Taxability of Activities of Charitable Trusts / NGOs under GST Law

In this article an attempt has been made to discuss the applicability of GST on different kinds of activities and grants / funds received by NGOs. In order to levy GST on any transaction / activity, that transaction / activity should satisfy the conditions laid down in GST law i.e. the same should fall under the definition of the term "Supply" as laid down in Section 7 of the Central Goods & Service Tax Act, 2017. Until & unless an activity falls under the definition of term Supply as defined under GST law, the same cannot be the subject matter of tax because under the GST law tax is levied on supply of goods or services or both when made in the course or furtherance of business.

Hence, before moving forward it is important to understand the meaning of term "Supply" under GST law. Section 7 of the Act, ibid defines the term "Supply" and provides that (only the relevant portion of said Section is reproduced as hereunder)

> *"7. (1) For the purposes of this Act, the expression "supply" includes—*
>
> *(a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person in the course or furtherance of business…………………..."*

Thus, if we go through the provisions of Section 7 of the Act, ibid as reproduced above we will note that the said section provides an inclusive definition of the term supply and states that provisioning of goods or services or both in any form such as sale, transfer, barter, exchange, licence, rental, lease or disposal made shall be said to be supply only when both the conditions mentioned below are satisfied;

1. That, supply of goods or services or both in any form as discussed above **should be made or agreed to be made for a consideration by a person**; and
2. That, the supply of said goods or services or both **should be in the course or furtherance of business**.

Hence, if both of the above stated conditions are satisfied only then an activity can be regarded as Supply and be the subject matter of tax.

It is also important to note here that Section 7 of the Act, ibid also provides for some deeming fiction for the term supply i.e. when an activity shall be deemed to be supply even if any of the above laid conditions are not satisfied, i.e. supply made without consideration (for example activities specified in Schedule I). The said scenarios are not discussed in this article as not relevant to the present topic.

In the light of the above discussion, it is equally important to understand the meaning of the terms "Consideration" and "Business" in order to properly appreciate the provisions of Section 7 of the Act, ibid.

Section 2(31) of the Act, ibid defines the term Consideration and reads as hereunder:

> *"(31) "consideration" in relation to the supply of goods or services or both includes—*
>
> *(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;*
>
> *(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:*
>
> *Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply unless the supplier applies such deposit as consideration for the said supply;"*

By going through the provisions of the Section 2(31) of the Act, ibid as reproduced above one can understand that again the word consideration has inclusive definition and includes any payment made or agreed to be made in money or otherwise **in respect of, in response to or for the inducement** of the supply of goods or services or both whether by the recipient or any other person but excludes the subsidy provided by the Central Government or a State Government & deposit received unless that deposit is settled by supplier as consideration for the said supply. Thus, any payment received by supplier or monetary value of act or forbearance accepted by supplier in relation to supply of goods or services or both falls within the contours of term consideration.

Section 2(17) of the Act, ibid defines the term business and reads as hereunder (only the relevant portion is reproduced)

"(17) "business" includes—

(a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, ***whether or not it is for a pecuniary benefit;***

(b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);

(c) any activity or transaction in the nature of sub-clause (a), ***whether or not there is volume, frequency, continuity or regularity of such transaction***………………."

Thus, we can say that in order to term an activity as business that activity should be of the nature of trade or commerce or manufacture or profession or vocation or adventure or wager or any other similar activity, whether or not that activity is for a pecuniary benefit. The term "Pecuniary Benefit" means monetary reward. Thus, performance of any activity / transaction of the above nature will be termed as business irrespective of the fact whether or not any monetary benefit is generated from it.

It is also important to note here that even performance of a single activity or transaction of the nature specified in sub-clause (a) constitutes a business because sub-clause (c) of Section 2(17) of the Act, ibid specifically states that frequency or regularity or volume of such transaction does not matter at all.

However, the most important thing that needs to be understood here is that there is nothing in the GST law that specifically provides that **an activity carried without profit motive can be treated as business** and hence within the purview of tax. As discussed above, the law specifically provided that the volume or frequency…. is not necessary in order to constitute that activity as business. The only thing that is required is that activity should be of the nature of *trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity.*

It is a well settled principle of law that an activity can be regarded as business activity only when there is some profit element in it meaning thereby that the said activity is carried on with the motive to earn profit from it. If the activity is carried on without the motive of earning a profit that activity cannot be regarded as business.

In the VAT era, the vat statues specifically provided that an activity of the nature of trade, commerce or manufacture shall be deemed to be business whether carried on with profit motive or not. Reference is drawn to Section 2(c) of the Punjab Value Added Tax Act, 2005, reproduced as hereunder:

> *"(c) "business" includes -*
>
> *(i) any trade, commerce, manufacture, adventure or concern whether or not such trade, commerce, manufacture, adventure or concern is carried on with a motive to make profit and whether or not any profit accrues there from; and*
>
> *(ii) any transaction in connection with or ancillary or incidental to such trade, commerce, manufacture, adventure or concern;"*

Whereas under the GST law, the term business is not conceptually defined and what is defined is the activities that shall be meant to be business for GST law. Accordingly, the conceptual definition of term "Business" has to be drawn from normal parlance. In normal parlance an activity is said to be of the nature of business only when the motive to earn profit from that activity is present, as motive to earn profit and generation of economic gain is totally different. Even in case of charitable trusts some reasonable economic gain is generated from the activities carried on by charitable trusts though that activities are not carried on with profit motive.

At the same time, GST law does not define the phrase "in the course or furtherance of business" and accordingly that has to be understood in the light of above made discussion about the term business.

Thus, we can say that an activity of sale of goods or rendering of services can be regarded as in the course or furtherance of business only when that activity is carried on with some profit motive. If the motive to earn profit from that activity is missing then that activity cannot be regarded as business although some reasonable economic gain is generated.

The said understanding of the term business also draws strength from the Press Release issued by C.B.I & C. on 13th July, 2017 in which the concept of profit motive in a transaction has been considered and accordingly clarified that sale of old gold jewellery by an individual does not qualify to be a supply for GST law & hence not chargeable to tax.

The Hon'ble Supreme Court of India in number of judgments has ruled that nature of activities of trust has to be determined from the objects of the trust for which it was created. Thus, if the trust is created for the purpose of charitable activities i.e. carrying out the activities without profit motive, then that trust cannot be held to carry on any business.

The trust / NPOs are created with some main / primary objects and incidental or ancillary objectives. The major objects defines the primary activities of the trust which they pursue and if these activities are carried on without any profit motive behind the same, then the trust is of charitable nature and not a business entity. Whereas, the incidental or ancillary activities are carried on for the fulfilment of main objects which are of charitable nature. Thus, if the incidental activities are carried on with profit motive that will not alter basic nature of the trust which is charitable in nature. In this case only the incidental activities of the trust can be charged to tax i.e. GST being of business nature. The said is ratio laid down in the case of CIT v Andhra Chamber of Commerce [1965] by the Hon'ble Supreme Court of India.

The Authority for Advance Ruling in the matter of *"Shrimad Rajchandra Adhyatma Satsang Sadhna Kendra"* reported as GST-ARA-41/2017-18/B-48 has ruled that incidental business activities of exempt organisation shall also be subject to charge to tax under GST law.

It is interesting to note that the Hon'ble Supreme Court of India in its judgment delivered in the case of *"CIT Vs Sai Publication Fund"* [2002] has held that when the primary activities of a trust are not of business nature, then incidental or ancillary activities would also not amount to business.

However, if go through the Exemption Notification No. 12/2017-Central Tax (Rate) dated 28-06-2017 issued under GST Law, we see that legislature has specifically exempted the charitable activities (i.e. Entry No. 1) which means that intent of the legislature is to tax all activities whether rendered by NPOs / Charitable Trust and exempt only some specific services as mentioned.

Whereas in the GST law, the phrase "business" and "in the course of furtherance of business" has not been conceptually defined and accordingly has to be understood in accordance with already laid down judicial principles and test of common parlance.

If we go by the ratio of ruling delivered by AAR, then incidental activities are chargeable to tax under GST law, as the legislator has specifically exempted some charitable activities, accordingly rest are taxable if in the course or furtherance of business. Thus, the taxability of activities of the trust under GST law is purely debatable and depends on facts & circumstances of the each & every case.