

APPLICABILITY OF GST TO NGOS

Considering widespread likely impact of GST, legal provisions, rules and available circulars were studied to understand its applicability for NGOs. While one cannot say that GST is applicable to GST per se, simply because there is no blanket exemption to GST to any organization. However one should look at this question, from the point of services NGOs undertake and if these are likely to be taxable.

OVERVIEW

GST constitutes of three components, CGST, SGST (incl. UTGST) and IGST. As the acronyms suggest Central GST represents Central Goods & Services Tax Act 2017, SGST & UTGST represent individual states' & Union Territories' GST Acts. IGST or Integrated Goods & Services Tax Act 2017 represents GST on Interstate sales. The legislations of central & states have been drafted on Model GST laws and are generally similar.

Incidence of GST

As per CGST/SGST Acts, S. 9 provides for the incidence of GST, which basically is on 'supply'. S.9(1) states that '...there shall be levied a tax called the Central Goods and Services Tax on all intra-State (within the state) **supplies** of goods or services or both, on the value determined under section 15 and at such rates.....and shall be paid by the taxable person.'

From the above text it is clear that definition of 'Supply' would be the most important term to determine applicability of GST, alongwith specific prescribed negative list & exemptions. 'Supply' has been defined under S.7 of CGST/SGST/UTGST, while IGST has stated that definitions as given under the above Acts will apply under IGST.

Definition of Supply

S. 7 (1) states that Supply includes:

- (a) All forms of supply of goods & 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 of furtherance of business,
- (b) Import of services for consideration whether or not in the course of business – *could this mean imports even for charity would be covered by GST?*

- (c) Certain specific supplies from related persons, etc. (as covered under Schedule I) made or agreed to be made, even when without consideration,
- (d) Activities falling under Schedule II to be treated as supply of goods or services (Any transfer of title without consideration, any transfer of rights in goods without transfer of title, rental of immovable property, etc. would become supply – likely to have consequences for Non-profits -see below)

Two most important terms used in definition of Supply are 'consideration' and 'business'. These are now looked into to understand application of GST on NGOs.

Consideration has been defined under S.2(31) as any payment made or to be made, in response to 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 Government. Here the words 'any other person' become important in context of NGOs.

In this regard let's examine the Govt circular no. 127/9/2010 reproduced

Circular No. 127/9/2010-ST dated 16-8-2010

Service tax on commercial training and coaching - Whether 'donation' is 'consideration'

1. A representation has been received seeking clarification whether donations and grants-in-aid received from different sources by a charitable Foundation imparting free livelihood training to the poor and marginalized youth, will be treated as 'consideration' received for such training and subjected to service tax under 'commercial training or coaching service'.
2. The matter has been examined. The important point here is regarding the presence or absence of a link between 'consideration' and 'taxable service'. It is a settled legal position that unless the **link or nexus between the amount and the taxable activity can be established, the amount cannot be subjected to service tax.**
3. Donation or grant-in-aid is not specifically meant for a person receiving such training or to the specific activity, but is in general meant for the charitable cause championed by the registered Foundation. Between the provider of donation/grant and the trainee there is no relationship other than universal humanitarian interest. In such a situation, service tax is not leviable, since the donation or grant-in-aid is not linked to specific trainee or training.
4. Trade Notice/Public Notice may be issued to the field formations accordingly.

below.

The above circular issued under Service Tax, clearly required that there is a need to have a link between the person to whom the service is being provided and the person who is providing the consideration. In absence of

such a linkage, service tax was considered not to be leviable (*refer para 2 in the circular*).

However S.7(1c) of CGST clearly states that activities falling under Schedule I to be considered as supply, even if made without consideration. In this regard, clause 3(a) of Schedule I states *Supply of Goods by a principal to his agent where the agent undertakes to supply such goods on behalf of the principal will be treated as a supply under GST*. Thus in the example given in the circular above, if the authorities decide to treat the NGO as an agent of donor (it is often described as implementing agency), then any grant utilised for the benefit of third parties (beneficiaries) is likely to be subjected to GST. However one should remember that an NGO has its own mandate for fulfillment of its objectives, and it could be argued that the NGO is not an agent of the donor, but the program (often attached with the agreement as Proposal submitted by the NGO) belongs to it.

Principle mentioned in the above circular is also echoed in a recent case law on Service Tax, stating that income ought to include consideration for services rendered and cannot be considered as such only on the basis of reimbursement of expenses. [**2010 (7) TMI 176 - CESTAT, BANGALORE**]

In the case of APITCO vs Commissioner of Service Tax, Hyderabad, in which SC upheld the decision of Tribunal that assessee company had implemented welfare schemes consisting of training, technology facilitation, etc. for the Govt for the benefit of the vulnerable / weaker sections of the society and grant in aid received from the Govt was utilized for this purpose alone. Tribunal had held that in implementation of the Governmental schemes, the assessee as implementing agency did not render any taxable "service" to the government.

The Judgment further stated that the department seems to be considering the Governments to be "clients" of APITCO. The question now is whether there was "service provider-client" relationship between the assessee and the governments. Here, again, the nature of the amounts paid by the governments to the assessee is decisive. A client must not only pay the expenses of the service but also the consideration or reward for the service to the service provider. Admittedly, in the present case, there was no payment, by any government to the assessee, of any amount in excess of what is called "grant-in-aid". Thus any service provider-client relationship between the assessee and the governments is ruled out.]

Furtherance of business

Another important term used to define supply is *furtherance of business*.

S.2(17) of CGST Act defines business as trade, commerce, manufacture, profession, vocation, adventure, wager (bet) or any other similar activity, whether or not it is for a pecuniary benefit. All the activities covered under the definition are such which have a profit element, and one could argue that it excludes non-profits. Some doubts have been expressed regarding the implications of last part of the definition, i.e., *whether or not it is for pecuniary benefit* means that it covers non-profit activities. In my view this is not so since the last term cannot be read independent but only in terms of activities as defined under business which as explained earlier are clearly activities undertaken with intention of profits. The context of the last term only clarifies that such activities taken with intention of profits but if do not result in pecuniary benefit, would still be classified as in furtherance of business. However if an activity is undertaken by a non-profit entity, first assumption would be that activity is not furtherance of business, unless otherwise can be proved. For example, where activity can be clearly demonstrated as falling under trade or commerce (selling of artisan products) or profession or vocation (consultancy), and it can be demonstrated to have been undertaken with an intention of making profit/surplus out of such activity. It is not important how this profit will be used, but the intention was to make such profit.

Schedule II defines Transfer as

- (a) *any transfer of the title in goods is a supply of goods;*
- (b) *any transfer of right in goods or of undivided share in goods without the transfer of title thereof, is a supply of services;*
- (c) *any transfer of title in goods under an agreement which stipulates that property in goods shall pass at a future date upon payment of full consideration as agreed, is a supply of goods.*

Thus if a donor donates 'goods' in kind to an NGO, could this be treated as supply of goods ? Say a donor transfers medicines to an NGO to be distributed by the NGO in its health programmes, would these be treated as 'supply' and become subject to GST. Similarly, say if a donor hands over assets for use, would use of these assets become a supply. Based on present understanding of the law, one needs to carefully consider any receipt of in-kind donations.

Applicability of GST on major NGO activities / incomes

Mainly a Non-Profit organisation registered under S.12AA has following type of incomes:

- **Donations:** Once given becomes irrevocable income for the NGO, since no consideration in return for the donor. In our view, since consideration is absent there should not be any GST on a donation.
- **Grants** covering Govt grants, CSR grants, grants from philanthropic organisations to NGOs for implementing various projects.

In absence of any definition within GST / Service Tax, Grant has been defined as follows on www.BusinessDictionary.com

Bounty, contribution, gift, or subsidy (in cash or kind) bestowed by a government or other organization (called the grantor) for specified purposes to an eligible recipient (called the grantee). Grants are usually conditional upon certain qualifications as to the use, maintenance of specified standards, or a proportional contribution by the grantee or other grantor(s).

Grants normally are given to an NGO under an agreement with detailed budget, which outlines, how funds are to be utilised and what outcomes are expected under the Project. These could be running orphanages, extra coaching classes for children, vocational courses for youth, health camps, etc. among several other type of projects.

In this context it is clear that NGOs whose activities fall under definition of **charitable activities** (see Annexure II) as defined in the Mega Exemption Circular No. 25/2012 will remain outside the scope of GST, but what about other NGOs – likely to be the majority. There is no doubt that non-profits or NGOs per se are not working for furtherance of business (there may be exceptions), therefore ideally non-profits should not be covered under GST. The objective of a non-profit is to work for social causes, as defined in its Memorandum /Byelaws. It accordingly prepares proposals for projects to fulfil these objectives and approaches philanthropic agencies / corporates (under their CSR programme) to contribute to its programmes. These agencies may decide to either just give donations (without asking questions) or may enter into an agreement with the relevant agency, requiring regular reporting to ensure accountability over funds used. Asking for reports on how they have performed and putting a condition that if grant is not used in accordance with terms and conditions agreement could be cancelled is a

condition of ensuring accountability and cannot be stated to be a consideration.

In view of the above, in our view Grants per se cannot be classified as supply under GST, since both 'consideration' and 'furtherance of business' is missing in such activities.

It also is being argued that contributing funds to NGOs helps corporates fulfill their legal obligations under S.135 of Companies Act 2013. That may be so, but the ownership of the social program remains that of the Non-Profit organisation. Also several times corporates require that their brands / names / logos, etc. are exhibited in all the materials being published with its money, or even exhibit their companies' names wherever the programmes are being undertaken. Such requirements of branding do complicate the issues, however it may be noted that this should still not alter the applicability of GST on such grant contacts, since the condition of 'furtherance of business' is still missing in the whole activity.

However as a precaution following should be considered:

- NGOs must not raise invoice for receipt of grant, these should be based on Partnership Agreement or MoU. You may have to sign a Purchase Order, but payment terms should be as per attached agreement or MoU.
- Agreement budget must never use term like 'mark-up'. These could attract GST and could even have repercussions under Income Tax.
- Rather than using the terms like branding, etc. suggest use terms like 'due credit' would be given for this support. In any case amount being spent on such 'due credit' should be nominal only.

Reverse Charge Mechanism is applicable only on transactions between a registered and an unregistered supplier. In case your NGO is not registered, Reverse Charge Mechanism would not be applicable. However if your NGO is registered, then you would need to pay Reverse Charge GST. It would be payable on all supplies which are taxable supply by an unregistered vendor. Exemption is upto Rs 5000/- per day for all such supplies. One cannot aggregate a whole month's exemption and say any supply upto Rs 150, 000 would be exempt (Rs 5000x30), it is limit for one specific day, if not used does not mean you can carry it forward. Clearly it is meant for small supplies and cannot cover any major supply.