

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
NO.1, WILLIAMS ROAD, CONTONMENT, TIRUCHIRAPPALLI-620 001.

General Circular No.2/2009 S. Tax

Dated: 10-2-2009.

Subject: 1) Circular No. 107/01/2009-ST dated 28-1-2008-
 Levy of service tax on educational institutions
 2) Circular No. 108/02/2009-ST dated 29-1-2009 –
 Imposition of service tax on Builders -
 –Communication –Regarding.

Ministry's Service Tax Circular No. 107/01/2009-ST dated 28-1-2009 issued in F.No.137/23/2007-CX.4 and Circular No.108/02/2009-ST dated 29-1-2009 issued in F.No.137/12/2006-CX.4, on the above subject are enclosed herewith for information, guidance and necessary action.

The contents of this General Circular may be brought to the notice of field formation.

(Issued from C.No.IV/16/813/2009 S .Tax)

Encl.: As above.

Sd./-
 (A. RAJENDRAN)
 ASSISTANT COMMISSIONER

To
 The Mailing list - III.

Copy of Board's Service Tax Circular No. 107/01/2009-ST dated 28-1-2009 issued in F.No.137/23/2007-CX.4 and Circular No.108/02/2009-ST dated 29-1-2009 are reproduced below.

Subject: Levy of service tax on educational institutions- regarding

Various educational institutions impart training and conduct courses in different fields. Many of these institutions issue certificates/degrees/diplomas to the candidates upon their successfully completing such courses. Apart from government run or aided institutes imparting education, training or coaching, there are several private run institutes or centers, which impart education/ training/ coaching, teach skills, help in preparing for competitive examinations or run classes on various subjects. Service tax is leviable on services provided by 'commercial training and coaching centers', since the year 2003. Over a period of time, certain doubts /disputes have arisen in the field in respect of the chargeability of service tax on the fees/ charges collected by such institutes and education centers. Some of such issues have been discussed below.

2. COMMERCIAL NATURE OF INSTITUTE

The first issue arises from the very name i.e. **Commercial training or coaching center**'. Many service providers argue that the word '**commercial**' appearing in the aforementioned phrase, suggests that to fall under this definition, the establishment or the institute must be **commercial (i.e. having profit motive)** in nature. It is argued that institutes which are run by charitable trusts or on no-profit basis would not fall within the phrase *commercial training or coaching center* and none of their activities would fall under the taxable service. This argument is clearly erroneous. As the phrase '**commercial training or coaching center**' has been defined in a statute, there is no scope to add or delete words while interpreting the same. The definition *commercial training or coaching center* has no mention that such institute must have 'commercial' (i.e. profit making) intent or motive. Therefore, there is no reason to give a restricted meaning to the phrase. Secondly, service tax, unlike direct taxes, is chargeable on the gross amount received towards the service charges, irrespective of whether the venture is 'profit making, loss making or charity oriented' in its motive or its outcome. The word "Commercial" used in the phrase is with reference to the activity of training or coaching and not to the nature or activity of the institute providing the training or coaching. **Thus, services provided by all institutes or establishments, which fulfills the requirements of definition, are leviable to service tax.**

3. POST SCHOOL EDUCATION

3.1 Determination of taxability of education, other than school education is more complex and poses more questions. This is because, it covers an entire gamut of educational courses, such as formal higher education (i.e. bachelors, masters, doctoral, post doctoral course), specialized education, vocational education, language (including foreign language) courses etc. These vary

in terms of their content; purpose; scope; and the type of institutes or establishments, which impart them.

3.2 The system of statutory recognition of educational establishments or institutions in India is still in the state of evolution. As regards university education, University Grants Commission (UGC) is the apex regulating body. As per the objects of the University Grants Commission Act, 1956 (which established UGC) the said Act is 'to make provision for the co-ordination and determination of standards in Universities and for that purpose, to establish a University Grants Commission'.

As per the definition, in terms of Section 2(f) of the Act, a University means a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in this behalf under this Act. . Therefore, all universities which are a creature of a State or Union Act fall within this definition of 'University'.

Further, Section 3 of the Act, explains the scope of a 'deemed university' and defines that the Central Government may, on the advice of the Commission, declare by notification in the Official Gazette, that any institution for higher education, other than a University, shall be deemed to be a University for the purposes of this Act, and on such a declaration being made, all the provisions of this Act shall apply to such institution as if it were a University within the meaning of clause (f) of section 2.

Also, UGC, with the approval of Central Government and under the Recognition of College in Terms of Regulations, 1974 framed under the UGC Act, can grant recognition to a college or institution run by a trust, a registered society or a body corporate or body incorporated under Central or state Act as an institution affiliated to or form as constituent member with a university, providing education up to a bachelors degree, masters degree or diploma of a duration of minimum one academic year

As per National Policy on Education, 1986, a scheme of autonomous colleges was promoted. In the autonomous colleges, whereas the degree continues to be awarded by the university, the name of college is also included. These colleges develop and submit new courses of study for approval by the university. These autonomous colleges are fully responsible for the conduct of examination.

As all these institutions or establishment are either created or recognized in terms of the power conferred by statutes, they would fall in the category of institutes/ establishments which issues diploma or certificate recognized by the law for the time being in force. As regards issuance of degree, section 22(1) of the said Act, provides for right of conferring or granting degrees only by a 'university' (as defined above) or a 'deemed university' (as defined above).

3.3 In addition, for recognition of professional courses, promotion of professional institutions and providing grants to various programmes, a number of 'professional councils (Such as All India Council for Technical Education-AICTE, Medical Council of India-MCI, Indian Council for Agricultural Research-ICAR, Bar Council of India-BCI) have been created through independent Union Acts. Since, *inter alia* these councils are entrusted with ensuring norms and standards of the courses, physical and instructional facilities, undertaking assessment etc., they have also been provided with powers to make subordinate legislations (i.e. through notifications, circulars, rules) that the institutions or the establishments within their ambit must abide. In case of default, the councils have the power to derecognize an institution or establishment or a particular course being conducted by them, even if they are recognized as a university, a deemed university or an affiliated college. If an institution or establishment is derecognized, then such institution or establishment cannot be called to be an institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by the law for the time being in force. With the result, the courses conducted would fall under the ambit of 'commercial training or coaching centers' and would be charged to tax. It may however, be noted that for exercising such power, there should be a valid rule / notification / circular, prescribing the minimum requirements or standards as also the consequences of default.

3.4 All India Council for Technical Education-AICTE, was started in 1945 with the objectives stated above. Based on the recommendations of a 'National Working Group' (constituted by the Government of India) that AICTE be vested with the necessary statutory authority, it was given legislative support through an Act, called the AICTE Act, 1987. AICTE, using the powers conferred on it through 1987 Act, issued the 'AICTE (Grant of Approval for Starting New Technical Institutions, Introduction of Courses or Programme and Approval), Regulation 1994. Theses were amended in the years 1997 and 2000. Under Regulation 4 (Requirement of Grant of approval) of these Regulations, AICTE prescribed that,-

"After the commencement of these regulations,-

- a. No new Technical Institution or University Technical Department shall be started; or
 - b. No course or programme shall be introduced by any Technical Institution, University including a Deemed University or University Department or Collage; or
 - c. No Technical Institution, University or Deemed University or University Department or College shall continue to admit students for Degree or Diploma course; or
 - d. No approved intake capacity of seats shall be increased or varied;
- Except with the approval of the council.

The powers to issue regulations for approval are conferred on AICTE under Section 23 read with Section 10 of the AICTE Act.

3.5 In 2003, when service tax was first imposed on commercial training and coaching centers, the AICTE regulations required that for (a) starting or establishing new technical institutions; (b) introduction of additional programmes; or (c) increase in 'intake' in the existing programmes of AICTE approved institutions, a 'no objection certificate' from the concerned State government /UT would be required (notification F.37-3/Legal (iii)/2002 dated 10.09.2003). This notification does not prescribe any certification for existing institutes or establishments, which did not introduce any additional programme or did not increase in 'intake' in an existing programme. Thus, at that stage, not having a AICTE approval for such existing institution or establishment did not make them ineligible for being an institute or establishment which issues any certificate or diploma or degree or any educational qualification recognized by the law for the time being in force. Thus, if otherwise recognized or accepted, this sole reason of absence of AICTE approval did not cause such institutions or establishments to be within the service tax net. On 6.01.2005, vide notification No. F.37-3/Legal/2004, the previous AICTE Regulations was replaced by new Regulations. These Regulations expanded the scope and stated (Regulation No. 5) that no new technical institution of the Government, Government Aided or Private institution shall be introduced; no new courses or programs in technical education shall be introduced or no variation of intake shall be effected or **no existing technical institution of the Government, Government Aided or Private institution shall conduct any technical course** without prior approval of the council. The Regulation No. 7 of these Regulations also stated that the council shall, in every year publish the names of approved technical institutions, conducting course in technical education, the course and programs approved by the council and the number of seats permitted for each course etc. These Regulations were again superseded by another set of Regulations issued vide Not. No. F-37-3/Legal/2004 dated 28.11.2005, where the requirement of grant of approval by AICTE was further elaborated to specifically include universities, deemed universities and any admission authority etc. Vide notification No. F-2-1/2006 U.3 (A) dated 5.04.2006 the Central Government issued clarification regarding the role and the powers of AICTE and UGC with respect to 'Deemed to be University'. From the above it emerges that from the year 2005 onwards, a technical institution or establishment (which is otherwise recognized being a university, or affiliate college) not having AICTE approval cannot be called to be the one issuing any certificate or diploma or degree or any educational qualification recognized by the law for the time being in force and thus be within the ambit of service tax. However 'Deemed to be University' have been exempt from this requirement. As per the said notification for the institutes 'Deemed to be University', it is not a pre-requisite to obtain the approval of AICTE to start any programme in technical or management education leading to an award, including degrees in disciplines covered under the AICTE Act, 1987. However, such institutes are required to ensure the maintenance of the minimum standards prescribed by the AICTE for various courses under the jurisdiction of the said council.

3.6 Similar would be the situation in case of other Statutory Councils.

3.7 A related issue is, that since the concept of recognition of an educational qualification in India has been dynamic in nature (i.e. the degree/ diploma/ certificate an institute or establishment may be recognized by the law at one time and not recognized at other, due to change in legal provisions) the taxability of the courses conducted would depend on the legal status of such institute or establishment at the point of time when such service is provided (i.e. course is conducted). It cannot be said that once recognized an institute or establishment would remain so even in future or was so in the past.

3.8 Many a time private institutes conduct courses and issue diplomas or certificates in collaboration with certain foreign institutes universities. In many cases private enterprises conduct campus interviews of the students of such institutes and offer them jobs. Such certificates / diplomas may be accepted for higher education abroad. However, such a certificate / diploma cannot be called as the one 'recognized by the law for the time being in force' unless such a diploma/ certificate has been specifically recognized by the statutory authorities such as UGC, AICTE. Consequently, such institutes would not fall under the exempted category and would be subjected to tax.

4. VOCATIONAL TRAINING INSTITUTE

The vocational training institutes are exempted from service tax vide notification no. 24/2004-ST, dated 10.09.2004 (as amended). By definition, such institutes should provide training or coaching that imparts skill to enable the trainee to seek employment or undertake self-employment, directly after such training or coaching. Disputes have arisen in respect of institutes that offer general course on improving communication skills, personality development, how to be effective in group discussions or personal interviews, general grooming and finishing etc. It is claimed that such training or coaching improves the job prospects of a candidate and therefore they are eligible for exemption as 'vocational training institutes. However, a careful reading of the definition shows that the exemption is available only to such institutes that impart training to enable the trainee to seek employment or self-employment. The courses referred to above do not satisfy this condition because on their own such courses do not prepare a candidate to take up employment or self-employment directly after such training or coaching. They only improve the

chances of success for a candidate who already has the required skill. Therefore, such institutes are not covered under the exemption.

5. CONCLUSION

All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

(Gautam Bhattacharya)
Commissioner (Service Tax)
CBEC, New Delhi

New Delhi, dated 29th January 2009

Subject: Imposition of service tax on Builders - regarding

Construction of residential complex was brought under service tax w.e.f.01.06.2005. Doubts have arisen regarding the applicability of service tax in a case where developer / builder/promoter enters into an agreement, with the ultimate owner for selling a dwelling unit in a residential complex at any stage of construction (or even prior to that) and who makes construction linked payment. The 'Construction of Complex' service has been defined under Section 65 (105)(zzzh) of the Finance Act as "*any service provided or to be provided to any person, by any other person, in relation to construction of a complex*". The 'Construction of Complex' includes construction of a 'new residential complex'. For this purpose, 'residential complex' means any complex of a building or buildings, having more than twelve residential units. A complex constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex intended for personal use as residence by such person has been excluded from the ambit of service tax.

2. A view has been expressed that once an agreement of sale is entered into with the buyer for a unit in a residential complex, he becomes the owner of the residential unit and subsequent activity of a builder for construction of residential unit is a service of 'construction of residential complex' to the customer and hence service tax would be applicable to it. A contrary view has been expressed arguing that where a buyer makes construction linked payment after entering into agreement to sell, the nature of transaction is not a service but that of a sale. Where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. It has also been argued that even if it is taken that service is provided to the customer, a single residential unit bought by the individual customer would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax.

3. The matter has been examined by the Board. Generally, the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

4. All pending cases may be disposed of accordingly. Any decision by the Advance Ruling Authority in a specific case, which is contrary to the foregoing views, would have limited application to that case only. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

(Gautam Bhattacharya)
Commissioner (Service Tax)
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