GST is applicable on payment of notice pay recovery, medical insurance policy and telephone charges from an employees

The AAR, Madhya Pradesh in the matter of ***M/S. Bharat Oman Refineries Limited [Advance Ruling Order No. 02/2021 dated June 7, 2021]*** held that, GST is applicable on payment of notice pay by an employee to employer in lieu of notice period and telephone charges, Group Medical Insurance Policy (**"the Policy"**) recovered from employees and free of cost canteen facility provided to employees. Further, Input Tax Credit (**"ITC"**) is not available with respect to canteen services provided by the employer to their employees.

Facts:

M/s Bharat Oman Refineries Limited (**"the Applicant"** or **"the Employer"**) is a Company carrying on the business of refining of crude oil. The Applicant has sought this Ruling w.r.t. the liability to pay tax on any goods or services or both and admissibility of ITC of tax paid or deemed to have been paid.

Issue:

Whether the Applicant is liable to pay GST on amount recovered in lieu of notice pay by an employee, the Policy at actuals from non-dependent parents of employees, telephone charges, and free of cost canteen facility to the employees at the refinery, and whether the ITC of tax paid or deemed to have been paid is admissible on such facility provided?

Held:

The AAR, Madhya Pradesh in ***Advance Ruling Order No. 02/2021 dated June 7, 2021*** held as under:

- Noted that, except due to exclusion by Para 1 of Schedule III of the CGST Act the services by an employee to an Employer are covered in supply, otherwise there should have been no need for such exclusion. Further, Schedules are part of the CGST Act that contain specific provisions/exclusions, and therefore, they prevail over other general provisions of the CGST Act. Therefore, there can be other activities also which can be covered in supply even if they may not be a supply as per provisions of Section 7 of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**).
- Observed that, the Applicant as Employer is tolerating the act or situation whereby the employee is not giving the notice for the agreed period of 30 days before leaving the service of the applicant-company. Thus, by relieving an employee without notice period or by accepting a shorter notice period, the Applicant is tolerating an act or a situation created by such action of the employee, and therefore, it is covered by Para 5(e) of Schedule II of the CGST Act, and is a supply of service liable to GST.

- W.r.t premium on Policy recovered from the non-dependent parents of employees & retired employees at actuals- Stated that as per clause (a) of Section 2(17) business includes any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not there is volume, frequency, continuity or regularity of such transaction. As per Section 2(17) any activity or transaction in connection with or incidental or ancillary to any activity or transaction referred in clause (a) of Section 2(17) are also covered in business.
- Held that, the telephone charges recovered by Applicant from its employees and canteen services provided to the employees are covered in the definition of 'business' given in Section 2(17) of the CGST Act, as an activity or transaction in connection with or incidental or ancillary to the business of the Applicant. Moreover, it is a supply as per inclusive definition of 'supply' given under Section 7 of the CGST Act. Accordingly, the Applicant is liable to pay GST on the amount recovered from its employees towards telephone charges at actuals and the canteen services provided to the employees are to be treated as supply, even if there is no consideration.
- Further held that, the Applicant is not be eligible to claim ITC in respect of canteen services.

Our Comments:

Notice pay:

In our view, the levy of GST on notice pay recovery depends upon the "test of supply" i.e., one has to satisfy that notice pay in itself is a supply, then only GST could be levied on it. After the insertion of sub-clause (1A) in Section 7 of the CGST Act and omission of sub-section (d) of Section 7(1) of the CGST Act (vide Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. July 1, 2017).

The Schedule II of the CGST Act is confined to define as to what constitute supply of goods or supply of services and does not defines supply per se. Schedule II of the CGST Act has to be read along with Section 7 of the CGST Act, which means if an activity does not constitute a "supply" in itself as per Section 7(1) of the CGST Act, mere coverage of the same under the entry Schedule II ibid cannot make it liable to GST.

Further, there is no positive act of supply of services by employer to employee for quitting the organization. It is merely recovery of compensation from the employee on account of their failure to fulfil the terms of contract/appointment letter and tantamount to liquidated damage.

Furthermore, there is no agreement between employer and employee to cause loss or damage by quitting early for a consideration. The expression 'to tolerate an act' relates to situations where a person commissions another person to do or commit a particular act for a

consideration. The payment of damages is a condition of contract and not a consideration for any service in the nature of forbearance or tolerating an act.

In the Service Tax regime, the Hon'ble Madras High Court in ***Ge T & D India Limited v. Deputy Commissioner of Central Excise [W.P. No. 26292 of 2018 dated December 13, 2019]*** in a similar case has held that, no service tax is payable on notice pay.

GST on free of cost canteen services:

W.r.t supply of canteen services, the AAR, Kerala in the similar matter of ***M/s. Caltech Polymers Pvt. Ltd. [Order No. CT/531/18-C3, dated March 26, 2018]***, held that, supply of food by the employer to its employees, even though there is no profit involved, but only the cost of food is recovered, the activity of supplying food and charging price for the same from the employees would come within the definition of "supply" as provided in Section 7(1)(a) of the CGST Act. Consequently, the employer would come under the definition of "supplier" as provided in Section 2(105) of the CGST Act. Moreover, since the employer recovers the cost of food items from their employees, there is "consideration" as defined in sec 2(31) of the CGST Act and the transaction is incidental or ancillary to the core business (even though there is no profit involved) therefore, falls under sec 2(17)(b) of the CGST Act i.e. definition of business.

The above order has been affirmed by the AAAR, Kerala in ***M/s. Caltech Polymers Pvt. Ltd. [Order No. CT/7726/2018-C3, dated September 25, 2018]***.

Moreover, the above transaction even if made without consideration will be covered under Entry No. 2 of Schedule-I to the CGST Act, which states that supply of goods or services or both between **related persons** or between distinct persons, when made in the course or furtherance of business, is to be treated as supply even if made without consideration. Since the employee and employer are related persons according to the explanation to Section 15(5) of the CGST Act the transaction would amount to deemed supply and therefore, it would be taxable as per Section 15 read with Rule 28 of the Central Goods and Services Tax Rules, 2017.

ITC on canteen services:

W.r.t. ITC on canteen services, post amendment vide *Central Goods and Services Tax (Amendment) Act, 2018 w.e.f. February 2, 2019*, a proviso got inserted to Section 17(5)(b) of the CGST Act which allows ITC in respect of such goods or services or both where it is obligatory for an employer to provide the same to its employees under any law for the time being in force.

However, AAR, Gujarat held that sec 17(5)(b)(i) sub-clause ending with a colon and followed by a proviso which ends with a semi colon is to be read as independent sub-clause, independent of sec 17(5)(b)(iii) and its proviso [of sub-clause (iii)]. Thereby, the proviso to sec 17(5)(b)(iii) is not connected to the sub-clause of sec 17(5)(b)(i) and cannot be read into

it. Hence, input tax credit on GST paid on canteen facility is blocked credit under sec 17(5)(b)(i) of CGST Act and inadmissible to applicant- AAR, Gujarat in ***Re: Tata Motors Ltd. [Ruling no. GUJ/GAAR/R/39/2021 dated 30.07.2021]***

Premium on Policy:

AAR, Maharashtra in ***Re: Jotun India Pvt. Ltd. [2019 (29) G.S.T.L. 778 (A.A.R. - GST)]*** held that the assessee not in business of providing insurance coverage. To provide parental insurance cover not a mandatory requirement under any law for the time being in force and therefore, non-providing parental health insurance coverage would not affect its business by any means. Activity of recovery of 50% of cost of insurance premium cannot be treated as activity done in course of business or for furtherance of business. No service of health insurance to their employees by assessee.

Similar stand was taken by AAR, UP in ***Re: Ion Trading India Private Limited [2020 (32) G.S.T.L. 608 (A.A.R. - GST - U.P.)]***

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