

GST UPDATE



GST on Corporate Social Responsibility- A Dilemma

Pandemic of COVID-19 has forced all of us to live in a phase that was neither wished, nor imagined by anyone. Several lifesaving steps be, it nation-wide lockdown, shutting business operations, sealing of the national and international borders or working from home, are being taken by the authorities to keep its effect to a minimum.

And considering the impact that covid-19 could have on the humanity, organizations are indulging into social activities including the distribution drives of essential commodities to the needy including sanitizers and masks. The contribution made by the companies to combat the pandemic would count as CSR expenditure under the Companies Act.

To analyze the **implication of GST on above CSR expenditure**, we need to understand the applicability of provisions of this law on both the parts of the transactions i.e. **Procurement of Facility/ Asset** (Inward Supply) and **Spending the Facility/ Asset** (Outward Supply).

Availability of ITC on procurement of Facility/Asset- First Leg of transaction!

As per sec 16(1) of CGST Act 2017, every registered person will be allowed to avail ITC in respect of the inward supplies that are being used or intended to be used in the course or **furtherance of business**. However as per sec 17(5), ITC will not be allowed on goods or services used for personal consumption or goods disposed of by way of gift or free samples.

So in light of above provisions, it needs to be checked whether CSR expense can be considered in course or furtherance of 'business' or not?

While the term business is defined under CGST Act, the phrase "in course or furtherance of business" is not defined in the law. Dictionary meaning of the term "furtherance" implies advancement, promotion of scheme, etc. Therefore, furtherance of business would imply advancement of business, promotion of business. Any activity carried on with a purpose to achieve business objectives, business principles, **business continuity and stability** would per se amount to an activity in course or furtherance of business.

Further, as per "Section 2 (17) "business" includes –

- any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;
- any activity or transaction in connection with or incidental or ancillary to sub-clause
- ;....."

Since, **CSR activities are mandated under the law and non-compliance of which could have repercussion on the business**, these expenses could be regarded as the expenditure in the course or furtherance of business.

On coming to the **judicial frontier**, many rulings and judgements have been given both in favor and against the interest of taxpayers, prominent of those being recited as under.

In a recent case *Law Essel Propack Ltd. v. Commissioner of CGST, Bhiwandi (CESTAT Mumbai) [2018-VIL-621-CESTAT-MUM-ST]*, the Mumbai CESTAT **has allowed the Cenvat Credit** in respect of expenditure on CSR and it can be availed by the Company which discharges CSR obligations.

However, the Authority for Advance Rulings, Kerala, in the matter of *M/s. Polycab wires private limited [2019 (24) G. S. T. L. 103 (A. A. R. – GST)]*, where the applicant distributed electrical items like, switches, fan, cables etc. to flood affected people under CSR expenses on free basis without collecting any money, has ruled that **no ITC would be available** for these transactions as per section 17(5)(h) of the KGST and CGST Act, 2017 according to which ITC is not allowed on goods lost, stolen, destroyed, written off or disposed of by way of gift or free samples.

So, in order to understand perspective of above AAR, we first need to understand whether CSR activity would qualify as gift or not. The term gift is not defined under CGST Act. The **Gift-Tax Act (18 of 1958)** had defined the word gift to mean transfer by one person to another of any existing movable or immovable property **voluntarily** and without consideration in money or money's worth. Since CSR activity is mandated by Section 135 of the Companies Act, 2013 for some classes of companies and not voluntary, therefore CSR activity should not be regarded as gift and as a result of it, ITC should be available.

Taxability of spending the procured Facility/ Asset- Second leg of transaction!

As per section 7 of CGST Act 2017, supply includes all forms of supply of goods or services or both such as sale, transfer, barter, exchange, license, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business.

So, in order to qualify a transaction as a supply, it must satisfy following conditions:-

- The supplied item should be either a good or service,
- It should be in the course or furtherance of business,
- Consideration must be received against the item supplied &
- The said supply should be taxable under GST.

However as per Schedule I, certain transactions, even if made without consideration, would qualify as supply.

CSR activity undertaken by an organization would qualify as a supply and therefore would attract GST as it satisfies all the above consideration in the following manner:-

- If an entity is supplying any goods (like inspection kits, food, apparels etc.) or rendering any service (sanitization in society) for CSR purpose, the item supplied meets the definition of goods or services.
- Since Expenses incurred towards corporate social responsibility is within the moral duties of any organization to pay back the society and such activity is mandated for certain categories of corporates under Section 135 of the Indian Companies Act, 2013, it will be held as done in the course or furtherance of business.
- However consideration has been defined under CGST Act, but to put the above interpretation in simpler terms, a consideration is not just increase in assets but also decrease in liability, and in this scenario the decrease in liability vis a vis CSR mandate is the consideration incidental to the goods/ services supplied under this arrangement.
- The goods supplied or services rendered should be taxable under GST.

Alternatively in lieu of (iii) above, one may also argue that since CSR activity is undertaken without consideration and it amount to transfer or disposal of business assets, it will fall under entry 1 of Schedule I and will still qualify as supply.

Therefore, we can conclude that any activity undertaken by an organization under 'Corporate social responsibility', being a statutory obligation is in the course or furtherance of business and one can bust a gut to avail the input tax credit on the same (*also clarified by Circular No. 92/11/2019 dated 7th March 2019 that whenever activity of distribution of gifts or free samples falls within the scope of "supply" on account of the provisions contained in Schedule I of the said Act, the supplier would be eligible to avail of the ITC*), though the issue still remains disputable. However, there would be no escape from the levy of tax on the transaction, if the asset is permanently transferred, as discussed above.

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