

SERVICES PROVIDED BY DIRECTOR (FOREIGN NATIONAL, NRI & INDIAN CITIZEN AS WHOLETIME, NON-EXECUTE, NOMINMEE AND INDEPENDENT UNDER COMPANIES ACT, 2013 AND ITS TAXABILITY UNDERGST.

BY

Pradeep K Mittal*

In this Article, an attempt has been made to explain the provisions relating to services rendered by Managing Director, Whole-Time Director, Non- Executive Director such as “Independent, Nominee and Part- time Director. The services of Managing or Whole-time directors who are in whole time employment of company are not liable to GST as there is employer-employee relation and services of employee to employer are outside the purview of “Service” by virtue of Clause 1 of Schedule III to CGST Act, 2017.

*Advocate Past Central Council Member, the ICSI
Pkmittal171@gmail.com

2: Thus, salary, allowances, perks, benefits or any other amount which are in the nature of salary or a part of CTC and payable to either Managing Director or Whole time Director are not exigible to GST. Further more, Executive Director would also held to be Whole Time Director by virtue of Section 2(94) of Companies Act, 2013 read with Rule 2(1)(k) of Companies (Specification of Definitions Details) Rules, 2014 and consequently his salary and perks are outside purview of GST.

2: The Advance Ruling Authority Karnataka in Anil Kumar Agrawal, [2020] 116 Taxmann.com 428 (AAR-Kar.), has held that GST is payable on remuneration payable to non-executive director, nominee director or independent director under reverse charge. In other words, - no GST is payable on salary, allowances or perks payable to Managing Director, Whole time Director or Executive Director.

3: AAA Rajasthan in case of Clay Craft India P. Ltd. In Re(2020) 117 taxmann.com 14 (AAR-Rajasthan) has held that GST is payable by company under reverse charge on remuneration paid to whole-time/executive directors also. The ruling was not in accordance with law and hence, Government stepped in.

4: Later on, the Government came out with a Clarificatory Circular No.140/10/2020 – GST dated 10.06.2020 to clarify that no GST shall be payable on salary perks, benefits payable to Managing Director or whole time Director.

5: The Managing Director is appointed under Board Resolution & Shareholder resolution in terms of Section 179, Section 196 and Section 197 of Companies Act, 2013 read with Schedule V and salary is being paid to him under the authority of a Board Resolution and shareholders' resolution. Salary and perquisites like house allowance, electricity and furnishings for the accommodation, leave travel concession, reimbursement of medical expenses for self and family, medical/accident insurance, club fees, car with driver, telephone at residence etc, such remuneration are liable to GST.

6: The Hon'ble Tribunal in Allied Blenders & Distillers P. Ltd. v. CCE (2019) 101 Taxmann.com 462=24GSLT 207 (CESTAT), has held that where company paid remuneration to its four whole-time Directors for managing day-to-day affairs of Company and made necessary

deductions on account of (i) Provident Fund, (ii) Professional Tax (iii) TDS as appropriate rate and held out these Directors to all statutory authorities as employees of company and, therefore, remuneration paid to directors was nothing but salary and company was not required to discharge service tax on remuneration paid to Directors. Though the judgment is in respect of service tax, however, the principle shall equally apply to GST as well.

**NO GST/SERVICE TAX ON COMMISSION PAID
TO MANAGING DIRECTOR.**

7: As per Section 197(6) of Companies Act, 2013, remuneration payable to Whole Time Director could be by way of monthly payment or specified percentage of net profits or partly by one way and partly by other. In other words, it is not necessary that only monthly salary payable would make a person whole time employee of the company. It is on record that there are companies who pay remuneration to Directors based on profits, which is sometimes termed as 'commission'. Really, it is part of his salary on which no GST shall be payable. In McDowell & C V. CIT (2002) 123 Taxman 911 (Mad HC DB), it was held that commission payable to Directors on turnover basis is 'remuneration' for purpose of ceiling under Section 40© of Income Tax Act – following Metal Powder C. Vs. CIT (1999) 238 ITR 756 (Mad.) Such remuneration would be in the nature of salary and not liable to GST.

8: In CBE & C circular No. 115/09/2009-ST, dated 31.07.2009, it was clarified that some Companies make payments to Managing Director/Directors (Whole-time) or Independent), terming the same as 'Commission'. The said amount paid by a company to their Managing Director/Directors (Whole-time or Independent) even if termed as commission, is not the 'commission' that is within the scope of business

auxiliary service and hence service tax would not be leviable on such amount.

9: The Tribunal in the case of PCM Cement Concrete Pvt. Ltd. vs. CCE, Siliguri MANU/CK/0096/2017 wherein the Tribunal observed that consideration paid to whole time directors would be treated as payment of salaries inasmuch as there would be employer - employee relationships and in such cases, there cannot be any levy of service tax. He further relied on the CBEC Circular no. 115/9/2009-ST : MANU/DSTX/0054/2009 dated 31.07.2009, wherein it has been clarified that no service tax is leviable on commission paid to managing directors/whole time directors, even if the remuneration is termed as 'commission', inasmuch as the said managing directors/whole time directors do not perform consultancy or advisory function.

10: The Tribunal in the case of Maithan Alloys Ltd. vs. CCE and ST, Bolpur (02.11.2018 - CESTAT - Kolkata) : MANU/CK/0094/2018 has held if the payments are in the nature of salary and is subject to TDS under Section 192 Income Tax, no GST shall be payable on such payment.

**SERVICES PROVIDED BY NON-EXECUTIVE DIRECTOR,
NOMINEE DIRECTOR OR INDEPENDENT DIRECTOR OF
A COMPANY/BODY CORPORATE.**

11: The Non-Executive Directors do not take part in day to day activities of the company. They only attend the meetings of Board of Directors or its Committees and thus, work only at periodic interval on part-time basis. Section 166 of Companies Act, 2013 makes provision for duties of Directors. Generally, they are informed about the day to day progress by way of MIS/Periodic Reports. However, Companies

Act, 2013, does not make any distinction between executive and non-executive directors even in respect of liabilities as a Director.

12: Thus, sitting fees, commission on net profit and other payments made to non-whole time directors, independent directors or nominee directors of a Company or a Body Corporate are, however, subject to GST. The obvious question is under which Tariff Head. The services provided by a Director of company would, in my view, fall under Residual Tariff Head i.e. 999799. It needs no elaboration that such remuneration in the form of sitting fee, commission on net profit to non-executive director, guarantee commission or any payments which are given to a Director in discharge of his duties, functions and responsible as a Director of a Company, is also liable to GST under Reverse Charge Basis by virtue of Notification No.13/2017-CT (Rate) and 10/2017-IT (Rate) both dated 28.06.2017 effective from 01.07.2017.

**DIRECTOR HAVING HIS PLACE OF BUSINESS
OTHER THAN LOCATION OF REGD OFFICE OF
COMPANY IN WHICH HE IS DIRECTOR.**

13: If Director providing service is from out of State, a question arises as to whether IGST be paid or CGST and SGST/UTGST should be paid under RCM ? There appears to be no consensus and views are divided and hence, appropriate course would be to pay CGST and SGST/UTGST under reverse charge. If Director is from out of India, it will be import of service and IGST should be payable.

DIRECTOR WHO IS FOREIGN NATIONAL OR NRI

14: As per Section 2(34) of Companies Act, 2013, Director mean a Director appointed to the Board of a Company and whereas as per Section 2(13) of Companies Act, 1956, “Director” mean a Director

appointed to the Board of a company, and includes a deemed Director – the word “deemed director” has been excluded under Companies Act, 2013.

15: The Foreign National or NRI can be appointed as Managing Director or Whole Time Director in accordance with the provisions of Schedule V to the Companies Act, 2013. All Directors need not be resident of India and need not have local address in India.

16: During pre-GST regime, Service Tax was leviable on the sitting fee paid to the Directors who are not performing routine functions but only provide advice/consultation to the management while attending the meeting of Board of Directors of a company as has been held by Allahabad High Court in the case of Meekin Transmission Ltd. MANU/UP/0661/2008 (ALL). It may be seen that no case has been made out by the Department that such remuneration, other than salary paid to him, was not for the routine work he performs as Managing Director, but was for the consultation he provides. Therefore, case is squarely covered by the exclusion contained under Section 65(44)(b) of Finance Act, 1994 as has been held in NRB Industrial Bearings (P) Ltd CCE MANU/CM/0267/2019.

17: In Rentworks India Pvt.Ltd. v. CCE (2016) 43 STR 634 = 2016-TIOL-1199 (CESTAT), the Foreign Director was providing marketing consultancy services to company. Company contended that it was salary to foreign director and Income Tax department was treating this amount as salary. It was held by Tribunal that if an amount paid to an individual was treated as salary by the income tax department, it could not be held by the service tax department as amount paid for consultancy charges and service tax demanded on the same.
