes under the ambit of GST. “Used laptops are given by the company to employees on FoC (Full Operational Capability) basis or at subsidised value. Such transactions would be treated as supply and accordingly, liable to GST,”.
 - ✘ **GST: YES**

- ✘ **Health check-ups:** Corporates often provide Annual Health Check up facility to employees, but this will not have any GST liability since there is no underlying “supply” per se by the company.
- ✘ **GST: NO**
- ✘ **Other benefits:** Perks that are part of the offer letter such as cash allowance given to staff on successful reference (up to Rs 50,000), mobile handsets, long service awards, employee welfare schemes, off-sites/town halls, relocation benefits, temporary accommodation and free gym services will be out of GST net.

GST: NO

- × **Stock Exchange Charges:**
- × Fees paid towards approval of ESOP Scheme for employees (Employee Stock Option Plan): This being a statutory requirement in terms of company law, therefore the appellant was entitled for credit and refund of the same in case Company is export business.
- × Training Charges: These services are used to the employees and ITC is permissible.
- × 1. CCE Vs. Deloitte Tax services India Pvt. Ltd. MANU/CB/0374/2008.
- ×
- × 2. CCE Vs. Suprajit Automotive (P) Ltd MANU/CB/0034/2014 (Tri.-Bang.)
- ×
- × 3. Wipro Ltd Vs. UOI MANU/DE/0414/2013; 2013 (20)

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- × **Catering Services:** Food and catering for staff and plant operators which is statutory requirement as per the Factories Act, since. The Appellant has more than 250 employees.
 - × 1. Stazen Toyotetsu India (P) Ltd., MANU/KA/0835/2011
 - × 2. CCE Vs. Jubilant Bio-Systems Ltd., MANU/CB/0282/2014.
 - × 3. Reliance Industries Ltd., Vs. CCE: 2016-TOIL-2392-CESTAT.

- ✘ The CESTAT in Carrier Airconditioning and Refrigeration Ltd. vs. C.C.E., Delhi : MANU/CJ/0001/2015, has held:-
- ✘ The service of insurance in relation to employees' who travel for the purpose of business meetings, sales, advertisement, campaigns, recruitment, training, etc. is again fell within the scope of input service. Following judgment also support above.
- ✘ (i) Emcon Technologies India Pvt. Ltd. v. CCE - MANU/CB/0201/2012: (ii) General Manager, BSNL v. CCE - MANU/CE/0799/2014:

GROUP INSURANCE POLICIES.

4: The DB Karnataka High Court in CCE vs. Stanzen Toyotetsu India (P) Ltd. : MANU/KA/0835/2011 has held “Group Insurance Health Policy, so taken under Section 38 of the ESI Act, 1948, which mandates that all employees in factories or establishments, to which this Act applies, shall be insured. Group Insurance Health Policy taken by the Assessee is a service which would constitute an activity relating to business and is a “input service”.

- ✘ 5: The Group Medical Policy and Group Insurance Health Policy is otherwise mandatory by virtue of Section 38 of ESI Act and hence Cenvat credit/ITC would be permissible - CCE Vs. Mirco Lab Ltd 2011(270) ELT 156 Kar HC.
- ✘ 6: Likewise, Insurance Policies taken by the Employer for the workmen employed by employer in terms of Ministry of Home Affairs Order issued under statutory provision i.e. Section 10(2)(1) of Disaster Management Act,. MHA order is mandatory nature and hence ITC to be allowed by virtue of above judgments of different Hon'ble High Courts.

- ✘ **CONTRIBUTION TO CSR & RELATES ACTIVITIES.**
- ✘ 8: The DB of Karnataka High Court in CCE Vs. Millipore India Pvt. Ltd. [reported in MANU/KA/2672/2011: (2012) 26 STR 514, held that Environmental Laws expect the employer to keep the factory pollution free and eco-friendly manner.
- ✘ Tax paid on such services would form part of the costs of the final products and, therefore, service tax paid in all those cases would fall within the definition of 'input services' and is entitled to benefit of Cenvat.
- ✘ The above decision was followed by the Madras High Court in CST Vs. Rane TRW Steering Systems Ltd MANU/TN/1727/2015.

× **AMOUNT SPENT ON CSR.**

- × 9: The Tribunal in Northern Coalfields Limited Vs. CST MANU/CE/0447/2019 dt.20.11.2019 (period is 1.7.2012 to 31.7.2014) has held that amounts spent under Corporate Social Responsibility is a statutory obligations as per Section 135 of Companies Act, 2013 and hence is entitled to Credit.

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✘ **Donation made during COVID 2019 period.**

- ✘ If the donation is a part of CSR activities as permitted under Section 135 of Companies Act, 2013 and amount donated to PM Relief Fund (for which FAQ released by the Ministry of Corporate Affairs), ITC could be availed. However, if it does not fall in CSR, it would be a charity in the course of business (as defined in Section 16(1) of CGST Act) and, therefore, is permissible as permitted CIT Vs. Malyalam Plantations Limited MANU/SC/0110/1964.

✘ The Company may have spent amounts on the following heads:

✘ Medi-claim Insurance

✘ Transportation facility from home to work place and vice-versa

✘ Expenditure incurred for sanitation facility i.e. sanitizer, PPE Kits, Medical Facility, Spraying Disinfects; Stay arrangements, Food & so on

✘ MHA has issued Office order dt.30.3.2020 directing payment of full wages. Guidelines dated 1.5.2020 has saved earlier guideline but did not save Order dated 15.4.2020 wherein Insurance was mandatory. However, as per Section 38 of ESI Act, employer is mandatorily required to obtain Insurance Cover for employees.

- ✘ AA Rajasthan GST on salary paid to Director is liable to GST. MANU/AR/0004/2020 Clay Craft India (P) Ltd
- ✘ Company is deducting TDS on their salary and also making contribution towards PF also from salary paid to Directors. Incumbents are whole time employees of the company. Clause I of Schedule III attached to CGST Act, 2017 clearly holds that services by employee to employer in the course of employment are neither supply of services nor supply of goods.
- ✘ In Re: Anil Kumar Aggarwal (04.05.2020 - Authority For Advance Rulings) : MANU/AR/0017/2020

- ✘ ~~Remuneration received by the applicant as Executive Director is not includable in the aggregate turnover, as it is the value of the services supplied by the applicant being an employee. However, if the applicant receives the remuneration as a Non-Executive Director, such remuneration is liable to tax and payable by the Company under reverse charge mechanism.~~
- ✘ The CBIC issued a Circular dt.10.6.2020 clarifying that whole time Director including Managing Director (who are employees of the Company), salary, allowances, perks, benefits etc. paid to them are not subject to GST.

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- ✘ The Directors who are not employee of the company, the remuneration paid to them are clearly outside the purview of Schedule III of CGST Act and, hence subject to GST on reverse charges basis by the Company. The remuneration paid to Independent Director or any other Director by whatever name called (who are not employee of the Company), such remuneration to such Directors shall be subject to GST on Reverse Charge Basis.

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- ✘ Section 7 define Supply which is liable to GST. The Sub (2) Of Section 7 of GST which in the nature of overriding provision (overriding to Section 7) clause clearly, inter alia, says that activities specified in Scedule III shall not be treated as supply. The Press Release by Ministry of Finance dt 10th July 2017 clearly says that services by employee to employer is outside the purview of GST. Further in pre GST regime Para 2.9.1 of Service Tax Education Guide 2012 issued by the Ministry of Finance also clearly said that services provided by the employee to the employer are outside the purview of " Services".

- ✘ Further FAQ released by CBIC (question 23) clearly holds that services by employee to employer shall be treated neither supply of goods nor services.
- ✘ The AAA Rajsthan has merely picked up the word from central tax notification notifying rate of tax and holds that since notification talk of rate of tax hence salary paid to Director is taxable ignoring the elementary principle of taxation that charging Section determine taxability of subject and not notification specifying rate of tax. Further ignoring the elementary principle of law that there are types of Directors (i) Non Executive Director like (a) Ordinary (b) Nominee or © Independent Director and other category is Director (who are executive) i.e. MD/WTD.

✘ Sitting Fees or Commission paid to Non Executive Director (Nominee Independent or Ordinary) is liable to GST on Reverse Charge Basis and this notification deals with rate of tax in relation to sitting fees. Ministry of Corporate Affairs issued Circular No. 24/2012 dt. 9.8.2012 clarifying that Non-whole time Director are not covered under the Exemption List and hence sitting fees and commission payable to them is liable to Service Tax. In other words remuneration payable to executive directors is not subject to tax

- ✘ There are two types of Directors under the Companies Act, 2013
 - (i) Working Directors like (a) Managing Director, (b) Whole time Director, and (c) Executive Director (who is member of the Board) and
 - (ii) Non-Executive Directors like (a) Nominee Directors (b) Independent Director (c) Ordinary Director who only attends Board Meeting of a company:
- ✘ The working directors are appointed under a Letter of Appointment and/or under Board Resolution containing the terms of appointment including terms for payment of salary, remuneration, allowances, benefits, perks and other facilities
 - (i) Education Loan
 - (ii) Hard & Soft Furnishing allowances
 - (iii) Foreign Trips for self and family
 - (iv) House Building Advance given/arranged by the company as they are part and parcel or incidence of employment and hence, any amount spent or interest accrued over it not liable to GST.

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- ✘ If the Director is paid any other amount, as follows (which is not incidental to his employment and beyond the terms of employment), the said amount is liable to GST. (a): Consultancy Charges (b) Commission – which is not part of or incidence of employment © Renting of property to the company by a Director in the capacity of lessor/owner (d): Guarantee Commission 3: The Director has raise an taxable Invoice for having provided the taxable services and shall have to charge GST at the rate of 18% on forward charge basis and the GST would be payable by him and paid to the Government.



× **NON-WORKING DIRECTORS I.E. NOMINEE
INDEPENDENT, ORDINARY PART TIME DIRECTOR.**

- × The above category of Directors are rewarded in any of the form of remunerations. a); Sitting Fees b): Commission on Net Profit; c) : Guarantee Commission d): Renting of immovable property by a Director in the capacity of lessor/owner; a) Supply of goods/services by him on principal to To principal basis. 5: The Company shall have to pay GST, under Section 9(3) of GST at the rate of 18% on (i) Sitting Fees (ii) Commission (iii) guarantee commission on reverse charge mechanism. If the premises are let out by the Director to the company, then GST on rents shall be payable at the rate of 18% by the Director on forward charge basis.

× VALUATION OF SERVICE:

- × Can you charge different fees for different clients for the same work.
- × Yes. Section 15 talks of Transaction Value
- × (a) : Price actually paid or payable
- × (b): Parties are not related
- × ©: Price is Sole Consideration.
- × Consideration would include any amount which the supplier is liable to be incur but incurred by Recipient.
 - such conveyance expenses, hotel expenses, travel expenses.

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- ✘ PCS Firm M/s AA Professionals LLP is engaged in incorporation of a company and incur the expenses
 - ✘ (I): Professional fee plus CGST & SGST/IGST
 - ✘ (II): Expenses incurred as Agent
 - ✘ (a) Name approval fee (b) registration fee © filing fees (d) fees payable to MCA (e) Printing of MA&AA

- ✘ The Madras High Court in Infrastructure Development Finance Co Ltd Vs. ACIT 2019(Taxmann.com 205 held that Liquidated Damages recovered by Lender from Borrower due to delayed remittance of either installment or loan or interest, was really an interest. Judgment under I Tax Act = ration to apply in GST also.
- ✘ AAA Maharashtra in Bajaj Auto Finance Ltd 2018 (99) Taxmann.com236 held penal charges levied due to delay in payment of EMI, is subject to GST.

- ✘ Appellate Authority of AAA UP has held that no GST is payable on delayed payment charges collected from clients who made payment with delay on sale and purchase of shares. SPFL Securities Ltd 2019 (76) 76 GST 141. FAQ issued by CBIC on Banking Sector dt.27.12.2018.
- ✘ AGM, Annual Dealers Meet, Annual function of Co.
- ✘ Section 17(5)(b), inter-alia, bar Food and Beverages, Outdoor Catering.
- ✘ Engage Event Management Firm

- ✘ INPUT TAX CREDIT - SECTION 16(1)
- ✘ Section 16(1) ITC shall be used for providing taxable goods or output services or both
- ✘ Inputs or Inputs services used or intended to be used in the course or furtherance of business;
- ✘ The SC in SAIL Vs. CCE 1996(5) SCC 484 observed “intended for use” as appearing exemption notification mean that the raw naptha was “intended for use” in the manufacture of fertilizers.

FUNDAMENTAL REQUIREMENTS FOR AVAILING ITC

- ✘ (2):(a) Possession of (i) Invoice (ii) Debit Notes (iii) Tax paying documents i.e. Bill of Entry for IGST;
- ✘ (b) received goods (Job Worker) or services - (license Fee) for three years paid in advance.
- ✘ (c): tax actually paid to Government (i) cash or (ii) use of ITC/Cenvat;
- ✘ (d) Filed Returns under Section 39

- ✘ Tax paid on purchase of AC, Fridge, Photocopy Machine, Computers, laptop, Computer Table/Chairs, Mobile Phones, Landline phones, Motor Cycle, Cycle, Water Purifier/Dispenser, Coffee blending machine, Geyser, all office equipments, furniture, fixtures, carpets, furnishing materials, office materials, stationery or Tax paid on Hire Purchase or Renting of above.
- ✘ All expenses incurred in “in the course of or furtherance of business.
- ✘ **NOT ALLOWED**: Tax paid on Motor Vehicle (sitting cap. upto 13 persons). Even leasing, HP or Hiring of Motor Vehicle, tax paid, ITC cannot be taken.
- ✘ Food & Beverages, Outdoor Catering,
- ✘ **ALLOWED**: Restaurant and Hotel where 18% GST was paid.

✘ TIME LIMIT FOR UTILIZING ITC.

- ✘ There is no time limit for utilization of ITC, ITC could be utilized at any time in future.
- ✘ If issue is debatable, pl take credit = do not utilize till such time favourable judgment of court comes – Safari Retreat (P) Ltd – Orissa High Court.

× **DEPUTATION/SHARING OF SERVICES**

× **OF EMPLOYEES.**

- × Para 1 of Schedule III attached CGST Act speaks of services of employee is outside the purview of the GST as it is not a supply at all. Clause I reads as under:
- × Services by an employee to the employer in the course of or in relation to his employment.
- × **Section 25(4) and 25(5) of CGST Act.**
- × (4): A person who has obtained or is required to obtain more than one registration, whether in one State or UT or more than one State or UT shall, in respect of each such registration be treated as distinct persons.

- ✘ (5): Where a person who has obtained or is required to obtain registration in a State or UT in respect of an establishment, has an establishment in another State or UT, such establishment shall be treated as establishment of distinct person.
- ✘ The Appellate Authority of AAA in M/s Columbia Asia Hospitals (P) Ltd where it has 11 Hospitals in six states. Employees of Corporate Office in Karnataka carry out activities like accounting, administration and maintenance of IT, the benefit of which flows across the Co. The Corporate Office avails services such as renting immovable property, telephone, business consultancy etc. Common expenses of Corporate Office other than employee costs are allocated to other units on the basis of turnover.

- ✘ The applicant contended that employee costs shall not be allocated as the employer – employee relationship is with the legal entity as a whole.
- ✘ **RATIO**: There is no dispute that each unit registered in different States is a 'distinct person' as per Section 25(4) of the CGST Act. When two units of the same business entity in different States take separate GST registration, then each registered unit will be considered as a distinct entity/person as per the GST law Every distinct person will have to maintain separate records for their principal place of business. The laws relating to filing of returns and other compliance procedures shall apply to both of them separately.

- ✘ Every distinct person is liable to pay GST on all supplies of goods and services or both made by it and every distinct person is treated as a separate taxable person. In the event of supplies between distinct persons, there will not be a consideration element as the transaction is within units of the same business entity. However, Section 7(1)(c) of the CGST Act provides that the scope of supply extends to activities referred to in Schedule I which are made or agreed to be made without a consideration. Entry 2 of Schedule I refers to supply of goods or services or both between distinct persons even if made without consideration.

- ✘ The provisions of entry 2 of Schedule I of the CGST Act clearly state that transactions between distinct persons are to be treated as a "supply" even if made without consideration
- ✘
- ✘ **HELD:** Employer and employee relationship exists only at Corporate Office and Corporate Office and other units in different states are distinct and separate person. Hence, services of employees located at Corporate Office which benefit other distinct persons, will be considered as a supply of service by one distinct person to another person.

JOINT EMPLOYMENT

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- ✘ a): One employee is employed with more than one employer
- ✘ b); Both the employers are able to exercise independent control;
- ✘ c) Each employer pays his share of emoluments or one of them pays on behalf of other employers and recovers the same on actuals.
- ✘

✘ **Franco Indian Pharmaceutical Pvt. Limited vs. CST, Mumbai - MANU/CM/0199/2016: 2016 (42) STR 1057.:**

5. There can also be cases where staff is employed by one or more employers who normally share the cost of such employment. The services provided by such employee will be covered by the exclusion provided in the definition of service. However, if the staff has been engaged by one employer and only made available to other for a consideration, it shall not be a case of joint employment.

6: Another arrangement could be where one entity pays the salary and other expenses of the staff on behalf of other joint employers which are later (sic) from the other employers on an agreed basis on actual. Such recoveries will not be liable to service tax as it is merely a case of cost reimbursement.

- ✘ Punj Lloyd Ltd Vs. CCE-MANU/CE/0130/2018: 2019 (22) GSTL 85 (Tri. Del.), the relevant paragraph is as under:
- ✘ We note that the appellants have deputed some of their employees to their subsidiary group company, they have got consideration on actual basis (without mark up) reimbursed by the said subsidiary unit. We note that the appellant is not engaged in manpower recruitment or supply and are not to be considered as manpower supply agency.

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✘ The Tribunal in *Airbus Group India Pvt. Ltd. - MANU/CE/0302/2016*, held that deputing employees to group company cannot be considered as supply of manpower. The appellants categorically asserted that they continued to control the deputed employees and have only got reimbursement of actual cost for such deputation. The Service tax liability on appellant on this issue cannot be sustained".

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- ✘ The CESTAT in *Nissin Brake India Pvt. Ltd. Vs. CCE : MANU/CE/0704/2018*, has observed as under:-
- ✘ On perusal of the agreement entered into between the appellant and its parent company, we find that the employees deployed by the latter were working under the control, direction and supervision of the appellant. The appellant also deducted tax at source from the salary and other perks given to the employees. The fact is also not under dispute that the appellant did not pay any direct/indirect consideration to its parent company towards deployment of the employees. Thus, it cannot be said that there is any agency and client relationship between the parent company and the appellant.

✘ Rather, the terms of the agreement makes the position clear that the relationship between the appellant and the manpower deployed by the parent company is of employer/employee, and as such, it cannot be considered as the taxable service under the category of manpower recruitment or supply agency service. In the decision cited by the Learned Advocate for the appellant, the Tribunal has held that when the employee/employer relationship exists, the method of disbursement of salary cannot determine the nature of transaction. Thus, we are of the view that the adjudged demand cannot be confirmed against the appellant.

✘ ~~The Tribunal in Ivanhoe Cambridge Investment Advisory India (P) Ltd. vs. CST, Delhi : MANU/CE/0491/2018 held:-~~

✘ The holding co of the appellant have made available the service of certain experts to the appellant in India. We have also seen some of the payment letters issued by the appellant to the expatriates which make it clear that such expatriates will be employees of the appellant during the period of their assignments to the appellant. Further, the Income-Tax returns filed by the expatriates clearly shows the appellant as their employer and Income-Tax has also been paid for the amounts received by the expatriates in India, under the category of salary.

THANKYOU

**THE CHAIRMAN AND THE TEAM OF
HYDERABAD CHAPTER OF ICSI**

