# INDIRECT TAX EXPRESS

Fortnightly e-newsletter from m/s DAVA& Associates, Chartered Accountants

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## FROM THE EDITORIAL TEAM

### Service tax on Online Poker Games- An Analysis

Clause 3 of Articles 246 of The Constitution of India has provided full right and legitimate authority to state government to make laws on the matter enumerated in List II (State List) in the Seventh Schedule. Entry No. 34 of List II (State List) of the 7th Schedule of the Indian Constitution includes “gambling and betting”. Furthermore, Entry No. 62 conferred authority to the States to tax gambling and betting events or activities. Thus state governments have power to permit or ban gambling operations and impose tax on it.

Accordingly, Clause (i) negative list of service under Section 66D of the Finance Act 1994 comprises ‘Betting, gambling or lottery’. This means activity of betting or gambling is out of ambit of service tax. As per Section 65B(15) of Finance Act 1994 “betting or gambling” means putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring.

Almost all states have prohibited all forms of gambling, betting and wagering and adopted law in line with the Public Gambling Act, 1867 (which is a Central Act governing public gambling) with minor modifications and explicitly excluded ‘game of mere skill’ from its purview. However, state of Goa and Sikkim are exceptions. The state of Goa has allowed cardrooms in offshore vessels and slot machines in five star hotels subject to the prior approval and permission of the state government on payment of a specified recurring fee since 1996, by the Goa, Daman and Diu Public Gambling Act, 1976. The state of Sikkim also legalized gambling by the Sikkim Regulation of Gambling (Amendment) Act, 2005. Whereas, other states have not differentiated any game of cards from the scope of gambling or gaming, West Bengal has specifically excluded card games like Bridge, Poker, Rummey or Nap. from the definition of betting & gambling which means it is treating card games as game of skill instead of betting/gambling.

With the emergence of technology in recent years, the gaming industry has gained significant popularity in online medium. Among these online games, poker is a well-liked one. Many companies registered in these States (Goa, Sikkim, West Bengal) have developed model for providing the platform for online poker game. In such model, players located at different location can play together using such platform. These companies earn commission/fee for organising such games in online medium which is similar to rake taken by a cardroom operating a poker game. However, taxability of such commission for operating poker in online medium is dependent on whether poker is a game of skill or a betting/gambling activity.

Both Central and state enactment on the subject matter of betting and gambling provides exemption to *‘game of mere skill’*. Therefore, considering, the exemption of the game of poker from the definition of gambling in the West Bengal Act and decisions of the Supreme Court in the case of **State of Andhra Pradesh v. K. Satyanarayana [1968 SCR (2) 387]**, classifying rummy as a game of skill, a view may be taken that playing poker and other similar card games for money or other forms of consideration would be permitted presumably due to the preponderance of skill involved in these games and shall be considered the game of skill, not betting or gambling. However, the legal position is still uncertain as there is no specific ruling in respect of poker.

### Inside this issue:



### GST NEWS

The Times of India reported that –

Although the monsoon session ended on 13.8.2015 (Thursday), the Cabinet committee on political affairs chose not to prorogue Parliament, keeping the door open for both Houses to meet at short notice before the winter session begins in November.

The government is sounding out political parties over scheduling a two-day session of Parliament in September ahead of the Bihar elections to pass the Goods and Services Tax (GST) Bill, which is seen to be a crucial piece of tax reform linked to the Modi government's effort to improve ease of business and boost revenues.

## IDT NEWS

The Central Board of Excise & Customs through an advertisement in newspapers on 6th August' 2015 , Thursday clarified that liability to pay service tax on service provided by mutual fund agents and distributors is on mutual funds and asset Management companies (AMCs) and not on agents and distributors. However, the AMCs and mutual funds can claim credit against the service

In case of betting and gambling activity, only State governments can impose tax on it. The nature and quantum of tax to be levied on such gambling/betting activity falls under the domain of the respective State government which allows such betting/gambling activity in the State. For example, the State of Sikkim which is the first state to legalize and license online gambling has provided a legal framework for online gaming (including poker) by **The Sikkim Online Gaming (Regulation) Act, 2008** and **Sikkim On-line Gaming (Regulation) Rules, 2009.** As per these laws, licenses are granted to person interested to operate specified online games including poker on payment of Rs. One Crore for one year which are renewable on payment of a renewal fee. Apart from this, an online gaming levy at the rate of one percent of the gross gaming yield is exigible. This gaming fee payable to state government is based on a percentage of gaming yield or turnover apart from the license fee.

If poker is considered as a betting/gambling activity, then organising poker game through online medium although qualify as an activity for consideration as per the definition of service under section 65(B) (44), still it will come under the jurisdiction of the respective State government for the purpose of taxation. Accordingly this has been covered under the negative list of services. Thus, services by way of organising poker, being a State subject service tax shall not be applicable. However, auxiliary services that are used for organizing or promoting betting or `gambling events shall be taxable as it is not covered in negative list. Same has been clarified by the CBEC in para 4.9.1 of Service Tax Education Guide also.

In case, poker is considered as a game of skill, it is not excluded by the negative list. The rake/ commission earned are a consideration for an activity of organising the poker game on online medium and such commission earned is a taxable service.

In absence of any provision of legislation or judicial pronouncement clarifying specifically whether poker is a game of skill or a game of chance, it continues to be a grey area till the time Supreme Court or central government clarifies the legal position regarding online poker game.

## NOTIFICATIONS & CIRCULARS

- Central Government, vide **Notification No. 40/2015-CE** and **Notification No. 41/2015-Customs** dated **30.07.2015**, has extended the exemption of excise duty, customs duty and additional duty to Anti Tuberculosis Drugs, Diagnostics and Equipments upto 01.04.2016.

- Central Government, vide **Notification No. 36/2015-Cus (ADD)** dated **31.07.2015**, has rescinded Notification No. 109/2011-Cus dated 15.12.2011 to remove the definite anti-dumping duty imposed on import of Ceramic tiles other than Vitrified tiles of specified dimensions, originating in, or exported from China PR.

- Central Government, vide **Notification No. 37/2015-Cus (ADD)** dated **06.08.2015**, has extended the anti-dumping duty on import of Viscose Staple Fibre excluding Bamboo fibre, originating in, or exported from, Indonesia and China upto and inclusive of 25.07.2016.

- Central Government, vide **Notification No. 38/2015-Cus (ADD)** dated **06.08.2015,** has re-imposed anti-dumping duty on imports of Vitamin C, originating in, or exported from, the People's Republic of China, at rates as specified for a period of five years.

- Central Government, vide **Notification No. 39/2015-Cus (ADD)** dated **12.08.2015,** has re-imposed anti-dumping duty on imports of Flax or Linen Fabric having flax content of more than 50%, originating in or exported from the People's Republic of China and Hong Kong, at rates as specified for a period of five years.

- Central Government, vide **Notification No. 43-45/2015-Cus**, has amended certain entries and effective rates of basic and additional duty for specified goods.

## QUIZ!!!

**1. What shall be the place of provision of transport services in relation to goods?**

**2. Which form of return is required to be filed by the assessees availing SSI concession under central excise?**

**3. State True or False – "There is no time limit for filing claim of refund of interest paid on service tax."**

(Please mail your replies with your name and 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- **Rs. 5,000/- for each default**
Reply to Q2– **Less than Rs. 50 lakhs**
Reply to Q3– **Rs. 10,000/-**

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1. **Winsome Yarns Ltd. vs Commissioner of C.Ex. & S.T., Chandigarh-II [2015 (318) E.L.T. 261 (Tri. - Del.)]**

**Issue: - Whether benefit under a particular notification can be denied merely on the fact that conditions of some other exemption notification were being fulfilled by the assessee?**

**Decision-** Notification No. 29/2004-C.E. prescribes a concessional rate of duty of 4% for yarn without any condition and as such input duty Cenvat credit can be availed, whereas Notification No. 30/2004-C.E. provides for full duty exemption to the items specified thereunder (including yarn) subject to condition that no input duty credit is availed. In this respect, the Hon'ble Delhi CESTAT held that when two exemption Notifications are available to an assessee, he can always opt for the Notification which is most beneficial for him and in this regard the Department cannot force the assessee to avail a particular exemption Notification. Thus, the department's contention that once the appellant has not availed any input duty credit and have become eligible for Notification No. 30/2004-C.E., they have no option but to avail of the exemption Notification No. 30/2004-C.E. only was said to be incorrect.

2. **Memories Photography Studio vs Commr. Of C.Ex. & S.T., Vadodara [2015 (39) S.T.R. 331 (Tri. – Ahmd.)]**

**Issue: - Whether Cenvat credit can be denied to a service recipient when the service provider has not discharged the tax liability?**

**Decision-** The Hon'ble Ahmedabad CESTAT held that there is no evidence on record that the service recipient was aware of non-payment of service tax by the service provider before taking cenvat credit. A service recipient will only see the cenvatable document under which service tax paid/payable has been indicated. Thus, under present facts and circumstances, Cenvat credit is not deniable to the service recipient and the same has been correctly availed.

3. **Commissioner of C.Ex., Chennai vs Addisons Paints & Chemicals Ltd. [2015 (318) E.L.T. 17 (S.C.)]**

**Issue: - Whether value of packing done for safety during transportation of goods shall be included in the assessable value of goods for calculation of excise duty?**

**Decision-** The Hon'ble Supreme Court held that it is only when packaging is done to make the goods saleable in the market that the cost of such packing is to be included for the purpose of calculating the excise duty. In the present case, parts of sheet glass were being manufactured and the wooden packing was required only for safety during transport. Thus, since packing is not done in order to put the goods in marketable condition and the goods are capable of reaching the market even without the type of packaging concerned, such activity cannot be considered to be a requirement for sale at "factory gate". Hence, value of wooden packing is not includible in assessable value of sheet glass.

4. **Commissioner of C.Ex. & S.T., Noida vs Greater Noida Indl. Development Authority [2015 (38) S.T.R. 1062 (Tri. – Del.)]**

**Issue: - Whether Service Tax is chargeable only on the lease rent or also on one time premium amount charged in respect of long term leases?**

**Decision-** A lease is a transaction which has to be supported by consideration. The consideration may be either premium or rent or both. As regards premium, the Apex Court in the case of *Commissioner of Income tax, Assam and Manipur vs Panbari Tea Co. Ltd.* has made a distinction between premium and rent observing that when the interest of the lessor is parted with for a price, the price paid is premium or salami, but the periodical payments for continuous enjoyment are in the nature of rent. Thus, the premium is the price paid for obtaining the lease of an immovable property. While rent, on the other hand, is the payment made for use and occupation of the immovable property leased. The Hon'ble Delhi CESTAT held that since taxing event under Section 65(105)(zzzz) read with Section 65(90a) is renting of immovable property, service tax would be leviable only on the element of rent and not on the premium or 'salami' paid by the lessee to the lessor for transfer of interest in the property.

# FREQUENTLY ASKED QUESTIONS

*"Independence isn't doing your own thing; it's doing the right thing on your own."*

*- Kim John Payne*

***Team Indirect Tax Express wishes you all a very Happy Independence Day.***

**Query 1: M/s. ABC Ltd. is engaged in the manufacture of cotton yarn. Whether service tax shall be applicable on packing, loading/unloading, and transportation of the cotton waste generated in the course of above process?**

**Reply by e-newsletter team:** As per Exemption Notification No. 25/2012-S.T. dated 20.06.2012 (as amended by Notification No. 6/2014-S.T. dated 11.7.2014), *services provided by way of transportation of cotton, gilled or baled* is exempted from levy of service tax. It is well settled that an exemption notification is to be determined strictly as per the express words mentioned therein without any possibility of deviation. Thus, exemption shall be available only in respect of transportation of cotton, and not cotton waste. All such activities of packing, loading, unloading and transportation of cotton waste shall be liable to service tax.

**Query 2: M/s XYZ Pvt. Ltd. provided repairs services in respect of machinery which belongs to M/s ABC Manufacturing Pvt. Ltd. of Bangladesh. The machinery was imported to Kolkata and after repairs it was re-exported to Bangladesh. Whether service tax is payable on such repairs in India?**

**Reply by e-newsletter team:** As per Rule 4(a) of Place of Provision of service Rules 2012, if service is provided in respect of goods that are required to be physically available by the service provider to the service receiver, place of provision of service is the location where service is actually performed. However, as per proviso to this rule, w.e.f 1.10.2014, Rule 4(a) is not applicable in the case of a service provided in respect of goods that are temporarily imported to India for repairs and are re-exported after the repairs without using them in India. Hence, in such case, Rule 3(Default Rule) of POPS Rules will apply and accordingly place of provision of service shall be location of service receiver i.e. Bangladesh. Therefore, service tax shall not be payable.


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