

CONCEPT AND CONTROVERSY IN APPLICABILITY OF GST ON NGOs



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SUMMARY AND ISSUES OF GST APPLICABILITY TO NGOs

1.1.1 The Central Goods and Service Tax Act 2017 (GST) along with state legislations have brought far reaching changes in the Indirect Tax levy and collection in India. This Act has far reaching implications on the NGO sector also. This Act has raised many legal and conceptual issues with regard to the applicability of GST on NGO sector. A brief overview of such concerns and issues is as under:

- (i) The GST law, primarily, is a combination of both Service Tax laws and taxes being paid on the goods i.e. like Excise duty, Central Sales Tax, Purchase Tax etc. Therefore the question of applicability of GST in case of NPOs should arise if they were otherwise taxable under any of such erstwhile laws. Under Sales Tax or VAT goods were covered and under Service Tax services were covered; the GST combined the two term 'services' and 'goods' and in place of making sale and provision of services as a taxable event, the supply has becomes taxable event under GST.
- (ii) However the applicability of any statute is determined by the provisions of that particular statute. There is a significant difference between the applicability of the erstwhile Service Tax law and the GST.
- (iii) The Service Tax law applied to any service provided against consideration as long as it was not specifically excluded or exempted from levy of tax. Similarly VAT or Sales Tax applied to anykind of sale/trade activity irrespective of the fact whether there was profit motive or not. Even the Hon'ble Supreme Court in the case of *CST v. Sai Publication Fund* [2002] 285 ITR 70/122 Taxman 437 held that indirect taxes were levied on the economic nature of an activity and therefore an activity can be taxable under VAT or Excise law but still may remain charitable in nature as far as Income Tax or some other law is concerned where the dominant objective was important to determine the taxability.

- (iv) Under GST scope of supply has been defined and it provides that to come within the ambit of scope of supply, supply of goods & services should be for a consideration and will have to be in the course of furtherance of business.
- (v) To have greater clarity, the existence of following elements will constitute a 'supply' for the purposes of CGST/SGST Act:
 - (i) the activity should involve supply of goods or services or both;
 - (ii) the supply should be for a consideration unless otherwise specifically provided for;
 - (iii) **the supply should be made in the course or furtherance of business;**
 - (iv) the supply should be made in the taxable territory;
 - (v) the supply should be a taxable supply; and
 - (vi) the supply should be made by a taxable person.

In other words in addition to other conditions the 'supplies' shall be taxable only if it is conducted in furtherance of manufacture, trade, business, vocation, adventure.... In other words a plain reading of the statute implies that a supply of goods and services against consideration shall become taxable only if it is for carrying on or furtherance of business.

- (vi) The Supreme Court of India and various other High Courts on numerous occasions have held that the activities of NGOs cannot be treated as business or commercial activity even if it is in the nature of sale or service, if profit intent is absent.
- (vii) Now the issue arises whether certain activities of charitable or religious organisation become taxable under GST only because they are with consideration even if no business or profit motive is involved. Some examples could be as under:

- A NGO running vocational training institute, its cost per beneficiary/ training is Rs. 10,000/- however it charges only Rs. 2,000/- per beneficiary. This activity is clearly without any profit motive and a genuine charitable activity. But under Service Tax law the sum of Rs. 2,000/- was treated as consideration received from beneficiary therefore Service Tax was applied only on that amount though the total value of services rendered was Rs. 10,000/-. The point to be considered is whether under GST Act the sum of Rs. 2,000/- can be subjected to tax, as the entire activity cannot be treated as furtherance of business as long as the NGO is able to establish that there was no profit motive and it is otherwise recognised as a exempt charitable organisation under Income Tax Act and other applicable statutes.
- An educational institution charging fees to its students but is recognised as a exempt charitable organisation under Income Tax Act and other applicable statutes and it is also not disputed that it is not involved in any business activity as far as its primary business is concerned. In such circumstances there is absence of any business or profit motive therefore GST Act should not apply to such institution at all. It raises a question mark on the guideline issued by the Government titled 'GST on Charitable and Religious Trusts' in this guideline certain educational activity have been treated as taxable and certain other activities are exempted without distinguishing them on the criteria of business or profit motive. Under the current scheme of GST Act there is no reason to tax a educational or medical activity unless it is established that such activity is undertaken towards furtherance of business. The authorities will have a right to exempt or tax a certain category of educational activity only if such activity is covered within the scope of the GST Act.
- A religious institution selling prasad/food to its devotees/visitors without profit motive. In other words overall the organisation is making losses or subsidising such activity from the donations and contribution received. The organisation distributes the prasad free of cost and also may sell

the prasad at different rates/price to different devotees and overall there is considerable loss in the activity. The question is whether GST will apply keeping in view, firstly such activity is an integral part of the primary objectives, secondly there is no profit motive involved and thirdly the organisation is making losses on a continues basis. In such circumstances can it be treated as furtherance of business.

In all the above examples there is no furtherance of business or profit motive still the existing understanding and interpretation of law makers as well as legal experts suggest that GST. Though the definition of the term 'Business' is very broad under GST, however in our opinion, at least, there is a prima facie case of challenging the applicability of GST on those activities which cannot possibly be termed as furtherance of business as they are otherwise treated as furtherance of charity or religion.

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