

Time of Supply in case of HAM Projects

[Circular No. 221/1/2024-GST dated 26.06.2024]

I. Brief History of the issues involved

Governments started implementing Highway projects under the Hybrid Annuity Model (HAM) whereby certain percentile of the consideration was paid to the concessionaire during the construction period and rest is paid as Annuity in periodic installments over the period of the concession. DGGI Ahmedabad started inquiries first with a few companies implementing such projects. When these investigations started, it was believed by all including DGGI that Concessionaires were required to pay GST on the consideration paid during the construction period whereas Annuity payments were exempt under entry 23A of notification 12/2017-CTR.

Based on this understanding, DGGI sought reversal of ITC from the concessionaires Construction Period consideration was taxable and Annuity period consideration was considered as exempt.

Vide circular 150/06/2021-GST dated 17.06.2021, it was clarified that Annuity period consideration was taxable. DGGI changed track and sought payment of tax on the annuity period consideration on the COD (Commercial Operations Date) on the grounds that the physical construction of the road project was completed on that date and therefore and Time of Supply for payment of tax has been achieved. DGGI issued Show Cause Notices to almost all concessionaires across India putting the entire industry under a dark cloud of litigation.

We had explained entire genesis of the case made out by DGGI against the companies implementing HAM projects in our alerts 07/2020-21 dated 16.10.2020, wherein issues relating ITC reversal were discussed.

<https://njain.com/wp-content/uploads/2023/05/GST-Alert-7-ITC-Reversal-in-Hybrid-Annuity-Road-Project.pdf>



In our next alert on this issue (02/2021-22 dated 18.06.2021) we specifically discussed the time of supply related issues, same is placed at this link.

<https://njain.com/wp-content/uploads/2023/05/GST-Alert-02-Taxability-of-Annuity-in-HAM-Projects.pdf>

Article on this issue was also published on Taxsutra, link of the same is placed below:

<https://www.taxsutra.com/gst/experts-corner/itc-reversal-hybrid-annuity-model-ham-projects>

The entire crux of the case made out by DGCI was with reference to interpretation of Time of Supply of Annuity period consideration. In the above articles we had opined that time of supply for Annuity period consideration in HAM project would be the due date of payment of annuities as per the HAM project contract.

II. Clarification given:

1. As per Section 13(2)(a) of CGST Act, the time of supply in respect of a supply of services shall be the date of issue of Invoice, or date of receipt of payment, whichever is earlier.
2. Further, as per Section 13(2)(b) of CGST Act, in cases where invoice is not issued within the period prescribed under section 31, the time of supply of service shall be date of provision of the service or date of receipt of payment, whichever is earlier.
3. However, as per section 31(5) of CGST Act, in cases of **continuous supply of services**, where the payment is made periodically, either due on a **specified date** or is linked to the completion of an event, the invoice is required to be issued on or before the **specified date** or the date of completion of that event.
4. Specified Date here means the date which is prescribed in the HAM contract either for release of payment or for completion of any event.
5. **The tax liability on the concessionaire under the HAM contract, including on the construction portion, would arise at the time of issuance of invoice, or receipt of payments,**



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whichever is earlier. Invoice will have to be issued on or before the Specified date prescribed for:

- a. Completion of each stage of construction**
- b. Each annuity payment.**

In other words, Time of supply for annuity period would NOT be the date of completion of physical construction of the road, but it will be the date on which said annuity is due to be paid to the concessionaire as per the agreement.

6. If invoices are not issued on or before the specified date or the date of completion of the event specified in the contract, tax liability would arise on the date of provision of the said service (i.e., the due date of payment as per the contract), or the date of receipt of the payment, whichever is earlier.
7. It is also clarified that as the annuity payable by NHAI to the concessionaire also includes some interest component, the amount of such interest shall also be includible in the taxable value for the purpose of payment of tax on the said annuity in view of the provisions of section 15(2)(d) of the CGST Act.

III. Conclusion:

After so much pain caused to industry out of which some companies have now closed or sold due to the sheer pressure of the enormous litigation, the council chooses to break its silence. When it was known to all that one of the premier investigative agency, Directorate General of GST Intelligence (DGGI) was issuing demand notices left right and center, why was the council or the board silent. It would not be out of place to say that we had all along stated the same view to the DGGI in writing as well as publicly through our articles. Hope the ongoing litigations are now closed by the adjudicating authorities taking Suo moto cognizance of this circular. A man (or an organisation or govt) who doesn't learn from its mistake is not a man enough, governments especially tax departs cannot choose to be incorrigible at the expense of the taxpayers.

We would strongly suggest having a permanent set up in the council where issues under



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investigations having sector level or pan India implications can be referred by the investigating authority to this body for seeking clarification so that unnecessary and heavy litigation can be avoided, and the investigating officials are also safeguarded from vigilance related issues.

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