

Exemption from Service Tax on Education Related Services under the Comprehensive Scheme of Taxation by Finance Act, 2012 Needs To Be Widened



The negative list in clause 66D of the Finance Act, 2012, details the 17 services on which no service tax would be leviable. Sub-clause (I) of this list relates to services concerning education, which would be free from service tax. The three categories of services concerning education mentioned in the negative list in Section 66D(I), as also in the notification for being non-taxable, considerably narrows down the scope of services related to education, which need to be expanded in wider public interest. In a country where there is considerable illiteracy, unemployment and no organised social security system, the meaning of education needs to be broadly considered and interpreted under the Income-tax Act, 1961. Persons engaged in numerous fields of education, as held in income tax cases, need to be considered as engaged in education and should be entitled to be in the negative list or in mega notification and not subjected to service tax.



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Introduction

Tax on services started being charged *w.e.f.* the Assessment Year 1994-95 by the Finance Act, 1994. The concept, the method of levy of tax, the circumstances in which such tax can be charged, procedures, assessments, penalty, etc., were specified in Chapter V of the Finance Act 1994. It was visualised as a services specific tax, presently chargeable in respect

of nearly 110 notified services. It was visualised and introduced for the first time in India by Dr. Manmohan Singh, the then Finance Minister, who, in his budget speech for the year 1994-95, said while introducing this tax:-

“There is no sound reason for exempting services from taxation. I, therefore, propose to make a modest effort in this direction by imposing a tax on services of telephones, non-life insurance, and stock brokers”.

Selective Tax Approach in India

This tax has been introduced under the residuary entry of the Constitution and as such, could not be through a separate enactment. Therefore, service tax was levied under Chapter V of the Finance Act, 1994. To start with, only three services were subjected to this tax. The approach to this tax before the Finance Act, 2012 has been selective – not comprehensive. Under the selective approach, the Legislature attempts to specify and list the services that would be taxable and the scope and coverage of each service. The approach is *qua* the service provider and not in *generis*. Simultaneously, the coverage of tax is also *qua* a category of service. In brief, under the selective approach in vogue till lately, for attracting the tax, the following requirements were required to be satisfied:-

- There has to be service
- It has to be a taxable service
- It has to be provided by a service provider covered under the Act to a service receiver
- The service has to be provided on payment.

By and large, the tax is to be paid by service provider though in certain circumstances, service recipient may also be made liable to pay the tax (reverse charge mechanism).

Comprehensive Approach

The comprehensive approach contemplates the taxation of all services and a negative list of services specified for exempting the same from taxation. Such a comprehensive approach is in operation in many developed nations.

However, the formulation of a comprehensive approach requires a clear unambiguous definition of the term ‘service’, otherwise the same may lead to conflict, especially since many services like advertisement, property related utilities, etc., are also the subject matter of the State List.

Changeover from Selective to Comprehensive Approach

India, having a service tax regime on ‘selective’ approach for nearly 18 years, has now changed to a comprehensive approach. The Finance Minister, while moving the budget proposals for the year 2012-13, has announced moving over to a comprehensive regime. Paragraphs 159 & 160 of the budget speech read as under:-

“159. Last year, I had initiated a public debate on the desirability of moving towards taxation of services based on a negative list. In the debate that continued for the better part of the year, we received overwhelming support for this new concept. It has been perceived both as sound economics and prudent fiscal management.

160. Thus, I propose to tax all services except those in the negative list. The list comprises 17 heads and has been carefully drawn up, keeping in view the federal nature of our polity, the best international practices and our socio-economic requirements”.

Negative List

The negative list in clause 66D of the Finance Act, 2012 details 17 services on which no service tax would be leviable. Sub-clause (l) of this list relates to services concerning education, which would be free from service tax. This clause reads as under:-

“66D(l) services by way of -

- (i) pre-school education and education up to higher secondary school or equivalent;
- (ii) education as a part of a curriculum for obtaining a qualification recognised by law;
- (iii) education as a part of an approved vocational education course.”

In mega Exemption Notification, issued by CBEC, it has been clarified that ‘auxiliary’ educational services will also be exempt from service tax.

Such educational services have been exempted from tax. The scope of exemption of services in vogue before the Finance Act, 2012 relating to education, on

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the basis of selective approach (barring commercial training or coaching done purely as business ventures) gets curtailed because it would be confined to three categories of services only mentioned at clause (l) in the negative list.

Education can also be said to be exempted from service tax by the Finance Act, 2012 in a limited way, under the definition of ‘charitable activity’ as adopted for the service tax legislation. It is a progressive step to make the concept of ‘education’ under the service tax law compatible with the definition under the Income-tax Act, 1961 (IT Act) to adhere to the principle of ‘*pari-materia*’ in the interpretation of statutes under the IT Act in a limited way. Charitable purpose has been defined, in the IT Act, *inter alia*, to include “relief of the poor, education and medical relief....”. In the Finance Act, 2012, for service tax law, ‘charitable activity’ has been defined in Exhibit-A of the mega notification, which *inter-alia*, means -

- [c] advancement of educational programmes or skill development relating to-
- (i) abandoned, orphaned or homeless children;
 - (ii) physically or mentally abused and traumatised persons;
 - (iii) prisoners; or
 - (iv) persons over the age of 65 years residing in a rural area.

From these, it could be seen that the benefit of exemption from tax under the service tax is quite restricted.

Scope of Educational Services in the Negative List Needs to be Widened and Broadly Interpreted

The three categories of services concerning education mentioned in the negative list in Section 66D, as also in the notification for being non-taxable, considerably narrows down the scope of services related to education, which needs to be expanded in wider public interest. In a country, where there is considerable

illiteracy, unemployment and no organised social security system, the meaning of education needs to be broadly considered and interpreted under the IT Act.

‘Education’ under the IT Act

Section 11 of the IT Act provides exemption from property held under trust for charitable purpose. Section 2(15) of the IT Act defines charitable purpose, *inter-alia*, to include ‘education’. The word ‘education’ has not been defined in the Act, but has been broadly construed in various decisions of the High Courts and income there-from has been considered as exempt, considering the same as arising from educational activities.

Education – Coverage of

There is no definition of ‘education’ in the IT Act. Hence, it has to be interpreted in the sense, as it is commonly understood. In ‘Advanced Law Lexicon’ by P. Ramanatha Aiyar, third edition, 2005 at page 1542, ‘education’ has been explained thus-

“Education is the bringing up; the process of developing and training the powers and capabilities of human beings. In its broadest sense, the word comprehends not merely the instruction received at school, or college but the whole course of training moral, intellectual and physical; is not limited to the ordinary instruction of the child in the pursuits of literature. It also comprehends a proper attention to the moral and religious sentiments of the child. And it is sometimes used as synonymous with ‘learning’.”

In Article 41 of the Constitution, ‘education’ has been used without any limitations attached to it like education in schools/college only. In the context of Constitution, the word has to be interpreted broadly, not narrowly. Hence, it has to be construed as an ‘act or process of providing with knowledge’ in any manner.

In the case of *T. M. A. Pai Foundation vs. State of Karnataka (2002) 8 SCC 481 (Para 450)*, the Apex Court has said that the expression ‘education’ occurring in various Articles of the Constitution of India means and includes education at all levels, from


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the primary school level up to the postgraduate level and professional education.

High Court/Tribunal on 'Education'

In *CIT vs. Bar Council, Madras (1943) 11 ITR 1 (Mad)*, the activity of giving facilities for legal education and training of the advocates has been held to be an educational purpose.

In *Royal Choral Society vs. IRC (1944) 12 ITR (Suppl) 13(CA)*, the object of the assessee society was to promote the practice and performance of choral works. With this object in view, the assessee society used to give public performances of the choir. It was observed that training and practice of choral was promotion of aesthetic, education, which is just as much education as lecturing or teaching in a class or anything of that kind. Accordingly, the object of the society was held to be promotion of education.

In *ITO vs. Maganbhai S. Patel (2000) 74 ITD 841 (Ahd-Trib)*, it has been observed that, where the dominant object of the trust was to spread education by establishing, constructing, maintaining, contributing to or running institution and giving of assistance to students by way of scholarships, tuition fees, etc., it was engaged in the charitable activity of education.

In *Ecumenical Christian Centre vs. CIT (1983) 139 ITR 226 (Karn)*, the view expressed is that promotion of search for truth and diffusion of useful knowledge, promotion of conferences and discussions, the foundation and maintenance of conference centres and reading rooms and publications of journals and books for general use among the members and others are not beyond the scope of education. After referring to the decision of the Supreme Court in the case of *Loka Shikshana Trust*, the court held that the objects of diffusion of useful knowledge, publication of journal and promotion of search for truth were directly related to education. There was no material on record to show that the company was engaged in any trade or business and hence, the court held that education was being promoted by the assessee. It is to be appreciated that the High Court adopted a broader approach by accepting

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the principle that over and above normal schools, other means of rendering scholastic instruction are also included in the definition of education under Section 2(15).

There are quite a few other decisions but the foregoing ones clearly show that the term 'education' in 'charitable purpose' has to be interpreted widely - not narrowly.

Extension of financial assistance to students for their education squarely and fairly falls within the connotation of education [*CIT vs. Saraswath Poor Students Fund (1984) 150 ITR 142 (Karn)*].

Supreme Court on 'Education'

The Apex Court in one of its decisions, while explaining the meaning of education some 37 years back, has made some observations, which cannot be said to express the correct meaning of this concept. The observations of the Apex Court in *Sole Trustee Loka Shikshana Trust vs. CIT (1975) 101 ITR 234 (SC)* are:-

"The word 'education' has not been used in that wide and extended sense, according to which every acquisition of further knowledge constitutes education. According to this wide and extended sense, traveling is education, because as a result of traveling, you acquire fresh knowledge.

Likewise, if you read newspapers and magazines, see pictures, visit art galleries, museums and zoos, you thereby add to your knowledge. But that is not the sense in which the word 'education' is used in clause (15) of Section 2. What education connotes in that clause is the process of training and developing the knowledge, skill, mind and character of students by normal schooling".

With great respect to the Apex Court, it needs to be appreciated that this view, expressed long back, cannot be said to apply in the context of the continuing advancement in education, which encompasses varied fields in higher education, research work, doctoral work, information technology and so on. In any case, the Government and Courts have already deviated from the Supreme Court's interpretation (*supra*) by expanding the meaning of this concept. CBEC too has

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expanded the meaning of education under the above mentioned three heads, but has not gone a long way. For example, services provided by way of education as a part of a prescribed curriculum for obtaining a qualification recognised by law of a foreign country will be subject to service tax, being not covered by negative list. Similarly, services rendered in the context of skill development, not coming within the three heads in sub-clause (l) have not been brought within the purview of sub-clause (l).

- It was observed in *Barralet vs. Attorney General* that the law on charity is a moving subject and evolving all the time.
- Similarly, in House of Lords in *IRC vs. McMullen (545 TC 413 HL)* it was held that

‘the educated man’s ideas about education are not static, but are moving and changing’.

- In *Incorporated Council of Law Reporting for England and Wales vs. Attorney General (47 TC 321)*, the view taken is that the income of the council, which was engaged in the publication of the reports of judicial decisions delivered by Superior Court in a convenient manner, was applied solely towards the advancement of the activity of education and hence, the same should come within the compass of education and be not subjected to Income-tax.

Hence, persons engaged in numerous fields of education, as held in income tax cases, need to be considered as engaged in education and should be entitled to be in the negative list or in mega notification and not subjected to service tax. The present status of wider concept of tax-free education under the selective approach (minus services of training/coaching institutions, pursued as purely commercial/business ventures) needs to be restored under the new comprehensive scheme of taxation also. ■



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