

# Recent Case Laws

S B Gabhawalla & Co. | Chartered  
Accountants  
Dated 16.04.2016

# What is a service?

Larsen & Toubro Ltd., 2015 (39) S.T.R. 913 (S.C.)

- Whether service tax is leviable on Works Contracts prior to 01.06.2007 (introduction)?
  - Prior to 01.06.2007, department has been demanding service tax on indivisible works contracts under various other categories – commissioning service, installation service, commercial construction service, construction of service, etc.
  - There was neither any charge to tax on works contract, nor any machinery levy and assessment of service tax on indivisible works contract prior to 01.06.2007.
  - **Works contract is a separate species of contract and is distinct from simpliciter contracts.**

# L&T : Learnings...

- Works Contracts not taxable prior to 01.06.2007 (Academic to extent, except pending litigation)
- Assertion of various principles
  - Notification or rule cannot create a charge
  - Valuation is an integral and substantive provision and not procedural
  - In a composite transaction, service portion needs to be clearly specified charging provision itself

# Are we building the right blocks?

# Definition of Service : Structure

- Means
  - Activity for Consideration
  - by one person for another
- Includes
  - Declared Services
- Shall not include (IMAGE)
  - I Immoveable Properties
  - M Money
  - A Actionable Claim
  - G Goods

Service means...

# Activity for Consideration

- Are all receipts covered?
  - Grants for Research
    - PUBLIC HEALTH FOUNDATION OF INDIA V. Commr. Of Service Tax, Delhi [2015 447 (Tri. - Del.)] (Favourable)
    - IIT, Chennai Vs Commissioner Of Service Tax, Chennai, 2015-TIOL-06-CESTAT-M (Against)
  - Donations
- Is it the same as consideration for activity?

# By one person for another

- Mutuality
  - Ranchi Club Limited 2012 (26) S.T.R. 401 (Jhar.)
  - MATUNGA GYMKHANA 2015 (1) TMI 1146 - CESTAT MUMBAI
  - Cricket Club of India
- Deeming Fiction for Branches
  - Implications



# Mutuality of Interest..

Cricket Club of India -2015 (40) S.T.R. 973 (Tri. - Mumbai)

- Whether service tax is payable on entrance fees collected by from new members?
  - In a combined human activity, contribution of, or agreement to contribute funds cannot, therefore, be construed as consideration to be taxable under Finance Act, 1994.
  - To the extent that any of these collections are not directly attributable to an identified activity, provision of a taxable service cannot be imagined or presumed.
  - Contribution to expenses cannot, by any stretch, be deemed to be consideration for any identified service rendered to individual members for access to the facilities or advantage that is within the wherewithal of a "club or association".

# Mutuality – Contd..

Matunga Gymkhana-2015 (38) S.T.R. 407 (Tri. - Mumbai) – Upheld  
Apex Court

- Whether service tax is payable on fees collected by a club from its members?
  - There are no operative legislative provisions of the Act legitimizing and collection of Service Tax from the appellants, for providing any services provided to members of these appellants.
  - on application of the principle of mutuality, services provided to appellants to their respective members would not fall within the ambit of taxable service nor the consideration whether by way of subscription or otherwise received therefor be leviable to Service Tax.

# Deeming Fiction for Branches...

- Services received by branch
  - Jet Airways
  - British Airways
  - Infosys
- Services provided by branch
  - Tech Mahindra
  - Godaddy
- Remittances inter-se between branches
  - Tech Mahindra

# Services received by branch / HO

Jet Airways Ltd., 2014 (36) S.T.R. 290 (Tri. - Mumbai)

- Whether services received from CRS are liable for service tax RCM?
  - Assessee had availed services from Computer Reservation System companies i.r.o. flight reservations/ bookings.
  - CRS companies load airlines' database and transmit the same to travel agents for bookings. Thereafter, once a ticket is booked, the information is transmitted to the airlines.
  - Tribunal observed that though it is assumed that travel agents are beneficiaries of this service, the service recipient is airlines.
  - Since the CRS companies enable the airlines to sell tickets, the airlines are liable to pay service tax.

# Services received by branch / HO

British Airways 2014 (36) S.T.R. 598 (Tri. - Del.)

- Whether services received from CRS are liable for service tax RCM?
  - CRS/GDS companies had been engaged by Head Office in London promoting sale of airline tickets all over the world .
  - Appellant was a branch office, and not a temporary establishment for limited purpose.
  - Payments were made by HO and benefit did not accrue to Indian branch alone.
  - Since the contract was entered into by HO, there is no liability under RCM.

# Services received by branch / HO

Infosys Ltd., 2015 (37) S.T.R. 862 (Tri. - Bang.)

- Whether services received by overseas branch from overseas contractors are liable for service tax under RCM?
  - Indian company had sub-contracted the work to the foreign branch and the foreign branch had further sub-contracted the work to overseas contractors.
  - Payments to the overseas contractors were made by Indian Company through EEFC account in foreign currency.
  - Tribunal held that department cannot treat branch as a part of the main branch to determine who received the service; whereas for the purpose of service tax (normal charge), the branch is considered as a separate person.
  - The services had not been received in India and the benefit also did not accrue in India. Therefore, there was no liability under RCM.<sup>4</sup>

# Services provided by branch / HO

Tech Mahindra Ltd., 2014 (36) S.T.R. 241 (Bom.)

- Can services provided by overseas subsidiaries be considered export of services?
  - Agreement for services was executed between Tech Mahindra and overseas customers for providing ITSS services. Certain onsite activities were outsourced to the subsidiary in USA.
  - Subsidiary was to provide personnel, but overall responsibility of services was with the Indian company. There was no privity of contract between the subsidiary and overseas customers.
  - The nature of services and activities undertaken reveal that they can be provided from India.

Recent Case Laws

• Provider of service was Indian subsidiary outside India and its recipient was outside India. **S B GADHAWALA & CO. Chartered Accountants** vs. **Commissioner of Income Tax**

# Inter – Se Remittances

Tech Mahindra Ltd. & others, CESTAT Mumbai,

Whether remittances made to overseas branch is liable for serv under RCM?

- The branch by its very nature cannot survive without resources assigned by the Head office. The activities of the head office and branch are thus inextricably enmeshed. Its employees are the employees of the overseas branch as a business. The economic survival of the Branch is entirely dependent on finances provided by the Head office. Its mortality is entirely contingent upon the will and pleasure of the Head office.

- The transfer of funds by gross outflow or by netted outflow is therefore, nothing but reimbursements and taxing such



# Cost Sharing Arrangements

## Reliance ADA Group Pvt. Ltd.

- Whether service tax is payable for cost sharing arrangements between group companies?
  - Appellants had procured various services and then cost is allocated to group companies in pre-determined ratio without any mark-up.
  - The goods or services procured by the Appellant for the use of Group Companies are not availed by the Appellant for its own use or consumption.
  - The Appellant has no function or existence other than as Trustee / Manager (agent) of the Group Companies.
  - The Appellant completely satisfies the conditions of a 'Pure Agent' and therefore service tax is not payable.

Services includes...

# Includes Declared Services, Excludes Dee Sales

Declared Service	Controversies
Software	Infosys Limited Oracle
Renting	CIDCO 2015 (37) S.T.R. 165 (Bom.) Gr. Noida 2015 (39) S.T.R. J87 (All.)
Leasing	AGS 2013 (32) S.T.R. 129 (Mad.) Tata Sons [TS-33-HC-2015(BOM)-VAT]
Restaurants	INDIAN HOTELS AND RESTAURANT ASSOCIATION 2014 (34) S.T.R. 522 (Bom.) Kerala Bar Hotels Association and Others 2014 (36) S.T.R. 1205 (Ker.)

Endless Litigation Guaranteed !!!!

# Software

## Infosys Limited – TS-481-HC-2015(KAR)

- Whether activity of implementation of Finacle Software considered as service? Whether the activity of up maintenance of software be considered as service?
  - The customer has the option to engage anybody to implement the software. Therefore, sale of software and its' implementation were two independent activities.
  - There was neither any transfer of property in goods at the implementation, nor there was any deemed sale. Such transaction will attract service tax.
  - For the second issue, as per the agreement, copyrights in the enhanced software/ upgrades/ maintenance and releases vested with Infosys. There was a transfer of right to use and therefore constitutes goods.

# Software – Overlap with customs

## Oracle India Pvt. Ltd. – TS-659-CESTAT-2015-Delhi

- Whether customs duty is payable on software downloaded from internet?
  - The software downloaded from internet though intangible but is 'goods'.
  - The Customs Act in present form provides mechanism for levy and collection of duty only w.r.t. tangible goods and therefore such downloaded software is not liable to customs duty.
- Whether software licence fee is includible in the assessable value of software in media packs?
  - The software consignments were imported and the value declared at the time of importation did not include licence fee paid by Oracle India to Oracle USA.

# Overlap with Customs – Different View

United Shippers Ltd., 2015 (37) S.T.R. 1043 (Tri. - Mumbai)

- Whether principle of mutual exclusivity exists between customs duty and service tax?
  - Shipping charges collected towards transportation of imported goods from mother vessel to jetty.
  - It was held that transportation activity is part of import transport bringing goods into India from a place outside India, hence, import duty is leviable.
  - The import transaction is complete only when the goods reach the customs barriers and the bill of entry for home consumption is filed.
- Value of such transportation charges not includible in value of cargo for service charges.

# Restaurants

Indian Hotels And Restaurant Association- 2014 (34) S.T.R. 522 (E)  
Appealed to Apex Court

- Is service tax on restaurants, constitutional?
  - Parliament inserted Article 366(29A) in the Constitution to enable the State to levy sales tax on goods supplied by way of or as part of any service in any other manner whatsoever.
  - HC stated that service tax is a distinct tax and cannot be confused with sales tax on goods. Further it was mentioned that the Parliament cannot be held to have encroached upon the power of the State Legislature to impose sales tax on sale of goods or to impose a service tax.
  - **Service tax cannot be considered as a tax on sale/ purchase and thus is not a tax on supply of goods as part of any service. Therefore, the validity of service tax on restaurants is upheld.**

# Restaurants

Kerala Bar Hotels Association, 2014 (36) S.T.R. 1205 (Ker.)

- Is service tax on restaurants, constitutional?
  - The bill raised on the customer cannot be split as charged for the service and as charged for the food part and that the supply of food by the restaurant owner to the customer.
  - The whole of the consideration received by a restaurant owner for supply of food and other articles of the human consumption, including the service of the transaction, is exigible to tax by the State by virtue of the constitutional definition.
  - It cannot be said that there is any service involved in the supply of food and other articles of human consumption in a restaurant. It is not open to the Union to characterize the same transaction as a service for imposition of service tax.



# Restaurants

## Valley Hotel & Resorts- 2014 (35) S.T.R. 28 (Uttarakhand)

- Is service tax on restaurants, constitutional?
  - Value Added Tax can be imposed on sale of goods and not on service can be taxed by Service Tax Laws.
  - The authority competent to impose service tax has also assumed com to declare what is service. The State has not challenged the same.
  - Therefore, where **element** of service has been brought under the Ser (i.e. 40% of bill amount to the customers having food or beverage restaurant was made liable to Service Tax) no Value Added Tax imposed thereon.

# Intellectual Property..

## Tata Sons Ltd., TS-33-HC-2015(BOM)

- Whether transfer of non-exclusive right to use intangible goods is considered as a service?
  - Tata Sons had entered into an agreement with Tata Companies to develop, promote and protect the brand equity of word TATA.
  - The trademark was licensed without any exclusive right in favour of transferee.
  - Goods means all kinds of property, including intangible/ incorporeal goods.
  - This would be considered as transfer of right to use goods and is liable to sales tax.

# IP – Service Tax Perspective

AGS Entertainment Pvt. Ltd., 2013-TIOL-521-HC-MAD-ST

Is copyright goods and transfer of copyright of Cinematograph only delivery of goods for consideration?

- The films were in use by the distributor/exhibitor and the same are under effective control of the producer.
- The distributor cannot make use of the film according to his wishes, but is only temporary transfer or permission to use or enjoyment
- The temporary transactions of copyrights or the permission to enjoyment of the copyright cannot be brought either under Entry 54 or Entry 92A of List I.

Service excludes..

# Employment/Pseudo Employment Contracts

# What is a service?

North American Coal Corporation India Pvt. Ltd., - TS-662-AAR-20

- Whether service tax is payable on salary and allowances payable to employees on seconded?
  - The employee was seconded to the Indian group company for a period of 12 months by its parent company in US. Appellant had paid salary to the employee during stay in India. There was no reimbursement of social security benefits by the US company. Department demanded tax under Manpower Supply Service Tax Act, 1997.
  - AAR observed that the employee does not get salary from US Company as he is offering services to the Indian Company. The definition of service tax excludes services offered by an employee to the employer.
- With regards to the salary, the benefits are mutually exclusive and therefore service tax is not payable.

# What is a service?

## Arvind Mills Ltd., - TS-81-HC-2014-GUJ

- Whether service tax is payable deputation of employees to subsidiary company under Manpower Supply Service?
  - The deputed employees did not exclusively work under the direct supervision/ control of subsidiary company. The employer had complete control over the employees.
  - Only the actual cost incurred in terms of salary, remuneration, etc. is reimbursed.
  - The deputation of employees was only for the company's interest. There is no agency-client relationship.
- Since the subsidiary company cannot be treated as client, service tax is not payable.

# What is a service?

Franco Indian Pharmaceutical Pvt Ltd., 2016-TIOL-885-CESTAT-MU

- Whether deputing of employees to group companies be considered service?
  - The marketing network of the Appellant was shared with the companies. Appellants recovered cost of the employees from the companies.
  - In the absence of any mark-up/margin, the payments received against notes by one employer-company upon the other employer-company not partake the character of consideration for any service.
  - It will merely represent reimbursement of shared costs.



# Actionable Claims...

Future Gaming & Hotel Services (Private) Ltd., TS-564-HC-2015(S)

- Whether activity of promoting, organizing or assisting in arrangement and sale of lottery tickets of State Govt. is a taxable service?
  - Buying and selling of lottery tickets is nothing but actionable claim
  - Definition of service excludes a transaction in money or actionable claim
  - The State Govt. and lottery distributors acts on a principal to principal basis. There is no activity carried by assessee in relation to promotion, marketing, organizing, selling, etc. of lottery of any kind. The lottery tickets are supplied by State Govt. to distributors at a discount.

# Transaction in Money

Delhi Chit Fund- 2013 (30) S.T.R. 347 (Del.), Upheld by SC in 2015

- Whether the provision of services in relation to conducting business is a taxable service?
  - In a chit business, the subscription is tendered in any one of the forms of "money".
  - The transaction would fall within the exclusionary part of the definition of the word "service" as being merely a transaction in money.
  - It is the function of an Explanation to explain the meaning and effect of the main provision to which it is an Explanation and to clear up any ambiguity in it.

Provided or agreed to be provided

# Advances...

## Thermax Instrumentation – 2015-TIOL-2736-CESTAT-MUM

- Is service tax payable when advances are received as earnest money?
  - In construction activities, customers are generally required to pay a certain amount as advance.
  - The advance is shown as current liability in the books of accounts and is later shown as income. It is provisionally transferred to sale/ consideration for service as and when proportionate amount is deducted from the advance raised on the customers.
  - Service tax is paid on the advances at the time of raising of invoices.
  - Tribunal held that the advance is not received towards taxable service. The advance is the customer's obligation as his part of the mutual contract between the two parties to honor the terms of the contract and hence not payable on receipt of advance.

# Provisions..

- GENERAL MOTORS (I) PVT. LTD. 2015 (40) S.T.R. 962 (Tri. - Mumbai)
  - With insertion of Explanation in Rule 6 of Service Tax Rules, 1994, value not payment per se but liable to be supplemented by accounting entries relating transacted between associated concerns
  - Royalty may be paid at frequencies scheduled in contract but deemed payment by book entries overrides relevance of actual payment
  - *Much as the appellant would like to alienate the bookkeeping entry from the provision on the ground that such entry is merely for internal management cannot be denied that the transaction has found a place in the books.*
  - *That the management reporting system placed emphasis on monthly booking accruing is also indicative of the importance of such monthly entries from the perception even if the contracted moment of compensation was later*

# Loans..

## Reliance Infratel – TS-130-CESTAT-2015-Mum

- Is service tax payable on loan/deposit amounts ?
  - Granting of a loan/deposit does not tantamount to rendition of service
  - Master Service Agreement provided for appropriation of the loan against stage wise payments.
  - It does not partake the character of advance and therefore service tax payable on the same

On the gross amount charged

# Notional Income, whether taxable?

## Reliance Infratel – TS-569-CESTAT-2015-Mum

- Is service tax payable on notional lease rent as per AS-19?
  - Assessee had transferred an right to use telecom towers for 10 years stated in the financial statements certain amounts as notional figure 'lease rent equalization' as per AS-19.
  - Service tax was paid on the amounts actually received.
  - The notional amount is neither a payment which is actually received, a 'consideration' charged.
  - Service tax is not payable on such notional amounts.



# TDS grossed up, service tax implications.

Magarpatta Township Development And Construction Co Ltd., 2  
TIOL-660-CESTAT-MUM

- Whether Service Tax liability arises on the Income Tax amount deducted as TDS and paid out of pocket?
  - The value of service is equal to the actual **consideration charged** for services provided or to be provided.
  - Appellant had not recovered the amount of Income Tax paid by them amount paid to the service provider from outside India.
  - Service Tax liability needs to be discharged on amounts which have been billed by the service provider.

# Free Supplies, whether to be added..

- Bhayana Builders...

- Free supplies to construction service provider - They are outside tax or gross amount charged, within meaning of expression in Section 11 of Finance Act, 1994
- Exemption Notification cannot enjoin condition that value of free must also go into gross amount charged for valuation of the taxable supply
- Consideration for transfer of property in goods from seller to buyer is relevant for sales tax, consideration for transfer of property in goods from seller to buyer is relevant and tax must be levied on consideration for transfer of property - This is unlike in case of Excise duty where levy is event based irrespective of whether goods are sold or captively consumed, liability is on manufacturer even where manufacturer is not owner of raw material or finished goods

Recent Case Laws: *SAL GABRIEL & Co Chartered Accountants* vs. *Commissioner of Service Tax* (2014) 42 ELT 1004 and is not applicable to levy of Service Tax under Finance Act, 1994 and is not applicable to levy of Service Tax under Finance Act, 1994.

# Thank You