

Secondment of Employees - GST Perspective

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In this era of rapidly growing economies, the companies are increasingly outsourcing business support functions to their subsidiaries or to third party vendors. This concept is widely known as secondment of employees. Secondment of employees, as a concept, has evolved in the era of global commercial mobility.

It is nowadays a common practise (epically in group companies) to send their employees, having expertise in the respective field to help the subsidiaries set up or carry out activities efficiently. During such deputation or secondment, such employee works under the direction, supervision, and control of the deputed/seconded company and receives a salary and other benefits as per their policy. The 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.

Considering the growing of this concept in India, this article has been drawn up to conceptualize and try to find answer to queries pertaining to the taxation of such kind of arrangements.

Recently, the Tamil Nadu State Authority for Advance Ruling in the case of **M/s. Tamil Nadu Generation and Distribution Corporation Limited [TS-465-AAR-2020-NT]** ruled on the above question.

The Applicant is a subsidiary of Tamil Nadu Electricity Board Limited (TNEB Ltd), which is 100% owned by Government of Tamil Nadu. The employees of the applicant company transferred to the other subsidiary company (TANTRANSCO) and vice versa, their outstanding liabilities are treated as payable and receivables in the respective company accounts. The applicant has stated that the transaction are in the course of generation of electricity and thus exempt under Sl. No. 25 of Notification No 12/2017- Central Tax (Rate) dated 28th June 2017 with corresponding exemption for SGST.

The applicant has sought advance ruling to confirm that the above said activity is exempt under Sl. No. 25 of Notification No.12/2017- Central Tax (Rate).

It is stated that the services of employees in the Roll of the applicant, when utilized by TANTRANSCO, the salary, related allowance, and other advances payable to such staff are accounted in the books of the applicant on actual values. The applicant and TANTRANSCO are two different persons. When the applicant extends the services of their employees to TANTRANSCO, and collects the considerations payable to such employees from TANTRANSCO, the said activity is a 'Supply of Service' and GST is applicable to this supply of service.

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. Several rulings from time to time has come up to throw light on this issue.

Under GST, the term Supply has wide scope it includes all forms of supply if made with consideration for furtherance of business. Such kind of arrangement wherein the company seconded his employee to other company and receives reimbursement in return could be litigated by the Authorities. Since there is flow of consideration and thus qualify to falls under the definition of supply.

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 and there is contractual agreement between both the companies.

This kind of arrangement of secondment of employees can also be constitute as "Joint Employment" since

there is no embargo in law to restrict an employee to act in more than one company. In case of a clear contractual position, it can be said that the reimbursement of salary by the seconded company to the other company does not amount to supply but such amount is towards the employer-employee relationship and thus should cover under Schedule-III of CGST Act,2017.

However, the nature of extent of control which is requisite to establish the relationships between employer and employee must necessarily vary from business to business and is by its very nature incapable of precise definition. Hence, the correct method is to give emphasis on contractual agreement executed between both the companies.

Several rulings under Income tax has also come up which states that all the legalities related to Income tax like deduction of TDS on Salary etc has to be done by the seconded company, since salary is being disbursed by them, and thus establish a employer- employee relationship between the seconded employee and seconded company.

The similar principles are also laid in case of **Volkswagen India (Pvt.) Ltd. Versus Commissioner of C. Ex., Pune-I [TS-187-Tribunal-2013-ST]** held that the foreign employees were seconded on Indian entity payroll and part of the salary was paid by the Indian Entity in India and part of the salary was paid by the foreign holding entity in the overseas bank account of the employee. The said payment of salary in the overseas bank account of the seconded employee was subsequently reimbursed from the Indian entity. The contention was that the reimbursement made by the Indian entity to a foreign entity was liable to Service tax. However, the learned judges held there is no supply of manpower services rendered to the appellant by the foreign group company. The method of disbursement of salary cannot determine the nature of the transaction. Thus the said reimbursements were non-taxable under service tax.

Similarly, In another case of **Franco Indian Pharmaceutical (P) Ltd. V. Comm. of ST [TS-185-CESTAT-2016-ST]**, 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.

In order to qualify as a supply, there must be reciprocity and the person providing the consideration is expected to receive something in return.

The true nature of rendering of services by an individual to another person shall determine his relationship with that person. If the person is under the control and supervision of such person and the contract is that of service and not for service, the relation per se shall be that of employer and employee and any remuneration paid to or for such services shall not be eligible to GST.

Additionally there has been an important ruling by supreme court of India in case of **Nissin Brake India Pvt. Ltd. [TS-230-SC-2019-ST]**, regarding the taxability of secondment of employees under the service tax regime. Important points of the case has been discussed below.

The assessee had entered into an agreement with its overseas parent company in Japan for payment of salary and other perquisites for employees deputed from such parent company. The employees deputed by the parent company operated under the control, direction and supervision of the assessee. Further, the assessee withheld tax on the salary paid to such employees as per the requirements of the Income-tax Act, 1961. The salary payment to such employees was disbursed by the overseas parent company. Subsequently, the salary cost was reimbursed to the parent company by the assessee.

The Revenue sought to tax such reimbursement of salary as manpower supply services and demanded service tax under the reverse charge mechanism.

The Tribunal ruled in favour of the assessee, after which the Revenue had filed an appeal with the Supreme Court. Apex court dismissed the appeal filed by the Revenue and upheld the Tribunal's ruling. While determining the nature of service, it made the following key observations:

1. The deputed person works under the control, direction and supervision of the assessee, and the compliance to withhold tax was also undertaken as an employer by the assessee.
2. The assessee did not pay any direct or indirect compensation to its parent company for the deployment of employees, apart from the reimbursement of salary at cost.

III. The terms of the agreement makes it clear that the relationship between the assessee and the deputed employee is that of employer-employee.

1. Method of salary disbursement [through a group company] will not result in provision of service.

Any ruling by Supreme Court is law of the land and it sufficient law in itself, even though taxpayers are expected to face to departmental heat in the GST era.

The concept of recourse arrangement of employee by the companies has gaining popularity these days due to globalization. Thus this arrangement is always under the lens of the tax authorities as the inherent relationship always casts a doubt on its valuation. Thus it is imperative on the Government part to come up with more concrete views to give reasonable clarifications on such arrangements and transactions in the GST regime.