



No GST on Salaried Directors' Remuneration

The CBIC has issued a circular¹ to clarify in which instances remuneration paid by companies to their directors would be excluded from the scope of supply i.e. as a “services by an employee to the employer in the course of or in relation to his employment”² under the Central Goods and Services Tax Act, 2017 (“the Act”) or would be liable to tax on a reverse charge basis³ as supply under a contract for services.

Summary of the Circular

- The circular states that, it is prudent to determine whether a director is an Independent director or an employee of the Company in terms of the provisions of the Companies Act, 2013.
- Once it has been determined that the director is an independent director or employee, it should be examined whether all the activities performed by the director are in the course of employer-employee relations or is there any element of “contract for service”.
- Activities of an independent director who discharges income tax as professional income which is subjected to tax deductible at source (“TDS”) under section 194J of the Income Tax Act,

1961, (“IT Act”), will be considered to be a contract for service and the fee paid to such directors would be consideration for services liable to Goods and Service Tax (“GST”)

- Directors drawing a salary from the company, which is accounted as “salaries” by the company, and subjected to TDS under section 192 of the IT Act, will not be liable to GST as it is a service by an employee to the employer in the course of or in relation to his employment which is neither a supply of goods nor services.

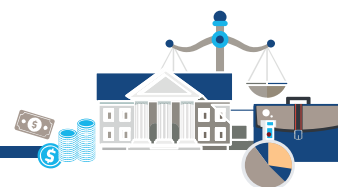
Dhruva Comments:

There is intense deliberation on the taxability of remuneration to directors, owing to some advance rulings that have pronounced that such remuneration is liable to GST. In *M/s Alcon Consulting Engineers (India) Pvt Ltd*, the Karnataka Authority for Advance Ruling (‘AAR’) held that reimbursements paid to the directors is liable to GST under reverse charge mechanism, as the directors cannot be employees of the Company, contrary to the facts on record and without providing any reason for the conclusion. Similarly, in the ruling of *M/s Clay Craft India Pvt Ltd* pronounced by the Rajasthan

¹ Circular No: 140/10/2020 – GST dated June 10 2020

² Schedule III of the Act

³ Notification No. 13/2017 – Central Tax (Rate) dated June 28 2017



AAR, proceeded on a general premise that the directors could not be employees of the company and any remuneration paid to the directors whether as salary or fee would be liable to GST on a reverse charge basis. By contrast, in the ruling of *Shri. Anil Kumar Agarwal*⁴, there was insufficient documentary evidence to establish if the amount received by the applicant is in the capacity of an executive director or a non-executive director. However, the ruling held that if the amount is received as salary from an employer, then the amount should not be added to the aggregate turnover of the applicant for the purposes of GST.

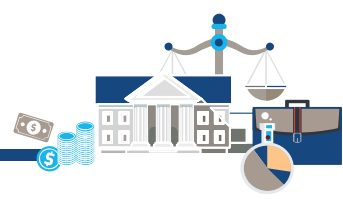
It may be noted that in terms of section 103 of the Act, the Advance Ruling pronounced by an AAR or the Appellant Authority for Advance Rulings ('AAAR') is only binding on the Applicant who had sought it, and on the concerned officer or the jurisdictional officer in respect of the Applicant. It is also a settled position in law that a circular is clarificatory in nature and is binding on the Department Authorities.

It is important for companies to review their employment contracts, disclosures made under the Company Law and other labour laws (as may be applicable) to evaluate if the directors are employees of the company or not, and consequently discharge their GST liability. Factors such as Form 16 and deduction of TDS as salary or as professional fees, the treatment accorded while filing the Income tax returns, employment letters, payment of provident fund and employer's contribution, and payment of professional tax, will help in distinguishing between an employer-employee relationship, which would not be liable to GST, and a professional service fee relationship, which would become liable to GST. In most cases, since GST credit could be available to the Company, non-payment of GST, where applicable, would lead to unwarranted litigation, in a situation where the tax payment is per se revenue neutral.

The circular also assumes significance in evaluating similar situations where a question arises as to whether the service provider is an employee or not. One such situation where the criteria set out in the circular may be

relevant is deputation of manpower from one Company to another resulting in payment of salaries and deduction of TDS by the Company to whom the employee has been deputed.

⁴ AR No. KAR ADRG 30/2020, dated May 04 2020





ADDRESSES

Mumbai

11th Floor, One IndiaBulls Centre,
Tower 2B, 841, Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad

B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahaldnagar, Corporate Road,
Ahmedabad - 380 015
Tel: +91-79-6134 3434

Bengaluru

Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560 001
Tel: +91-80-4660 2500

Delhi / NCR

101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana - 122 002
Tel: +91-124-668 7000

Pune

305, Pride Gateway, Near D-Mart, Baner,
Pune - 411 045
Tel: +91-20-6730 1000

Kolkata

4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal – 700016
Tel: +91-33-66371000

Singapore

Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai

WTS Dhruva Consultants
U-Bora Tower 2, 11th Floor, Office 1101
Business Bay P.O. Box 127165
Dubai, UAE
Tel: + 971 56 900 5849

New York

Dhruva Advisors USA, Inc.
340 Madison Avenue, 19th Floor, New York,
New York 10173 USA

KEY CONTACTS

Dinesh Kanabar

Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Ritesh Kanodia

ritesh.kanodia@dhruvaadvisors.com

Niraj Bagri

niraj.bagri@dhruvaadvisors.com

Ranjeet Mahtani

ranjeet.mahtani@dhruvaadvisors.com

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