INDIRECT TAX EXPRESS

FORTNIGHTLY e-NEWS LETTER FROM M/s D A V A & ASSOCIATES
Chartered Accountants

PART-A: FROM THE EDITOR

Service Tax applicability on activities of a Charitable Trust

Contrary to popular belief, a charitable trust does not enjoy blanket exemption from service tax. A charitable trust undertakes a host of activities related to social welfare and gets funds/grants from various Government bodies, corporates, individuals, other charitable institutes etc.

No service tax if Receipt is in the nature of grant/donation:

For any activity to be taxable under service tax, it should be carried out by one person for another person. Moreover, such an activity should be for consideration. Hence an act by charitable trust for consideration would be a service and taxable unless otherwise exempted. “The concept ‘activity for a consideration’ involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an ‘activity for consideration’ even though such an activity may lead to accrual of gains to the person carrying out the activity.

The funds generated for an activity can either be consideration for an activity, i.e. in the nature of service or in the nature of a grant / donation. If a receipt of fund is a grant/donation then there is no question of applicability of service tax, as it not a service as per the definition of service under Finance Act 1994. Further, **Rule 6(2)(vii) of the Service Tax (Determination of Value) Rules, 2012** excludes “subsidies or grants disbursed by the Government, not directly affecting the value of service”. Hence, receipt of such donation/grant would not be liable to service tax.

When can a receipt be considered to be in the nature of Grant?

For a receipt of funds to be considered a grant, following broad parameters (not exhaustive) may be applied:

- Donations to a charitable organization are not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor.
- Beneficiary & donor are generally different.
- Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.

WHAT'S NEW

- The Central Government vide **Notification No. 04/2015-Central Excise** dated 30.01.2015 changed the excise duty structure on branded diesel. It will now be charged at 14 per cent of refinery gate price of the fuel plus Rs 5 per litre or Rs 10.25, whichever is lower.

- CBEC vide **Circular No. 04/2015-Cus**, dated 20.01.2015, has prescribed that the permission for re-export of goods that are shipped contrary to instruction of the importer will be granted on merit by the officer concerned as per the adjudication powers.

- CBEC. vide **Notification No. 01/2015-CE(N.T.)** dated 20.01.2015, has amended Notification No. 27/2015- CE(N.T.), dated the 16th September, 2014, changing jurisdiction of various Central Excise Commissionerates all over India.

- The Single Member Bench of Calcutta High Court vide Order dated 19-01-2015 has extended the stay from payment of Entry Tax to Unregistered Dealers also. It has also directed the department to issue waybill in Form 50A without payment of Entry tax.

“We did not come to fear the future; we came here to shape it”

-Barack Obama

- In case of donation/grant, beneficiaries are not nominated by the donor and the charity is at liberty to identify the beneficiaries.
- Sometimes, in case of a grant, detailed financial accountability reporting is required including conditions such as a specified time period, returning of unexpended funds at the end of the period, allowable & unallowable expenses etc. however, these conditions shall not lead to the conclusion that the receipt is consideration for an activity unless and until some specific advantage is being transferred to the donor.

In some case, the donors provide the funds for a program, nominate/identify the beneficiaries themselves and the role of the trust is that of a facilitator for the program. In these cases therefore, the receipt of funds may amount to consideration for an activity. However, if the activity is a charitable activity as per the service tax provisions, then service tax shall not be applicable on it.

If Receipt is in the Nature of Consideration, No Service Tax is Payable if Activity qualifies as "Charitable Activity" under the Definition:

The Central Government, vide **Notification No. 25/2012-ST dated 20.06.2012**, has exempted **"Services by an entity registered under section 12AA of the Income tax Act, 1961 by way of charitable activities"** from the whole of service tax leviable thereon under section 66B of the Finance Act, 1994. 'Charitable activities' has been defined in Clause 2(k) of the aforesaid notification as follows:

"(i)public health by way of -

(a)care or counseling of (i) terminally ill persons or persons with severe physical or mental disability, (ii) persons afflicted with HIV or AIDS, or (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or

(b)public awareness of preventive health, family planning or prevention of HIV infection;

(ii)advancement of religion or spirituality;

(iii)advancement of educational programmes or skill development relating to,-

(a)abandoned, orphaned or homeless children;

(b)physically or mentally abused and traumatized persons;

(c)prisoners; or

(d)persons over the age of 65 years residing in a rural area;

(iv)preservation of environment including watershed, forests and wildlife;

Therefore, if a registered charity u/s 12AA of Income tax act is doing any activity falling explicitly in any of the charitable activities specified under Clause 2(k) of Notification No. 25/2012-ST dated 20.06.2012; it is exempt from service tax without any value limit. Even if the activity is a service, if it is covered under Negative List or exempted by any exemption notification, service tax shall not be payable on it.

Activity is not Charitable Activity, Still Basic Exemption of Rs. 10 Lacs Available:

Moreover, even for a taxable service, there is a basic exemption limit of turnover of Rs. 10 Lakhs. Service tax shall be chargeable only after the turnover exceeds Rs. 10 Lakhs in a particular year.

PART-B: QUIZ TIME!!

1. Which state in India enjoys full exemption from Clean Energy cess on coal produced in that state?

2. Export to which two countries is not to be excluded in the turnover for computation of SSI exemption limit under Central Excise?

3. What is the prescribed Form for exercising the option of paying compound rate of tax under WBVAT Act, 2003?

(Please mail your replies with your name, location and e-mail id to ***davaidtexpress@gmail.com)***

(The first 3 correct answers will be published in the next issue with name & mail id of the sender.)

ANSWER TO LAST FORTNIGHT'S QUIZ

Reply to Q1- **Form F**

Reply to Q2 – **Telecommunication Service, Construction of Residential Complex, Works Contract Service.**

Reply to Q3 – **Rs. 100000/-**

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Sub judice***-before a judge or court, pending decision of a competent court. E.g. The Judge still has not rendered a decision; therefore the issue is still *sub judice.*
- ***De novo***- from the beginning. E.g. The matter was remanded to the adjudicating authority for afresh *de novo* proceedings.

PART-C: CASE UPDATES

1. Shriram EPC Ltd. Vs. Commissioner Of Service Tax, [2014 (35) STR 564 (Tri. - Chennai.)]

Issue: Whether penalty should be imposed when service tax along with interest is paid before issuance of show cause notice?

Decision: The Hon'ble CESTAT, Chennai held that the provisions of sections 73(3) of Finance Act, 1994 was issued with an intention to encourage immediate realization of short payments detected by audit teams so that whoever discharges the short paid tax immediately need not get entangled in protracted litigations. Therefore, unless there is a case of active suppression, provisions of Section 73(3) should be extended. Similar view was held by Karnataka High Court in the case of **ADECCO Flexione Work Force Solutions Ltd. 2012 (26) STR 3 (kar.)**. Considering the decision of Hon. Karnataka High Court, the penalty imposed on the appellant was set aside. Thus the appeal was allowed.

2. Hotel East Park vs. Union of India [2014 (52) taxmann.com 341]

Issue: Whether service tax on supply of food/ beverages in hotels/restaurants is Constitutional?

Decision: The Hon'ble Division Bench of Chhattisgarh High Court held that the entry "***service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity***" in Section 66E (i) of the Finance Act, 1994 is not ultra vires the Constitution and is valid as the same taxes only the service portion. In respect of the services provided by the hotel, Service Tax of 40% on the bill value of the food and drinks is charged in view of section 66E(i) of the 1994-Act read with rule 2C of the Service Tax (Determination of Value) Rules, 2006. Article 366(29A)(f) of the Constitution does not indicate that the service part is subsumed in the sale of the food; it rather separates sale of food and drinks from service and Section 65B (44) as well Section 66E(i) only charges service tax on the service part and not on the sale part. No VAT can be charged over the amount meant for service. It will be open to the Petitioner to object the same before the VAT authorities. There is no provision in the VAT-Act to bifurcate the amount. The State Government will do well to frame such rules to this effect. These rules may be in conformity with the bifurcation as provided under the 1994-Act or ensure that the Commercial Tax authorities do not charge VAT on that part of the value of the food and drink on which the Service Tax is being assessed.

A Swachh Bharat cess is likely to be imposed by way of a Service Tax amendment in the forthcoming Annual Budget. It may range between 0.02 to 0.05 per cent. The cess is likely to be levied on telecom SVCs and spectrum sale. The government hopes to mop up Rs 1 lakh crore in five years for Swachh Bharat Mission.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: A company brought goods from supplier. The supplier paid transportation charges to transporter & then got reimbursement from the company (buyer) by charging it in the supplier bills. The supplier has neither charged service tax separately on transportation charges in supply bills & also not paid service tax. Who is liable to pay service tax under reverse charge mechanism?

Reply by E-News Letter Team: The service of goods transport agency is covered under reverse charge and the service tax is to be paid by the person who is actually paying the freight either himself or through his agent. In this case, the company is paying freight to the transporter through the supplier i.e. the company is reimbursing the whole amount of service tax to the supplier on actual basis. The supplier is acting as pure agent to the company. Hence, in our opinion, the liability to pay service tax on Goods Transportation Agency service under Reverse Charge is on the buyer.

Query 2: M/s A Company Ltd. has registered their H.O. as Input Service Distributor recently. They have distributed the Input Tax Credit for the period before the date of registration. The department is denying credit that pertains to the period before registration as ISD. Whether the department is correct in denying the benefit of cenvat credit prior to the date of registration of HO as ISD?

Reply by E-News Letter Team: If receipt of input service and payment to the service provider is not in dispute, mere procedural lapse, should not lead to denying substantial benefit to the assessee. There are a plethora of cases where cenvat credit was allowed on ISD bills even when some procedural lapses existed. **[Ref: Doshion Limited v. Commissioner of Central Excise, Ahmedabad [2013 (288) E.L.T. 291 (Tri.-Ahmd.)], Modern Petrofils v. Commissioner of Central Excise, Vadodara [2010 (20) S.T.R. 627 (Tri.-Ahmd.)].** However, recently, in the case of **Mangalore Refinery & Petrochemicals v. CCE, Mangalore [2013 (30) S.T.R. 475 (Tri.-Bang.)]** cenvat credit distributed by the head office to another unit was not allowed since it was not registered as an input service distributor: However, keeping the spirit of law in mind, in our view cenvat credit should not be denied.

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