

Taxability of ESOPs and Reimbursement thereof

[Circular No. 213/1/2024-GST dated 26.06.2024]

I. Issue Involved

Few Indian companies provide the option to their employees for allotment of shares of their foreign holding company as per terms of employment contract. In such cases, on exercising the option by the employees of Indian subsidiary, the shares of foreign holding company are allotted directly by the holding company to the concerned employees of Indian subsidiary company, and the cost of such shares is generally reimbursed by the subsidiary company to the holding company. This circular answers following twin questions:

- a. Whether the act of giving shares by the foreign holding company to the employee of the Indian subsidiary would be taxable under GST?
- b. Whether the act of reimbursing the value of shares by the Indian subsidiary to the Foreign holding company would be taxable under GST?

II. Transactional understanding of the issue involved

A transaction involving transfer of ESOP/ESPP/RSU to the employees of domestic subsidiary by the foreign holding company appears to involve the following steps:

- a. The domestic subsidiary company gives option of ESOP/ESPP/RSU to its employees as part of compensation package as per terms of employment.
- b. The employees exercise their stock options, either by purchasing shares at the grant price or by holding the options until they vest.
- c. The foreign holding company of the domestic subsidiary company issues ESOP/ESPP/RSU, which are shares listed on the foreign stock exchange, to the employees of the domestic subsidiary company.



- d. The foreign holding company transfers the shares directly to the employees of the subsidiary company.
- e. The domestic subsidiary company generally reimburses the cost of such shares to the foreign holding company on cost-to cost basis either through an actual remittance or through an equity transfer as prescribed by the relevant Indian Accounting Standard.
- f. The employees hold the shares and may sell them at a later date, if they so choose.

III. Circular clarifies as under:

1. Under the GST law, shares and securities are treated as neither goods nor services, hence transactions involving transfer of shares would be outside the purview of GST. Accordingly, the circular clarifies that the act of giving shares by the holding company to the employees of its Indian subsidiary would not be taxable under GST.
2. Further, companies offer ESOP/ESPP/RSU to their employees to motivate them to perform better, and to retain the employees, by aligning the interest of employees with that of company. The ESOP/ESPP/RSU is a part of remuneration of the employee by the employer as per terms of employment. As per Schedule III - Entry 1 of the CGST Act, the services by an employee to the employer in the course of or in relation to his employment are treated neither as supply of goods nor as supply of services. Therefore, on this count as well, GST is not leviable on the compensation paid to the employee by the employer as per the terms of employment contract which involve transfer of shares.
3. Reimbursement of such shares is generally done by subsidiary company to foreign holding company on cost-to-cost basis (equal to the market value of shares) without any element of additional fee. Since the said reimbursement by the subsidiary company to the foreign holding company is for transfer of shares, which is neither in nature of goods nor services, the same cannot be treated as an import of service and therefore cannot be taxed in GST.
4. However, if the foreign company does choose to charge a mark up fee over and above the cost of the shares so transferred, that fee would be taxed as import of service in the hands of the Indian Subsidiary.



IV. Will the legal principle enshrined in this circular be applicable to other such domestic transactions

Three principles are explained in this circular,

- a. Transaction involving transfer of shares or securities is outside the purview of GST
- b. Anything done either by the employee for the employer or by the employer for the employee would not be taxable if the same is done as per the contract of employment.
- c. Reimbursement of cost on actual basis would not be taxable.

These principles would, in our view, be applicable for domestic transactions of similar nature as well. For example, ESOPs given by Indian holding companies to the employees of its Indian subsidiary, or shares allotted to employees by a company during its IPO. This circular will also be helpful for transactions involving reimbursement of cost of IPO by the shareholders to their companies. This circular will also be applicable for notice pay recoveries being made, all litigants can take refuge of this circular.

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