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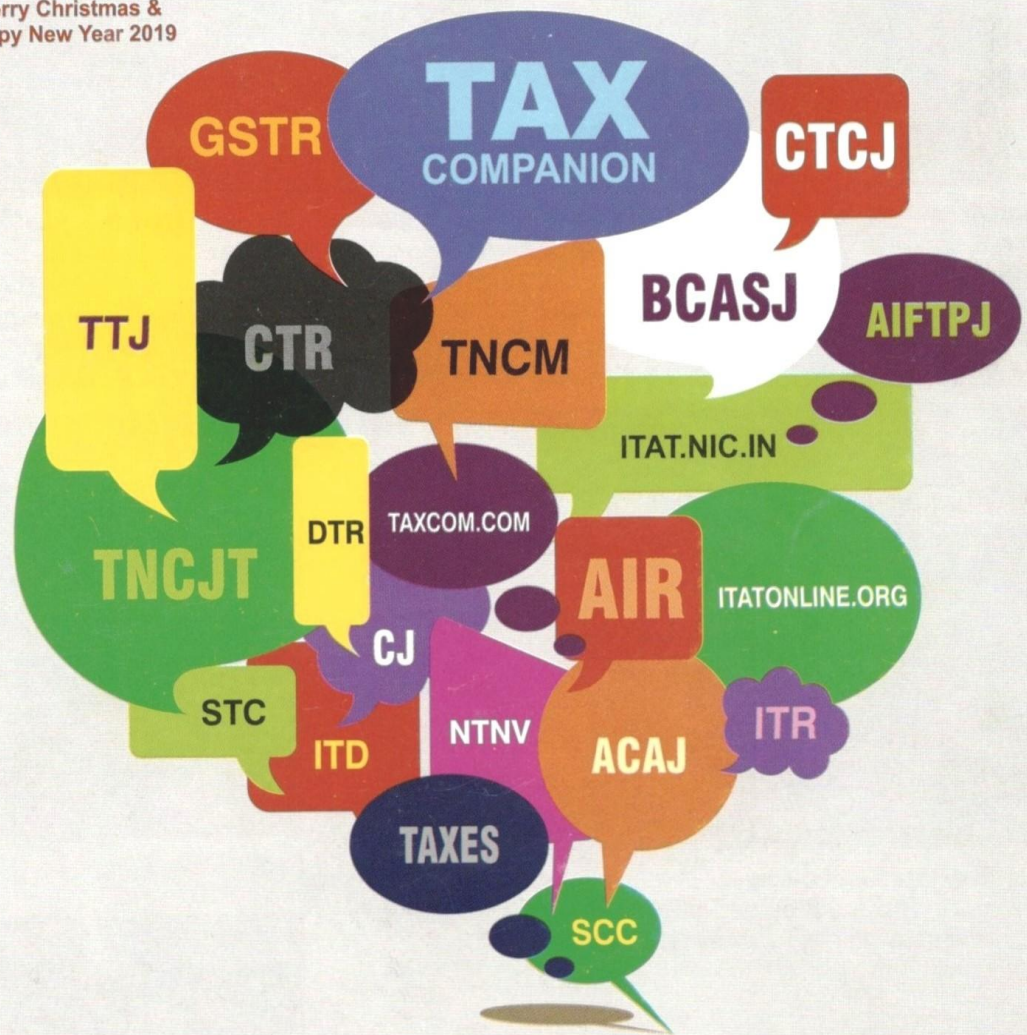
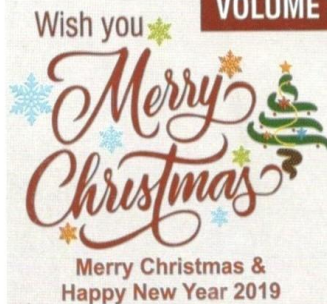
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The Payment of Gratuity Act, 1972



Ramesh L. Soni, Advisor

An employee expects and deserves, as a matter of right, some reward when he retires after a long meritorious service. The enactment of the Payment of Gratuity Act, 1972 has fulfilled this expectation of an employee. This Act has come into existence since 16th September, 1972.

What is Gratuity?

Gratuity is a sort of an award which an employer pays out of his gratitude, to an employee for his long and meritorious services, at the time of his retirement, or termination of his services. Payment of Gratuity is however, compulsory for employers subject to Eligibility (stated as below).

Under the Act an employee become, entitled to earn gratuity after putting in service of minimum five years. When an employee dies while in service his nominee or heirs are entitled to get gratuity even if the employee had put in less than 5 yrs. service. The rate of gratuity is 15 days salary for every year of service; recently from 29th March 2018, Central Govt. by Gazette Notification enhanced the limit up to ₹ 20,00,000/- (Rupees Twenty Lakh).

Object

The Payment of Gratuity Act, 1972 has been passed with the object of providing a uniform scheme for payment of gratuity to industrial workers throughout the country.

Applicability

1. Every factory (as defined in Factories Act), mine, oilfield, plantation, port and Railway Company.

2. Every shop or establishment to which Shops & Establishment Act of a State applies in which 10 or more persons are employed at any time during the year, and
3. Any establishment employing 10 or more persons as may be notified by the Central Government.
4. Once Act applies, it continues to apply even if employment strength falls below 10.
5. The Act also has been made applicable to
 - a) Motor Transport undertaking,
 - b) Clubs,
 - c) Inland Water Transport Establishments
 - d) Local Bodies and
 - e) Solicitors Offices.

Eligibility

1. Any employee has to render minimum five years' of service.
2. At the time of retirement or resignation or on superannuation, an employee should have rendered continuous service of not less than five years.
3. In case of death or disablement, the gratuity is payable, even if he has not completed 5 yrs of service.

Notice of Opening, Change or closure of an Establishment

An employer has to send a notice in Form A to the Controlling Authority of the area within

30 days of the Rules as becoming applicable. In addition to that, Form B is to be submitted within 30 days of any change in the name, address, employer or nature of business whereas an employer has to send Form C intending to close down the business at least 60 days before intended closure.

It is permissible to opt for better Gratuity Scheme

An employee can, no doubt opt for scheme other than the payment of Gratuity Act, if it appears to be better, but on adoption of that, he has to abide by the Scheme in toto. The Supreme Court has held that sub-section (5) of section 4 of the Payment of Gratuity Act does not contemplate that the employee would be at liberty to opt for better terms of the contract by keeping option open in respect of a part of the statute. While reserving his right to opt for beneficial provisions of the statute, he has to opt for either of them and not the best of the terms of the statute as well as those of the contracts. He cannot have both, such a construction would defeat the purpose for which sub-section (5) of section 4 has been enacted. Impugned judgment cannot sustain and is set aside.

What is Continuous Service ???

The term 'complete year of service' means continuous service for one year.

An employee is said to have rendered continuous service, if:

- a) He has been in uninterrupted service, including service interrupted by sickness, accident, absents from duty with or without leave, lay-off, strike, or lock-out or cessation of work not due to the employee's fault.

Note: if an employee having been superannuated is a reemployed by the employer without any break in service, he will be eligible for payment of service.

- b) In case of mine or non-seasonal establishment working for less than 6

days in week, he has actually worked for at least 190 days (in mine) during the period of 12 months or 95 days, during the preceding 6 months, he shall be deemed to have rendered continuous service for a period of one year or 6 months, respectively.

- c) In case of any other non-seasonal establishment he has actually worked for at least 240 days during the preceding 12 months or 120 days during the preceding 6 months, he shall be deemed to have rendered continuous service for a period of 1 year or 6 months, respectively.
- d) In case of seasonal establishment, he has actually worked for at least 75% of the days on which the establishment was in operation.

Notes: for this purpose an employee shall be deemed to have actually worked on a day on which :-

- a) He has been laid off under an agreement or in accordance with standing orders;
- b) He has been on leave with full wages, earned in the previous year;
- c) He has been absent due to temporary, disablement cause by accident arising out of, and in the course of his employment, and
- d) In the case of female, she has been on maternity leave not exceeding 12 weeks

Retrenched Employee entitled to get Gratuity

Retrenchment means termination of service and termination of service is covered by the definition of retirement under the Act. Retrenchment of an employee falls within the scope of section 4(1)(b) of the act under which gratuity is payable to an employee on his retirement. Therefore the employee is entitled to get gratuity.

Benefits

1. Gratuity is payable on the basis of all emoluments earned by the employee, i.e., basic wages plus dearness allowances / special allowances.
2. The quantum of gratuity is to be computed at the rate of 15 days a wages (7 days wages in case of seasonal establishments) based on rate of wages last drawn by the employee concerned for every completed year of service or a part thereof exceeding 6 months.
3. The total amount of gratuity payable shall not exceed the prescribed limit i.e., ₹ 20,00,000/- w.e.f. 29th March, 2018.
4. In case where higher benefit of gratuity is available under any gratuity scheme of the Co. the employee will be entitled to higher benefit.

Calculation of Gratuity

1. $\text{Gratuity} = \frac{\text{Monthly Salary / Wages Last Drawn}}{26} \times 15 \text{ days} \times \text{no. of yrs. of Service}$
2. Piece rated employee –
 $\frac{\text{Daily wage is average (total wages drawn in last 3 months preceding termination)}}{\text{No. of days worked}} \times 15 \text{ Days} \times \text{No. of Years of Service}$
3. Seasonal employee – based on 7 days wages for each season.
4. Max. Gratuity Payable under the Act is ₹ 20,00,000/- (w.e.f. 29th March 2018)

Q. Since the payment of gratuity is not a regular feature, as such, we face difficulty in calculation of gratuity. Kindly appraise the method of calculation of gratuity?

A. Section 4 of the Payment of Gratuity Act, 1972 deals with calculation of gratuity, The *Explanation* to the Act inserted by Act No. 22 of 1987 (w.e.f. 1-2-1987) provides that the completion of continuous services of five years shall not be necessary where the termination of the employment of the employee is due to death or disablement.

Example: Mr. Jatin joined an establishment in January 1985 at ₹ 5,000/- per month. His wages were raised to ₹ 15,000 per month in December, 2005. He retired on 31st December, 2005. The amount of gratuity payable to him shall be calculated as under:

Mr. Jatin retired on: = 31-12-2005
 = -----X 15 X 20
 Joined on : 01-01-1985
 Total Service : 20 years

His last drawn monthly salary was ₹ 15,000.

The gratuity for the period of 20 years
 = 15 days wages X 20 Monthly wages last drawn
 comprises of 26 days.

Hence the calculation will result as follows

$$= \frac{15000}{26} \times 15 \text{ (days per completed year of service)} \times 20 \text{ yrs.}$$

= ₹ 1,73,077.00 will be payable toward gratuity to Mr. Jatin

Forfeiture of Gratuity

1. The employee may wholly or partially forfeit the gratuity payable to him if his services are terminated on account:
 - a) For his riotous or disorderly conduct or any other act of violence on his part, or.
 - b) For any act which constitutes an offence involving moral turpitude.

Note:- If a workman who was dismissed for assaulting another workman, in a factory, is not entitled to payment of any amount of gratuity.
2. The employee partly forfeits the gratuity payable to him if his services are terminated for any act, wilful omission or negligence, causing any damage or loss to, or destruction of, property belonging to

the employer, to the extent of damage or loss caused.

Recovery of Gratuity

1. **On account of his death:** If the employee has a family, he must nominate one or more members of the family and none other. If the employee has no family, he can nominate any person or persons of his choice. However, if the employee acquires a family after nominating any person or persons of his choice, such nomination becomes invalid and the employee has to make a fresh nomination of one or more members of his family.
2. The employee who is eligible for payment of gratuity and dies then his nominee or legal heir has to send a written application to the employer in Form J (for nominee) & Form K (for legal heir) within 30 days from the date gratuity becomes payable.
3. If the employer does not take any action on the application, the employee has to apply to the Controlling Authority in Form N within 90 days of the occurrence of the cause for the application for issuing necessary direction to the employer for making payment of gratuity.
4. If gratuity is not paid by the employer Controlling Authority issues certificate to collector who recovers the amount as arrears of land revenue together with compound interest.

employee have been terminated for any act which constitutes an offence involving moral turpitude. In one case, the Calcutta High Court has also held that even if a workman gives an undertaking for making deductions, the gratuity of an employee cannot be withheld.

Time Limit of Payment

The employer should pay the gratuity within 30 days from the date it becomes payable or after such date along with simple interest @ 10% p.a. (or as notified from Govt. from time-to-time) on the amount of Gratuity, unless the delay is on the part of payee.

Protection

Gratuity payable under the Act cannot be attached in execution of any decree or order of any civil, revenue or criminal court.

Note: If the employee is dead then the gratuity becomes payable to the heirs of the employee and the same becomes attachable in the hands of the employer as the employer is legally bound to pay the said gratuity to the legal heirs of the employee.

Penal Provision

1. If any person, for the purpose of avoiding any payment to be made under the Act, knowingly makes or causes to be made any false statement or false representation he would be punished with imprisonment up to 6 months, or with fine up to ₹ 10,000/- or, with both.
2. If any employer contravenes, or makes default in complying with any provisions of the act or any rule or order made there under, he would be punished with imprisonment up to 1 year, or with fine up to ₹ 20,000/- or with both.

Handy tips for Employer

- 1) It is advisable for the employer to obtain nomination from the employee in Form 'F'
- 2) Form G when employee acquired family later

Deduction of Gratuity – Not Permissible

The Gratuity of an employee can be forfeited or withheld only when he/she is dismissed for the prescribed misconduct like wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused or if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or if the services of such

- 3) And any change of nomination to be submitted in Form H, in duplicate.

As it renders easy for the employer to disburse the gratuity amount. If he neglects to obtain nomination and employee dies without nomination, it is likely that the family members of the deceased employee may approach the employer with conflicting claims to the gratuity compelling the employer to be dilemma and to resort to the legal processes.

Display of Abstract of the Act

Every employer must display an Abstract of the Act and the Rules made thereunder in English and in the language understood by the majority of the employees at a conspicuous place at or near the main entrance of the establishment.

Obligations of Employer

- 1) Pay gratuity to the employees as required by the provisions of the Act and the rules framed there under
- 2) Determine the gratuity as soon as it becomes payable, and give notice of the same to the employee concerned and the controlling authority. In case of dispute regarding the amount determined, the admitted amount of gratuity must be deposited with the Controlling Authority. If the latter decides that any more gratuity is due to the employees, the same must be deposited with him.
- 3) Obtain an insurance in the prescribed manner for his liability for payment of gratuity under the Act, or establish an approved gratuity fund in the prescribed manner.

Obligations of Employee

- 1) An employee eligible for payment of gratuity under the Act, or any person authorised in writing to act on his/her behalf, has to apply to the employer within such time and in such form as may be prescribed under the rules for payment of gratuity as soon as it becomes due.

- 2) Every employee, after completing one year of service, has to nominate members of his / her family who may receive gratuity in case of his / her death.

Summary

The Payment of Gratuity Act applies to every factory, mine, oilfield, plantation, port, railway company, and shop or establishment in which ten or more persons are employed. An employee is a person (other than an apprentice) employed for wages in any capacity including administrative and managerial. There is no wage ceiling for its applicability. Gratuity at the rate of 15 days wages for every completed year of service, is payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. The act authorises the appropriate Government to appoint any officer as a controlling authority for the administration of the Act.