

**TAXABILITY OF SALARY, ALLOWANCES,
COMMISSION, BENEFITS, PERKS, UNDER
GST – BOTH NON-EXECUTIVE AND
EXECUTIVE DIRECTOR OF A COMPANY.**

By
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As we all know, 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:

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WORKING DIRECTORS

2: The working directors (supra) 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 at all. The 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 goods. Section 7 (which define supply) which is liable to GST. The Sub-section (2) of Section 7 of GST which is in the nature of overriding provision (overriding to

Section 7) clause clearly, inter-alia, says that activities specified in Schedule III shall not be treated as “supply”.

3: The press release by the 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 Ministry of Finance also clearly holds that service provided by the employee to employer are outside the purview of “Services”. Further, FAQ released by CBIC (Question no.23 after promulgation of GST) clearly holds that services by employee to employers shall be treated neither supply of services nor goods.

4: The CESTAT, Calcutta Bench, in the case of PCM Cement Concrete Pvt. Ltd. vs. CCE, Siliguri MANU/CK/0096/2017: 2018 (9) GSTL 391 (Tri-Kol) 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.

5: However, in pre-GST regime, as regards variable components of commission, the Department had raised demand of service tax under reverse charge mechanism on the said remuneration paid to the whole time directors, in terms of Notification no. 30/2012-ST : MANU/DSTX/0070/2012, dated 20.06.2012, as amended. It was the case of the Department that the said remuneration paid to the directors would constitute 'service' liable to service tax in the hands of assessee under reverse charge mechanism.

6: The Cestat Kolkatta Bench in the case of Maithan Alloys Ltd. vs. CCE and ST, Bolpur (02.11.2018 - CESTAT - Kolkata) : MANU/CK/0094/2018 has observed that where the whole time directors who are entitled to variable pay in the form of

commission are 'employees' and payments actually made to them are in the nature of salaries and the same shall not be subject to Service Tax.

7: The CBEC Circular No. 115/9/2009-ST : MANU/DSTX/0054/2009 dated 31.07.2009, could also be relied upon 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 – impliedly meaning that they are whole time employee of the company. As pointed out by me, earlier, any commission, benefits, or perks which are a part of CTC to the company, shall also not be liable to Service Tax/ GST.

8: However besides above, 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
- c: Renting of property to the company by a Director
In the capacity of lessor/owner

9: The Director has to raise a taxable Invoice for having provided the taxable services (such Consultancy, Commission) 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. However, in case the director has provided accommodation on rent, then Director, in his individual capacity, has to pay GST and company need not pay on reverse charge basis.

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

10; 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.

11: The Company shall have to pay GST, under Section 9(3) of GST Act at the rate of 18% on (i) Sitting Fees (ii) Commission (iii) guarantee commission on reverse charge mechanism. It is, however, clarified that 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 basis. As regards consideration for supply of goods, the company shall have to pay purchase consideration to the Director in terms of Section 15 of CGST Act – director being related party.

12: The Ministry of Corporate Affairs issued Circular No.24/2012 dt. 9.8.2012 vide which it was clarified that Non-Whole time Director are not covered under the exemption list and hence sitting fee and commission payable to them is liable to Service Tax.

Conclusion:

13: AAA Rajasthan has merely picked up the words from Central Tax Notification notifying rate of tax and holds that since notification talk of rate of tax hence salary paid to whole time director is taxable ignoring the elementary principle of taxation

that charging section determine taxability of subject and not notification notifying rate of tax. Further, ignoring and completely obvious of the fact that that there various types of Directors (i) Non Executive Director like nominee, independent and ordinary director and rest are employee directors like Managing Director, Whole-time Director and Executive Director (member of the Board) and any salary, commission, benefits, perks which are part of total CTC, shall not be liable to Service Tax. The AAA has fallen into grave error of law which only deserves to be rejected and by virtue of Section 123 of CGST Act, any ruling rendered by AAA is binding only to the applicant who sought ruling and not to others. It is a judgment in persona and judgment not in rem.