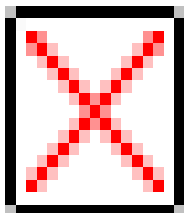


JANUARY 22, 2021

By Dr G Gokul Kishore



VALUATION

is slowly becoming a major area of dispute under GST. In the pre-GST regime, the only rival it had was tax credit which came to occupy the top position in litigation. In several articles in this series, the need for amending valuation provisions has been highlighted. Reforms benefit the taxpayers and a call for such reforms can be made any number of times till it is heard. With such optimism, this 96th part seeks to draw the attention of the top echelons of CBIC and GST Council to the crying need to amend valuation provisions.

Excluding salary under Section 15

Section 15 of CGST Act does not expressly exclude, from taxable value, salary and wages paid to employees. By virtue of Schedule-III whereby services supplied by employee to his employer during the course of or in relation to employment, such salary and wages are not liable to GST. However, when employment agencies or welfare boards source manpower, the issue becomes complicated. Such bodies act as pass-through insofar as salary is concerned by receiving amount from the companies where such manpower is engaged and disbursing the same as salary to such manpower. Typically for house-keeping, security and several jobs in factories, the agencies/bodies source manpower and they are liable to pay salary and other benefits as per the agreement/contract. Barring commercial bodies, many welfare-oriented organisations undertaking such activities collect nominal amount over and above the salary amount from the employers to meet administrative expenses. Due to inability to fulfill conditions like receipt of actual amount only, the benefit of pure agent as per Rule 33 of CGST Rules is not available to such organisations.

Though the issue has been brought to light again in the advance ruling in the case of Gujarat Industrial Force Society - [2021-TIOL-02-AAR-GST](#)

, this issue has been an irritant since service tax days. The business model is widely prevalent, CBIC is aware of the same and yet, no action has been taken on this issue. The taxpayers have been left to fight their own battle before Authority for Advance Rulings (AAR) now and later before the appellate authorities / tribunal. When artificial intelligence is being put to use for nabbing ITC fraudsters, the tax administration can easily bring out data on how sparsely the industry has been able to use the pure agent concept. If such provision has not helped the industry, then the solution lies in amendment to Section 15. Salary and wages when paid by such organisations acting as pass-through should be excluded from taxable value leaving only the administrative or other similar charges to tax. No benefit under tax law comes without strings attached and, therefore, CGST Rules may also prescribe conditions for such exclusion but they should be practical and realistic.

Electricity charges - Are they part of taxable value?

Even the best tax attorney or consultant cannot readily answer the question as to whether electricity charges collected by landowner from his tenant are to be included in taxable value or not. Confusion is caused by the fact that such charges are reimbursed on actuals based on sub-meter reading, they are in the nature of statutory dues and the bills are not issued by the service provider to the tenant but to the landlord. With lot of caveat, an advance ruling has been issued holding that such electricity charges are not part of taxable value when the tenant is GST Commissionerate. The caveat is that the ruling emphasizes it is applicable to the facts before it only. This means there is no universal principle that such charges are not part of taxable value [Gujarat Narmada Valley Fertilizers & Chemicals Ltd. - [2021-TIOL-56-AAR-GST](#)].

The primary reason for explosion of such issue is the frugal list of exclusions in Section 15. As noted above, such issues are not new and it is not unreasonable to presume that the tax administration has sufficient knowledge about the same. Despite such knowledge, these issues are

neither statutorily addressed nor pro-actively clarified but the taxpayers are issued with demand notices based on audit objections or otherwise. Section 15 is overtly pro-revenue as the exclusion on taxes is applicable only to GST levies and not any other tax. If GST is sought to be levied on another tax levy, the claim of it being truly value added, remains a mere claim. Section 15 needs to be re-visited and all taxes, statutory charges and levies of similar nature and essential utility charges are to be provided with express exclusion.

Supplies between distinct persons

Rule 28 of CGST Rules provides for methods to determine taxable value when one unit of the company supplies goods to another unit in a different State. Such inter-State supplies between distinct persons are governed by open market value. If such value is not available, then comparable value is to be taken. If both the above methods are not adoptable, then cost plus method is to be used. Open market value (OMV) is separately defined but the second proviso deems the value declared in the invoice as such OMV if the recipient is eligible for full input tax credit. While interpretation of this proviso is divergent, it is clear that if there is no issue with ITC at recipient's end, then any value can be declared in the invoice by the supplier in this type of transaction.

A common query from the taxpayers is whether zero value or Re. 1 can be shown in such invoices. Those who are conservative, cautioned against such exercise while the bold started adopting nominal value. The applicant before the AAR appeared to belong to the former category and, therefore, was paying tax on much higher value on such stock-transfers but piled up huge ITC at the receiving locations. Compelled by such swelling of ITC, advance ruling was sought and the AAR tacitly approved adoption of reduced value [Thirumalai Chemicals - [2021-TIOL-53-AAR-GST](#)].

There is no guarantee that AAR in other States will share the above view. There cannot be any illusion that the department will accept such value. The intention behind use of the words "**full ITC**"

is yet to be revealed. No industry would benefit from sitting on idle ITC which will take years to get liquidated when there is large credit balance due to expansion. CBIC should come out with a circular clarifying its understanding of Rule 28 besides issuing instructions to its officers that even nominal value is acceptable when supplies are between distinct persons and if such clarification is perceived as not sufficient, an amendment should be considered.

[The author is an Advocate, Gokul & Subha Advocates, Chennai. Views expressed are personal.]

See [Part 95](#)

(DISCLAIMER : The views expressed are strictly of the author and Taxindiaonline.com doesn't necessarily subscribe to the same. Taxindiaonline.com Pvt. Ltd. is not responsible or liable for any loss or damage caused to anyone due to any interpretation, error, omission in the articles being hosted on the site)