Treading the GST Path XLVI

FAQ on Employee Canteens

(G. Natarajan, Advocate, Swamy Associates)

The decision of the Authority for Advance Ruling (AAR), Kerala in the case of Caltech Polymer[1] to the effect that GST is payable on the amounts recovered from the employees for the canteen facility provided by the employer has led to lot of confusions. In this connection, the following suggestions are offered.

In the author's considered view the subsidised food provided by the employer to the employee is part of the perquisites extended to the employee, for the services provided by the employees to the employer, which is not treated as a supply, as per S.No. 1 of Schedule III of the CGST Act, 2017 and the same cannot be treated as any separate supply of any service by the employer to the employees and hence such recoveries will not attract the levy of GST. This view also finds support from one of the Press Notes issued by the Government. But, in view of the decision of the AAR referred to above, any non payment of GST in this regard would invite litigations and many assesses may prefer not to litigate the issue, but pay GST. In this connection, the following issues require clarification.

Q 1. : At what rate GST is payable by the contractor appointed by the employer for supply of food, either cooked in the factory itself or cooked outside and brought from outside.

Ans. : In both the cases, the rate of 5 %[2] would apply, if no ITC is availed by the contractor, though in the case of Merit Hospitality Services Pvt. Ltd.[3] the AAR has held that in case of cooking outside, the transaction is in the nature of outdoor catering and 18 % GST would apply. But, in our view in the absence of any definition for the term "outdoor catering" as per the commercial meaning of the term and as per the scheme of classification of services under GST, continuous supply of food by a contractor, in a factory canteen cannot be considered as outdoor catering. This view is further strengthened by Notification 13/2018 Central Taxes (Rate) Dt. 26.07.2018 which has cleared any doubts in this regard.

Q 2. : If it is decided to pay GST on the employee recoveries towards canteen, what is the value on which GST is payable? It may be noted that recovery of only nominal amount is made from the employees, which is even less than the cost of purchase of such food.

Ans. : In this connection, we may note that even in the Advance Ruling decision, the reasoning for holding that GST is payable is only because certain amount is charged and the AAR decision is silent as to valuation.

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[1] 2018-TIOL-1-AAR-GST

[2] S.No. 7 (i) of Notification 11/2017 CT (Rate) 28.06.2017, as amended by Notification 46/2017 CT (Rate) Dt. 14.11.2017

[3] 2018-TIOL-98-AAR-GST

It may be observed that as per Section 15 of the CGST Act, employers and employees are treated as related persons. If the parties are related, the transaction value, i.e. the price charged would not be considered as value for the purposes of GST and the value has to be determined as per the relevant rules of the CGST Rules, 2017.

> ***RULE 28. Value of supply of goods or services or both between distinct or related persons, other than through an agent.*** *— The value of the supply of goods or services or both between distinct persons as specified in sub-section (4) and (5) of section 25 or where the supplier and recipient are related, other than where the supply is made through an agent, shall -*
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> *(a) be the open market value of such supply;*
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> *(b) if the open market value is not available, be the value of supply of goods or services of like kind and quality;*
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> *(c) if the value is not determinable under clause (a) or (b), be the value as determined by the application of rule 30 or rule 31, in that order :*
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> ***Provided*** *that where the goods are intended for further supply as such by the recipient, the value shall, at the option of the supplier, be an amount equivalent to ninety percent of the price charged for the supply of goods of like kind and quality by the recipient to his customer not being a related person :*
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> ***Provided*** *further that where the recipient is eligible for full input tax credit, the value declared in the invoice shall be deemed to be the open market value of the goods or services.*
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> ***Explanation.*** *— For the purposes of the provisions of this Chapter, the expressions -*
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> *(a) "open market value" of a supply of goods or services or both means the full value in money, excluding the Integrated tax, Central tax, State tax, Union territory tax and the cess payable by a person in a transaction, where the supplier and the recipient of the supply are not related and the price is the sole consideration, to obtain such supply at the same time when the supply being valued is made;*
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> *(b) "supply of goods or services or both of like kind and quality" means any other supply of goods or services or both made under similar circumstances that, in respect of the characteristics, quality, quantity, functional components, materials, and the reputation of the goods or services or both first mentioned, is the same as, or closely or substantially resembles, that supply of goods or services or both*

Situation 1. It may be noted that as per clause (a) of Rule 28, "open market value (OMV)" shall be considered as the value, which means the price payable by a recipient, if the supply has to be procured from a non related party. As the nature, quality, and other parameters of the food supplied in any other source cannot be compared, it is very difficult to get any OMV for the supply, Then recourse has to be made to clause (b) of Rule 28, which refer to *value of supply of goods or services of like kind and quality.* So, if the employer is also offering the food in his canteen to any unrelated persons (contract workers, visitors, etc.) such price can be considered for the purpose of payment of GST for the employees also.

Situation 2. If the employer is not offering food to any such unrelated persons from the canteen, then both clauses (a) and (b) of Rule 28 are not applicable and hence recourse has to be made to clause (c), according to which the price of goods or services shall be determined by applying Rule 30 or 31 in that order.

> ***RULE 30. Value of supply of goods or services or both based on cost.*** *— Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*

Situation 3. It may be noted from the definition of the term "value of supply of goods or services of a like kind and quality" does not exclude such values in a related party transaction, unlike the definition of "open market value". Hence, it can be argued that the price charged to one employee for supply of food, can be adopted as the "value of goods or services of a like kind and quality" and therefore, GST is payable only on the actual price charged to each employee. Though this view seems to be in line with the definition of the phrase "value of goods or services of a like and quality", it may lead to disputes with the department and hence not advised.

To summarise the above,

Option I. Do not pay any GST on canteen recoveries from employees and demands if any can be contested.

Option II. GST @ 5 % may be paid, by adopting the sale price of food to other non related parties, for supply to employees also. No ITC can be claimed.

Option III. GST @ 5 % may be paid on 110 % of purchase price of food. No ITC can be claimed.

Q 3. : If the purchase price plus 10 % is adopted, will it not be questioned that the purchase price does not represent the true cost as many facilities like, space, water, electricity, gas, utensils would have been provided by the employer to the canteen contractor and hence might have influenced the price charged by the contractor?

Ans. : Rule 30 is reproduced below.

> ***RULE 30. Value of supply of goods or services or both based on cost.*** *— Where the value of a supply of goods or services or both is not determinable by any of the preceding rules of this Chapter, the value shall be one hundred and ten percent of the cost of production or manufacture or the cost of acquisition of such goods or the cost of provision of such services.*

It may be observed from the above, what is relevant is only the cost of acquisition (and not the intrinsic cost of the goods or services in question), in this case. Hence, 110 % of the purchase price can be adopted.

Q 4. : Employers and employees are treated as related persons. As per S.No.2 of Schedule I of the CGST Act, supply of goods or services or both between related persons, even without consideration is treated as a supply. So, even in cases where no recovery towards canteen / food is made by the employer from the employees also, whether any GST is payable?

Ans. : Though such a view can be entertained, we are of the view that in as much as the said supply of free food is only a perquisite for the employees, as part of the employment contract, it cannot be said that there is any supply of goods or service or both by the employer to employee in such cases. Hence, in our considered view no GST is payable in case of free supply of food to the employees. Hence, irrespective of whether any amount is recovered from the employees towards food or not, no GST is payable. But considering the AAR decision and probable litigation, assessees may choose to pay GST where any amounts are recovered from the employees, under any one of the options mentioned above.

Q 5. : If the employer is also supplying food to the contract labourers, at a rate higher than the rate charged from regular employees, but still at a price lower than the cost, what value has to be adopted for the purpose of payment of GST, in respect of food items sold to such contract labourers.

Ans. : The contract labourers are not employees of the employer and hence they are not related persons. Hence, whatever be the price charged to such contract labourers, GST is payable only on such price charged.

Q 6. : At what rate GST is payable for the food supplied to employees, contract labourers and visitors?

Ans. : As per S.No. 7 (i) of Notification 11/2017 as amended by Notification 46/2017 Dt. 14.11.2017, GST is payable @ 5 %. No ITC can be claimed. Further, since the 5 % rate is prescribed as without ITC, then ITC availed on common input services shall be liable for proportionate reversal as per Rule 42 of the CGST Rules, 2017, by considering the supply of food as an exempt supply (as the 5 % rate is subject to non availment of ITC). In this connection, Explanation (iv) under the Notification 11/2017 may be referred to, which his reproduced below.

> *(iv) Wherever a rate has been prescribed in this notification subject to the condition that credit of input tax charged on goods or services used in supplying the service has not been taken, it shall mean that,-*
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> *(a) credit of input tax charged on goods or services used exclusively in supplying such service has not been taken; and*
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> *(b) credit of input tax charged on goods or services used partly for supplying such service and partly for effecting other supplies eligible for input tax credits, is reversed as if supply of such service is an exempt supply and attracts provisions of sub-section (2) of section 17 of the Central Goods and Services Tax Act, 2017 and the rules made thereunder.*

Q7. : Is there an option to pay 18 % GST, after availing ITC of the GST charged by the Contractor?

Ans. : No. As per the Explanation under S.No. 7(ix) of Notification 11/2017, as amended by notification 46/2017, the same is not permissible.

> *Explanation. - For the removal of doubt, it is hereby clarified that, supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or drink, where such supply or service is for cash, deferred payment or other valuable consideration, provided by a restaurant, eating joint including mess, canteen, whether for consumption on or away from the premises where such food or any other article for human consumption or drink is supplied, other than those located in the premises of hotels, inns, guest houses,*

clubs, campsites or other commercial places meant for residential or lodging purposes having declared tariff of any unit of accommodation of seven thousand five hundred rupees and above per unit per day or equivalent shall attract central tax @ 2.5% without any input tax credit under item (i) above and shall not be levied at the rate as specified under this entry.

Q 8. : What is the binding nature of AAR decisions? Can it be argued against the decision of AAR?

Ans. : As per Section 103 of the CGST Act, 2017, the Advance Ruling is binding only on the applicant who sought such advance ruling and the jurisdictional officer having jurisdiction over such applicant. Hence, other assesses are not precluded from arguing against the decision of the AAR.

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