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"GST IMPLICATIONS ON DEPUTATION AND SECONDMENT OF EMPLOYEES"


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GST implications on deputation and secondment of employees

Introduction

It is a common practice (specially in group companies) that an employee employed with one company is deputed for work to another company. During such deputation or secondment, such employee works under the under the direction, supervision and control of the deputed/seconded company and receives salary and other benefits as per their policy. However, in many cases to preserve the continuation of the employment benefits or to avoid migration pain in case of cross-border secondment, the entire salary of the said employee is processed and paid by the company who has deputed/seconded its employee and then such amount is recovered from the deputed/seconded company. The question comes up is whether such recovery amounts to a consideration for a supply? This article attempts to examine this issue in detail and bring some clarity in this regard.

Provisions under GST

Services provided by employee in course of his employment

Section 7(1) of the CGST Act, 2017 provides for inclusive definition of the supply such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business. Section 7(2) of the CGST Act provides for activities or transactions which would be treated neither as a supply of goods nor a supply of services. Schedule III specifies such activities and includes "services by an employee to the employer in the course of or in relation to his employment" in its ambit. Therefore, such activities cannot be considered as supply so as to be leviable to GST.

Position when an employee is seconded to another company

It has always been a burning issue whether the deputed employee qualify as employee of deputed/seconded company or the amount reimbursed is in lieu of supply of manpower services.

In order to demonstrate employer-employee relationship, it is a settled position that there must be contractual understanding in this regard and the person must be working under control and supervision of the company.

In ***D.C Works Limited*** Vs. ***State of Saurashtra*** reported at AIR 1957 SC 264, it was held that the determination of the relationship between master and servant is the existence of the right in the master to supervise and control the work done by the servant not only in the matter of directing what work the servant is to do but also the manner in which he shall do his work. The nature or extent of control which is requisite to establish the relationship of employer and employee must necessarily vary from business to business and is by its very

nature incapable of precise definition. The correct method of approach, therefore, would be to consider whether having regard to the nature of the work there was due control and supervision by the employer.

Several factors may indicate the relationship of master and servant. None may be conclusive. On the other hand, no single factor may be considered essential independently. The presence of all or some of following factors may have to be considered to determine the existence of the relationship of master and servant:

- the right to select for appointment;
- the right to appoint;
- the right to terminate the employment;
- the right to take other disciplinary action;
- the right to prescribe the conditions of service;
- the nature of the duties performed by the employees;
- the right to control the employees' manner and method of work;
- the right to issue directions; and
- the right to determine and the source from which wages or salary are paid and other host of such circumstances

The deputed person shall be said to be the employee only if the seconded employee works under the direct control and supervision of the seconded company. The performance appraisal and any promotion or termination of employment of the employee shall be the discretion of deputed/seconded company.Further, if the documentation provides that such employee will be employed with secondee company, such transaction will be covered by the Schedule III of the CGST Act. In case of a clear contractual position, it can be said that the reimbursement of salary by the secondee company to the other company does not amount to supply but such amount is towards the employer-employee relationship.

In the case of ***CCE*** Vs. ***Computer Sciences Corporation India Pvt. Ltd***. reported at 2015 (37) STR 62, Hon'ble Allahabad High Court was considering a situation where the assessee hired certain expatriate employees from overseas. These employees were either directly employed by the assessee or were transferred from other group companies to the assessee in India. During the tenure of their employment in India, the expatriate employees performed their duties and responsibilities like other employees of the assessee in India. A letter of employment was entered into between the expatriate employee and the assessee from the date when the employee was transferred to India for the duration of the employment in the country. Assessee also incurred expenditure on such employees in form of provident fund and deposited TDS on the total salary earned by

such employees. The assessee also remitted to its group companies certain social security and other benefits that were payable to the accounts of the expatriate employees under the laws of the foreign jurisdiction. The High Court observed that there is no taxable service in the nature of manpower services which is being provided by the group companies to assessee and consequently same will not be chargeable to service tax.

Similarly, Delhi Tribunal in the case of ***M/s Paramount Communication Ltd*** v. **CCE, Jaipur**, reported at 2013-TIOL-37-CESTAT-DEL held that in a case where the employees of the assessee also work for its sister concern, it cannot be regarded as supply of manpower service. The relevant portion of the judgment is reproduced as under:

"3. The present appellant is a manufacturer of excisable goods and is not engaged in the business of supply of manpower, though they were sharing the services of some of the office personnel with their sister concern. Here there is no case of supply of manpower by the appellant to the sister company because the employees concerned continued to work for the appellant also and arrangement in which certain employees work for two of sister concerns and the expenses of employees are shared, the manpower is not supplied by one company to other. The situation is that the personnel do the work of both the companies. The service is by the personnel to the two companies in question and not one company providing service to the other company. So there is no taxable activity on the part of the appellant to the other to be taxed under manpower supply service taxable as 65(105)(k) and therefore, the stay petition as well as appeals are allowed. The fact that payment to employee is made by one company and there is inter-company payment of the share of the cost of the employees utilised by the other company cannot be interpreted to mean one company was providing service to the other. We accordingly set aside the impugned order and allow the appeal. Stay petition also gets disposed of."

Apart from the above judgements, there are plethora of decisions which has taken a view that the inter-company secondment agreement providing personnel at the disposal of recipient company as direct employees and who will work under direct control of the recipient company against payment of salary, does not come within the purview of service tax. Some of them are listed below-

- *JM Financial Services Private Limited* Vs. *Commissioner of Service Tax*, reported at 2013-TIOL-757-CESTAT-MUM
- *Commissioner of Service Tax* Vs. *Arvind Mills*, reported at 2014 (35) STR 496
- *Bain & Co. India Pvt. Ltd.* Vs. *Commissioner of S.T., New Delhi* reported at 2014 (35) S.T.R. 553 (Tri. –Del.)
- *Volkswagen (India) Private Limited* Vs. *CCE, Mumbai* reported at 2014 (34) S.T.R. 135 (Tri – Mum).
- *Samsung India Electronics Pvt. Ltd.* Vs. *Commissioner of Central Excise and Service Tax* reported at 2015-TIOL-393-Cestat-Del

- *Airbus India Pvt. Ltd*. Vs. *Commissioner of S.T., New Delhi* reported at 2016(4) STR.120(Tri. - Del.)
- *Fortune Park Hotels* Vs. *Commissioner of S.T., New Delhi* reported at 2017 (49) S.T.R. 567 (Tri. – Del.)
- *Nortel Networks Pvt. Limited* Vs. *Commissioner of S.T., New Delhi* reported at 2017 (52) S.T.R. 489 (Tri. – Del.)

Further, the supply of manpower can be differentiated from a contract of employment on various factors. The primary control and supervision in supply of manpower always remain with the supplier/contractor although the secondary control and supervision would be with the recipient. However, in an employment contract, the complete control and supervision of the employee is with the employer and not with any other person. Further, the privity of contract of the worker is with the contractor in a manpower supply service and not with the recipient/principal employer for whom work is done. However, in employment contract privity of contract is between the employer and employee.

Concept of Joint Employment

The next question that comes up is whether secondment can be considered as a joint employment or not. It may be noted that there is no embargo in law to restrict an employee to act as an employee for more than one employer. If the documentation provides that such employee will be jointly employed with both the companies, such transaction will still be covered by the Schedule III of the CGST Act. The said understanding is supported by the decision of the Hon'ble Supreme Court in the case of ***Commissioner of Income-Tax*** Vs ***Eli Lilly and Co, (India) P. Ltd.*** reported at [2009] 312 ITR 225 (SC), wherein the court observed that the fact employee continues to be on pay roll of an overseas company does not in any way affect the legal position that the same person can be an employee of the Indian company.

The said position has also been discussed in the draft circular of the department dated 27.07.2012 in the following manner-

"B. Joint Employment

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 recouped from the other employers on an agreed basis on actuals. Such recoveries will not be liable to service tax as it is merely a case of cost reimbursement."

It is worthwhile to refer to the guidelines issued by the HMRC on Joint Employment of the employees. Gist of Para 3.2 of the VAT Notice 700/34/05 is as under:

"In cases of Joint Employment, there is no supply of staff for VAT purposes between the joint employers.

Staff are regarded as jointly employed if their contracts of employment or letters of appointment make it clear that they have more than one employer. *The contract must specify who the employers are (e.g. Company A, Company B and Company C or Company A and its subsidiaries).*

Staff are not regarded as jointly employed if their contract is with a single company or person, even if it

(a) lays down that the employee's duties include assisting other companies;

(b) lays down that the employee will work full time for another company; or

(c) shows by the job title that the employee works for a group of associated companies (e.g. group accountant)"

We may also take a note of the decision under European Vat laws in the case of *The Midland Wheel Club Ltd.* reported at LON/84/284 (VTD 1770) wherein the general manager of a company which operated a gaming club also managed the affairs of a subsidiary company with a similar trade. The commissioners issued an assessment on the basis that the parent company had made a taxable supply of the manager's services to the subsidiary company. The Tribunal allowed the company's appeal, holding that, as the manager received salary from the subsidiary company as well as form the parent company, there was dual employment rather than a taxable supply.

However, the question arises as to what will be the treatment of such transactions if documentation doesn't stipulate for joint employment clearly. Whether can it be still be called as joint employment. The said question was answered in affirmative by Mumbai tribunal in *Franco Indian Pharmaceutical (P) Ltd.* Vs. *Commissioner of S.T., Mumbai* reported at 2016 (42) S.T.R. 1057 (Tri. –Mumbai). In this case, tribunal held that services rendered in the course of employment have been kept outside the purview of service tax levy which is not only for the period under consideration but even at present under the negative list regime. Tribunal in this case observed that-

"*No doubt, an employee who signs a contract of employment with one company can legitimately refuse to work for another company, either on deputation or on secondment, if such employment contract is silent on the employer's right to depute or second the employee. However, if such an employee consents to such deputation or secondment to another company and willingly works for other employer-companies for long periods of time, knowing fully well that his emoluments are being paid by such other companies, his contract of employment with a single employer will, by virtue of the parties conduct, transform itself into a contract of joint employment with several employers. In the present case too, employees have been working for many*

years with several group companies who have, in terms of a pre-existing understanding amongst themselves, been sharing the actual cost of employment on an agreed basis. ***The collective conduct of the employees and the employer-companies for long period of time has the effect of establishing that the contract of employment is one of the joint employment."***

Conclusion

In GST, in order to qualify as a supply there must be a reciprocity and the person providing the consideration is expected to receive something in return. In our view, reimbursement of salary by seconded company to the other company does not qualify as a supply since there is no service that is being provided by such company to the seconded company. The underlying transaction herein is the service provided by the employee to the secondee company which is covered by Schedule III of the CGST Act. It is just that salary is being paid by the company initially and then recovered by the secondee company. In case there is no mark-up being charged over and above salary, it is possible to contest that it does not amount as a supply. Further, in view of the *Franco Indian Pharmaceutical (P) Ltd (supra)*, it is also possible to contend that when an employee is seconded, it creates a joint employment by conduct and both the companies work in the position of an employer to the employee. **However, we suggest drafting these joint employment agreements with precision and brevity to carefully to preserve employer-employee relationship.**