

Goods & Services Tax :

Applicability to NGOs

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Important terms from Applicability point of view

- Incidence of GST - S. 9(1)
- Supply - S. 7 (1)
- Consideration - S. 2(31)
- Business – S. 2(17)
- Schedule I
- Schedule II
- Schedule III
- Exemptions

Incidence of GST

- S. 9(1): Subject to Section 9(2) there shall be levied a tax called the Central Goods & Services Tax on all intra-state **supplies** of goods or services or both, on the value determined under section 15 and at such rates..... as may be notified by GoI on recommendation of GST Council.....
- IGST (for inter-state) : S. 5(1) & S.5(2)

Supply – defined by S.7(1)

- (a) 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**,
(this form of definition gives it quite broad meaning)
- (b) importation of services, for a consideration **whether or not** in the course or furtherance of business,
(could cover charitable organisations)
- (c) activities specified under Schedule I, made or agreed to be made **without a consideration** and
- (d) activities to be treated as supply of goods or supply of services as referred to in Schedule II.

Consideration

S. 2 (31) defines Consideration

- Any payment made or to be made, whether in money or otherwise, in respect of, or in response to, or for the inducement of, the supply of goods or services or both, whether by the said person **or by any other person**; but shall not include any subsidy given by Central or State Govt.

(grant made by A to B for C, earlier case law stated that there was no direct relationship in funds given by A for C hence ST not applicable, but this definition could give a different meaning)

- It also covers any monetary value of any act or **not undertaking an act**. (example compensation for restraint)
- A deposit is not included as consideration, unless it is applied for settlement of any dues. [Tip : Instead of advances give deposits]
- Basis of valuation defined under S.15 based on price. Could lead to several contentious issues.

Business

S.2(17) includes

- Any trade, commerce, manufacture, profession, vocation, adventure (speculation), wager (bet), or any other similar activity, **whether for pecuniary benefit or not.**
[Profit motive irrelevant ? – could this mean coverage of non-profits]
- Any activity or transaction in connection with or incidental or ancillary to (a) above, [**sale of used car/machinery, scrap**]
Several case laws support the view that incidental or ancillary to the business also constitute business
[CSR ?– corporates could argue that CSR is incidental to their main activities]
- Any activity or transaction in the nature of (a) above, whether or not there is volume, frequency, continuity or regularity of such transaction [**Casual**]

Business.....*cont'd*

- Supply or acquisition including capital goods and services in connection with **commencement or closure** of business.
- Provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or **benefits to its members**
- **Admission**, for a consideration, of persons to any premises
- Services supplied by a person as the **holder of an office** which has been accepted by him in the course or furtherance of his trade, profession or vocation
- Services provided by a race club by way of totalisator or a license to book-maker in such club and

Business.....*cont'd*

- Any activity or transaction undertaken by GoI, state govt, local authority, in which they are engaged as public authority. This means apart from sovereign activities, i.e. which no one else can do, e.g. dispensing justice, maintaining armed forces, audit by CAG, running parliament, elections to legislature, etc. all other activities are business. However notification to exempt these services likely.

Schedule I – even without consideration

Schedule I

- (1) Permanent transfer / disposal of business assets where input tax credit has been availed on such assets.
- (2) Supply of goods or services between related persons, or between distinct persons as specified in S. 25, when made in course of furtherance of business.
Related Persons defined under S. 15 (related through business, employer/employee relationship, 25% shares, family members, Supply of Goods between Principal & Agent
Distinct Persons same entity in different states treated as distinct person for purposes of registration.
- (3) Import of services by a taxable person from a related person or from any of his other establishments outside India, in the course or furtherance of business.

Negative ListSchedule III

- Services by an employee to employer in the course of employment.
- Services by any court or Tribunal established under any law for the time being in force.
- Functions performed by legislature
- Duties performed by a person who holds a position in pursuance of constitution
- Duties performed by a person appointed as chairperson / director in a body established by GoI / state Govt / local bodies and not deemed as employee
- Funeral, burial, crematorium or mortuary including transportation of deceased
- Sale of land & **building** (subject to Sch II, i.e. after completion)
- Actionable claims other than lottery, etc. [examples, insurance claim, debt claim, claims based on court action, etc]

Exemptions

- Certain temporary imports by non-profit entities
- Certain imports as per agreement between GoI and specified entities
- Import of Equipment by DSIR approved entities (IITs/IISc, etc)
- Trophies, etc. won in tournaments
- Renting of residential units
- Services to UN and other specified bodies
- 12AA entity for charitable activities
- Services by educational institution upto higher secondary

Charitable Activities

Entry No. 4 Under Circular 25/2012

- Public Health relating to
 - Care or counseling of (i) terminally ill, severe physical / mental disability, (ii) HIV, (iii) drug or alcohol addicted persons
 - public awareness of preventive health, family planning or HIV
- Religious / spirituality or **yoga**
- Education / skill Development relating to abandoned, orphaned or homeless children, physically or mentally abused and traumatized persons, prisoners, persons over 65 residing in rural areas
- Preservation of Environment, watershed, forests and wildlife

Relevant Case Laws

- APITCO vs Commissioner of Service Tax, Hyderabad : SC upheld Tribunal Order assessee worked as an implementing agency for Govt schemes. Exps. reimbursed no income. [Could this be overruled by provision that no pecuniary element necessary under the definition of Business – S.2 (17)]
- Several case laws seen where even if NPO's activities were such that it resulted in realising of income, as long as the overall objects remained non-profit and profits if any were applied for its objects, then the entities remained Not For Profit and were entitled to continue to remain necessary Tax benefits. However these caselaws were for IT and not for ST. Under GST law has undergone major changes.

Circular 127/9/2010

- Circular 127/9/2010-ST dt 16-8-2010 – If no link between amount paid and taxable activity. Amount paid by donor to NGO which provided taxable activity (coaching) to individual beneficiary, then no tax. [Could definition of Consideration S.2(31) which states that consideration provided by person receiving the service or by any other third person will be treated as consideration]

Risk Analysis – GST Applicability to Grants

- If activities fall within Negative List ? GST Not Applicable.
- If the activities fall under Exempted charitable activities ? GST Not Applicable
- If not falling in either of the above categories, good amount of Risk that GST could become applicable to grants. For example, corporates could apply GST to CSR Grants.
- Way Forward, ask corporates to treat their grants as donations (Gives them IT benefit & Grants would then be not subject to GST – as there is no consideration in donations). Would they agree ?
- Grants from one non-profit to another (neither falling under Exemption list) - though risks remain, but this could be stated to fall outside purview of GST, since not in furtherance of business & if agreement comes out indicating no consideration, except philanthropic objective.
- Work with representative organisations to represent to Govt to include Grants received by non-profits registered under IT under Exemptions List.

Questions ?