GST IMPACT ON HOUSING SOCIETIES

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GST IMPACT ON HOUSING SOCIETIES

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One may start with a bit of history relating to Service Tax. Dr. Raja Chelliah Committee on tax reforms recommended the introduction of service tax. Service tax had been first levied on three services [Insurer, Stock-Broker and Telegraph Authority] at a rate of five per cent flat from 1st July 1994 till 13th May 2003, then the rates of tax were stepped up, education cess was added to boost revenue.

2. The revenue from the service tax to the Central Government has shown a steady rise since its inception in 1994. The tax collections have grown substantially since 1994–95 i.e. from Rs. 410 crore to Rs. 132,518 crore in 2012–13. The total number of Taxable services increased from 3 in 1994 to 119 in 2012. In the last fiscal, (2016-2017) the Service Tax revenue was about Rs. 254,000 crore.

3. In the Service Tax regime, prevalent during the period till 30th June 2012, the service tax was levied only on the Specified categories of activities mentioned as "taxable services" in the Finance Act, 1994.

4. Effective 16th June 2005 vide Notification No.15/2005-ST, dated 7th June 2005, a new Category of Taxable Service was introduced vide Section 65(25a) of the Finance Act, 1994:

- **"Club or Association"** means providing services, facilities or advantages, for a subscription or any other amount, to its members, **but does not include**-

  (i) **any body established or constituted by or under any law for the time being in force; or (RWA/Housing Society)**

(ii) any person or body of persons engaged in the activities of trade unions, promotion of agriculture, horticulture or animal husbandry; or

(iii) any person or body of persons engaged in any activity having objectives which are in the nature of public service and are of a charitable, religious or political nature; or

(iv) any person or body of persons associated with press or media;

- Section 65 (105) (zzze) of the Finance Act, 1994, defined **"Taxable Service"** means any service provided or to be provided to its members, by any club or association in relation to provision of services, facilities or advantages for a subscription or any other amount.
- Thus, until 30th June 2012, the Co-operative Housing Societies were outside the Service Tax net.

5. However, from 1st July 2012 the concept of taxation on services was changed from a 'Selected service approach' to a 'Negative List regime'. This changed the taxation system of services from tax on some Selected services to tax being levied on every service other than exempt services mentioned in the Negative list.

6. The Central Government had issued Notification [Notification No. 25/2012-S.T., dated 20-6-2012] effective 1st July 2012 granting Exemption to the Co-operative Housing Societies under certain conditions: Entry 28 reads:

"28. Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, **to its own members by way of reimbursement of charges or share of contribution -**

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of service tax; or

(c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

7. There were certain doubts and the Central Board of Excise & Customs, the Apex Administrative body, (CBEC) had clarified the position vide its Circular No. 175/1/2014-S.T., dated 10-1-2014:

Sl. No.	Doubt	Clarification
1.	In a residential complex, monthly contribution collected (i) from members is used by the RWA for the purpose of making payments to the third parties, in respect of commonly used services or goods [Example: for providing security service for the residential complex, maintenance or upkeep of common area and common facilities like lift, water sump, health and fitness centre, swimming pool, payment of electricity Bill for the common area and lift, etc.]. Is service tax leviable? (ii) If the contribution of a member/s of a RWA exceeds five thousand rupees per month, how should the service tax liability be calculated?	Exemption at Sl. No. 28(c) in notification No. 25/2012-S.T. is provided specifically with reference to service provided by an unincorporated body or a non-profit entity registered under any law for the time being in force such as RWAs, to its own members. However, a monetary ceiling has been prescribed for this exemption, calculated in the form of five thousand rupees per month per member contribution to the RWA, for sourcing of goods or services from third person for the common use of its members. If per month per member contribution of any or some members of a RWA **exceeds five thousand rupees, the entire contribution of such members** whose per month contribution exceeds five thousand rupees **would be ineligible for the exemption under the said notification.** Service tax would then be leviable on the aggregate amount of monthly contribution of such members.
2.	(i) Is threshold exemption under notification No. 33/2012-S.T. available to RWA? (ii) Does 'aggregate value' for the purpose of threshold exemption, include the value of exempt service?	Threshold exemption available under notification No. 33/2012-S.T. is applicable to a RWA, subject to conditions prescribed in the notification. Under this notification, taxable services of aggregate value not exceeding ten lakh rupees in any financial year is exempted from service tax. **As per the definition of 'aggregate value' provided in Explanation B of the notification, aggregate value does not include the value of services which are exempt from service tax.**

Sl. No.	Doubt	Clarification
3.	If a RWA provides certain services such as payment of electricity or water bill issued by third person, **in the name of its members**, acting as a 'pure agent' of its members, is exclusion from value of taxable service available for the purposes of exemptions provided in Notification 33/2012-S.T. or 25/2012-S.T.?	In Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, it is provided that expenditure or costs incurred by a service provider as a pure agent of the recipient of service shall be excluded from the value of taxable service, subject to the conditions specified in the Rule. For illustration, where the payment for an electricity bill raised by an electricity transmission or distribution utility in the name of the owner of an apartment in respect of electricity consumed thereon, is collected and paid by the RWA to the utility, without charging any commission or a consideration by any other name, the RWA is acting as a pure agent and hence exclusion from the value of taxable service would be available. **However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., Since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available.**
4.	Is CENVAT credit available to RWA for payment of service tax?	RWA may avail cenvat credit and use the same for payment of service tax, in accordance with the Cenvat Credit Rules.

Clarification by the Central Government

8. The aforesaid clarification given in January 2014 by the Central Government in the context of the Negative List regime of taxation of services, effective 1st July 2012, has been the basis of levy of Goods & Services Tax under the new GST regime effective 1st July 2017.

- It would be relevant to understand the role played by Resident Welfare Association or the Co-operative Housing Society as service providers to its Members or Shareholders, respectively, and the legal structure & status of these service providers under the law.

Resident Welfare Associations – [RWA]

9. In Delhi and several other cities in India, one will see that residential colonies are having a Resident Welfare Association for each colony and each block. For example, if one is staying at G-Block SAKET, it will be having an independent G-Block Resident Welfare Association (RWA). Resident Welfare Associations (RWAs) are typically registered under the Societies Registration Act, 1860; they are governed by constitutional documents such as a Memorandum of Association, which contains their objectives and functions. Being voluntary associations, made by residents, they don't have any statutory powers and have powers restricted to the contribution of sums for maintenance, and are answerable for accounting thereof.

- Some activities & functions are:

  (a) To take up the matter with the competent authorities for the common interest of the residents for providing or improving common facilities in the area like – park, drainage, roads, streetlights, scavenging, water and electricity supplies, banking, post office, bus services facilities, community hall, milk booth, health center, rationing shop, mini-super bazaar, shopping facilities etc.

  (b) To arrange and organize social and cultural functions from time to time.

  (c) To approach the concerned authorities for redressal of grievances of the members of the society.

  (d) To share information about the Government Rules, policies, notifications amongst the members of the association.

Comparison: RWAs and Co-operative Housing Societies

10. In contrast to the powers of co-operative housing societies, the powers of Resident Welfare Associations are very limited. There are no statutory powers as they are voluntary organizations created to manage residents' interest. Co-operative housing societies have various powers such as:

(a) The power to give permission or refuse for transfer of a flat by a member.

(b) The power to expel a member.

Co-operative Housing Societies

11. While the formation of the Co-Operative Societies, their registration procedures; Rules and bye-laws may differ from one State to another, the broad principles will be more or less similar in nature. Generally, a typical Housing Society will be a non-profit entity, but the activities may involve generation of some income which is shared by all on mutuality principle.

Co-operative Societies Act: Maharashtra State

12. Section 2 (16) of the Maharashtra Co-operative Societies(MCS) Act, 1960 defines: "Housing Society" means a society, the object of which is to provide its members with open plots for housing, dwelling or flats; or if open plots, the dwelling houses or flats are already acquired, to provide its members common amenities and services."

- Rule 10 of the MCS Rules, 1961 classifies the housing societies into THREE categories:

  (i) Tenant Ownership Housing Societies:

  (a) These are housing societies where land is held either on leasehold or freehold basis by societies and houses are owned or are to be owned by members.

  (b) In such societies, the societies are the owners or lessees of land, plots are carved out and given on a long term lease to construct their dwelling houses thereon as per the terms of the lease deed.

  (ii) Tenant Co-Partnership Housing Societies:

  (a) These are societies which hold land on ownership or on lease and construct flats thereon **which are allotted to members** who occupy them.

  (b) The societies, thus, hold both the land and buildings and its members are allottees therein having the right of occupancy which right is heritable, transferable by transfer of shares to other persons in accordance with the provisions of the Act.

  (iii) OTHER HOUSING SOCIETIES:

  (a) These are house mortgage societies and house construction societies.

  (b) House mortgage has the object of advancing loans to the members and to the societies on the security of land and houses.

(c) House construction deals in purchase and sale of constructed houses or dwellings to members or other societies.

JUDICAIL REVIEW

13. In Mulshanker Kunverji Gor and Ors. vs. Juvansinhji Shivubha Jadeja decided on 18 September, 1979, The Honourable Gujarat High Court has critically analyzed the provisions of the Gujarat Co-operative Societies Act, 1961 (same as MCS Act, 1960, as adapted on formation of the Gujarat State on 1st May 1960) and succinctly stated the law in these words:

"5. We have no doubt in our minds that Section 42 of the Gujarat Co-operative Societies Act, 1961, inter alia, exempts from compulsory registration instruments relating to shares in a society notwithstanding that the assets of such society consist wholly or in part of immovable property. .... It is necessary, therefore, to find out what an instrument of transfer relating to "shares in a society" conveys to the transferee. It has been argued that there are two types of co-operative housing societies. **One type is called 'tenant co-partnership society", another is called "tenant ownership society"**

- A **"tenant co-partnership society**" is a society where the land is owned by the society and upon which houses are constructed by the society for the benefit of its members. It is the co-operative venture of all the members of a co-operative housing society which brings into being the houses which the members in their turn may occupy. They are constructed out of its own assets and out of the moneys borrowed by it. The debt is discharged by the society by collecting periodical contributions from them in specified amounts. In such a society, it is the society in which the land and the buildings in the eye of law vest.
- It has been argued that in "**tenant ownership society**", the land belongs to the society and the superstructure thereupon is constructed, not by the society out of its funds but, by the member out of his personal funds.
- In such a case, when by an instrument a member transfers his "shares in the society" to another person, he not only transfers his shares but also his right to occupy and enjoy the land belonging to the society and the super-structure which he has constructed out of his personal funds and which belongs to him personally.
- The transfer of such a superstructure cannot be effected **except under a registered conveyance because clause (a) of Section 42 does not exempt from compulsory registration the transfer of a member's personal immovable property - not belonging to the society - to another……"**
- This distinction is vital when considering concept of "pure agent" **theory under the CGST Rules, 2017.**

NEW TAX REGIME

GOOD AND SERVICES TAX (GST):

14. With a great fanfare the Central Government announced at the Parliament Hall in New Delhi on the mid-night of 30th June 2017 / 1st July 2017 that the dream project of having "One nation, One Tax", i.e. Goods and Services Tax has actually dawned. The Honourable Prime Minister described it as "Good" and "Simple" Tax. At the first blush it does not look to be that simple, but time alone will judge the impact of it on the Trade & Industry, the people & the Nation's Economy.

15. Broadly, the Central Goods and Services Tax Act, 2017 (CGST Act) defines **various concepts** & terminologies (Definition section has 121 sub-sections): a few of them are new, but many others are borrowed from the erstwhile Taxation Laws like Excise Act, Central Sales Tax Act, Finance Act (for levying Service Tax) and other laws like Entry Tax, prevailing as on 30th June 2017. The composite structure of GST laws includes allied laws like State/Integrated/Union Territory GST Acts; and many Forms & Rules of procedure are in place for implementing the new Indirect Taxation System, which is in tune with the Theory of Value Added Taxation, evolved in 1950s & now adopted by about 160 out of nearly 193 Countries World –over.

16. Now, one can turn to the statutory provisions in the context of its impact on the Resident Welfare Associations (RWA) and the Housing Co-operative Societies functioning under the State Acts.

- Important definitions from the CGST ACT,2017 are reproduced below:

  Definitions. 2. — In this Act, unless the context otherwise requires,—

  (5) **"agent"** means a person, including a factor, broker, commission agent, arhatia, del credere agent, an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of supply or receipt of goods or services or both on behalf of another;

  (6) **"aggregate turnover"** means the aggregate value of all taxable supplies (excluding the value of inward supplies on which tax is payable by a person on reverse charge basis), exempt supplies, exports of goods or services or both and inter-State supplies of persons having the same Permanent Account Number, to be computed on all India basis but excludes central tax, State tax, Union territory tax, integrated tax and cess;

  (17) "**business**" includes —

  (a) any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit;

(e) **provision by a club, association, society, or any such body (for a subscription or any other consideration) of the facilities or benefits to its members**;

(31) **"consideration**" in relation to the supply of goods or services or both includes —

(a) any payment made or to be made, whether in money or otherwise, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government;

(b) the monetary value of any act or forbearance, in respect of, in response to, or for the inducement of, the supply of goods or services or both, whether by the recipient or by any other person but shall not include any subsidy given by the Central Government or a State Government:

Provided that a deposit given in respect of the supply of goods or services or both shall not be considered as payment made for such supply **unless the supplier applies such deposit as consideration for the said supply;**

(52) "**goods**" means every kind of movable property other than money and securities but includes actionable claim, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before supply or under a contract of supply;

(84) "**person**" includes —

(a) an individual;

(i) **a co-operative society** registered under any law relating to co-operative societies;

(l) society as defined under the Societies Registration Act, 1860 (21 of 1860);

(93) "recipient" of supply of goods or services or both, means —

(a) where a consideration is payable for the supply of goods or services or both, the person who is liable to pay that consideration;

(b) xxxxx ; and

(c) where no consideration is payable for the supply of a service, the person **to whom the service is rendered,**

and any reference to a person to whom a supply is made shall be construed as a reference to the recipient of the supply and shall in-

clude an agent acting as such on behalf of the recipient in relation to the goods or services or both supplied;

(102) **"services" means anything other than goods**, money and securities but includes activities relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;

(108) **"taxable supply"** means a supply of goods or services or both which is leviable to tax under this Act; (Section 9 (1) of the Act: Levy & collection)

17. It would be manifestly clear from the above definitions in the Central Goods & Services Tax Act, 2017 that a Co-operative Housing Society is 'a person' carrying on 'business' of making provision for a subscription or any other consideration of the facilities or benefits to its members; and consequently comes under the GST –net.

- However, under section 22(1) of CGST Act 2017, the supplier of services is not liable get registered or pay tax until he crosses the threshold limit of ' 20 lakhs:
- Section 22 (1) reads:

22. Persons liable for registration. — (1) Every supplier shall be liable to be registered under this Act in the State or Union territory, other than special category States, from where he makes **a taxable supply of goods or services or both**, **if his aggregate turnover in a financial year exceeds twenty lakh rupees :**

Provided that where such person makes taxable supplies of goods or services or both **from any of the special category States**, he shall be liable to be registered if his aggregate turnover in a financial year exceeds ten lakh rupees.

18. Therefore, once the "aggregate turnover", which includes value of taxable supplies, exempt supplies etc. then the person must get registered & pay taxes on all "taxable supplies". Under the section, if the aggregate turnover is below `20 Lakhs, then the person is outside the Tax-net, even if the aggregate value contains some "taxable supplies". So, even if "per member per month amount exceeds `5000", but if the aggregate turnover is below `20 lakhs; then no GST is payable. Likewise, if the aggregate turnover is above `20 lakhs, but there is no "taxable supply", that is, all members pay less than `5000 per month, there is no tax liability.

19. A Housing Society is also entitled to take the benefit of Exemption notification [Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017]; Entry 77 therein reads:

TABLE

Sl. No.	Chapter, Section, Heading, Group or Service Code (Tariff)	Description of Services	Rate (per cent.)	Condition
77	Heading 9995	Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution - (a) as a trade union; (b) for the provision of carrying out any activity which is exempt from the levy of Goods and Service Tax; or (c) **up to an amount of five thousand rupees per month per member** for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex.	Nil	Nil

20. A plain reading of this Exemption entry 77, will show that the ceiling limit is per member per month is ' 5000, and if the amount exceeds even by say '100, then the entire amount of '5100 becomes liable to be taxed @ 18%, rate of tax currently fixed.

- The Clarification as to what is to be included in this ceiling limit and what is to be excluded as given in January 2014 (supra) holds good under the GST Regime. This is evident from the recent Press Note dated 12 July 2017, reproduced below:

Press Information Bureau-

Government of India-Ministry of Finance

13-July-2017 15:48 IST

Services provided by the Housing Society, Resident Welfare Association (RWA) not to become expensive under GST;

(i) There are some press reports that services provided by a Housing Society [Resident Welfare Association (RWA)] will become expensive under GST. These are completely unsubstantiated.

(ii) It may be mentioned that supply of service by RWA (unincorporated body or a registered non- profit entity) to its own members by way of reimburse-

ment of charges or share of contribution up to an amount of five thousand rupees per month per member for providing services and goods for the common use of its members in a housing society or a residential complex are exempt from GST.

(iii) Further, if the aggregate turnover of such RWA is up to Rs.20 Lakhs in a financial year, then such supplies would be exempted from GST even if charges per member are more than Rs. five thousand.

(iv) RWA shall be required to pay GST on monthly subscription/contribution charged from its members if such subscription is more than Rs. 5000 per member **and** the annual turnover of RWA by way of supplying of services and goods is also Rs. 20 lakhs or more.

(v) Under GST, the tax burden on RWAs will be lower for the reason that they would now be entitled to ITC in respect of taxes paid by them on capital goods (generators, water pumps, lawn furniture etc.), goods (taps, pipes, other sanitary/hardware fillings etc.) and input services such as repair and maintenance services.

(vi) ITC of Central Excise and VAT paid on goods and capital goods was not available in the pre-GST period and these were a cost to the RWA.

(vii) Thus, there is no change made to services provided by the Housing Society (RWA) to its members in the GST era.

AMBIT & SCOPE OF EXEMPTION:

21. From the above clarification it is clear that even if the monthly charges per member per month cross the limit of ‘5000, the RWA / Housing Society is not liable to pay GST unless the “aggregate turnover” as computed in terms of section 2(6) of the CGST exceeds ‘20,00,000 in a fiscal. Now, computation of the threshold is comparatively easy, the computation of “per member per month limit” is the real poser.

22. Tax Experts, that is, tax professionals (Chartered Accountants or Advocates or other Practitioners) are not on the same page. Some argue that the Society makes payment of Property Taxes or Water Charges or Electricity Bills “on behalf of the members” and as such “acting as their Agent” or “pure agent”; and hence these amounts must be “excluded from the Monthly maintenance Bill” in the context of “exemption limit of `5000” under the Notification dated 28-06-2017. The other school of thought is that the concept of “pure agent” has limited application.

23. It is respectfully submitted that apart from the clarification of the Board (CBEC), on the basic principle of agency or pure agent theory embodied in Rule 33 of the Central Goods & Services Tax Rules, 2017, unless there is a legal liability on an individual Member to pay the Charges levied by a Municipal Body, or other Authority the question of RWA / CHS or someone “paying it to the Third Party on behalf of a Member” does not arise.

{CBEC Circular dated 10th January 2014, sr. no. 3,

"However, in the case of electricity bills issued in the name of RWA, in respect of electricity consumed for common use of lifts, motor pumps for water supply, lights in common area, etc., Since there is no agent involved in these transactions, the exclusion from the value of taxable service would not be available." }

For application of "agency theory" one must determine on whom the legal liability to pay the charge or amount rests.

In many Housing Societies, the Land & Building are both "owned" by the Society and therefore, the Property Card Register in Municipal Records will show the name of the Society as "owners". Consequently, the **primary legal liability to pay Property Tax / House Tax or water charges is on the owner**; even though some Municipalities hold "the occupier" also liable to pay such amounts. In these cases, certainly, the Agency theory fails.

24. Now, the "pure agent" concept embodied in Rule 33 of the Central Goods & Services Tax Rules, 2017, (or erstwhile Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006, prevailing prior to 30th June 2017) is entirely in the different context.

- A useful reference may be made to the **Guidance Note:**

  Exemption for Service Tax if Society is working as Pure Agent

- The CBEC's Education guide in para 7.11.8 clarifies that if resident welfare association or any society is working as pure agent i.e. service is provided on actual reimbursement basis or without any mark-up for procuring any goods or services from a third person, then the amount collected by the association / society from its members may be excluded from the value of taxable service, in terms of Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006. For instance, payment of electricity / water bill pertaining to individual member, **municipal taxes paid by society on behalf of its members, etc**. Charges collected by society towards common expenses such as electricity for common area, water bill for garden / swimming pool, club house, transfer fees etc. cannot be excluded from the value of taxable services, since in this cases, society is not acting as an agent but incurring these expenses for the members of the society.

25. Now, one may examine the ambit & scope of Rule 33:

CENTRAL GOODS & SERVICES TAX RULES, 2017

[Notification No. 3/2017-Central Tax, dated 19-6-2017 as amended]

RULE 33. Value of supply of services in case of pure agent. — Notwithstanding anything contained in the provisions of this Chapter, the expenditure or costs incurred by a supplier as a pure agent of the recipient of supply shall be ex-

cluded from the value of supply, **if all the following conditions are satisfied**, namely:-

(i) the supplier acts as a pure agent of the recipient of the supply, when he makes the payment to the third party on authorisation by such recipient;

(ii) the payment made by the pure agent on behalf of the recipient of supply has been separately indicated in the invoice issued by the pure agent to the recipient of service; and

(iii) the supplies procured by the pure agent from the third party as a pure agent of the recipient of supply are in addition to the services he supplies on his own account.

Explanation:- For the purposes of this rule, the expression "pure agent" ***means a person who -***

(a) enters into a contractual agreement with the recipient of supply to act as his pure agent to incur expenditure or costs in the course of supply of goods or services or both;

(b) neither intends to hold nor holds any title to the goods or services or both so procured or supplied as pure agent of the recipient of supply;

(c) does not use for his own interest such goods or services so procured; and

(d) **receives only the actual amount** incurred to procure such goods or services **in addition to the amount received for supply he provides on his own account.**

Illustration. — Corporate services firm A is engaged to handle the legal work pertaining to the incorporation of Company B. Other than its service fees, A also recovers from B, registration fee and approval fee for the name of the company paid to the Registrar of Companies. The fees charged by the Registrar of Companies for the registration and approval of the name are compulsorily levied on B. A is merely acting as a pure agent in the payment of those fees. Therefore, A's recovery of such expenses is a disbursement and not part of the value of supply made by A to B.

26. If one has to apply this concept of pure agent, the first thing missing in the case of Housing Societies is that there is no contract of service between the Society & the Member for rendering any service **"in the course of which" the Society incurs "cost & expenditure", and then as per Explanation, clause (d) >>>**(d) **receives only the actual amount** incurred to procure such goods or services "**in addition to the amount received for supply "he provides on his own account".**

With due respect, the "Pure Agency" concept does not hold good in the case of Monthly maintenance Bills rendered by the Society by way of "reimbursement of charges" or "share of contribution".

In the context of the concept of Pure Agent, the Board (CBEC) has clarified the matter and it would be binding on the Department.

QUOTE:

Pure Agent Concept in GST (Excerpts)

Directorate General of Taxpayer Services

CENTRAL BOARD OF EXCISE & CUSTOMS

www.cbec.gov.in

INTRODUCTION

The GST Act defines an "Agent" as a person including a factor, broker, commission agent, ..., who carries on the business of supply or receipt of goods or services or both on behalf of another.

Who is a pure agent and why is a pure agent relevant under GST?

Broadly speaking, a pure agent is one who while making a supply to the recipient, also receives and incurs expenditure on some other supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply.

• While the relationship between them (provider of service and recipient of service) in respect of **the main service** is **on a principal to principal basis**, the relationship between them in respect of other ancillary services is that of a pure agent.

Let's understand the concept by taking an example:

A is an importer and B is a Custom Broker.

• "A" approaches "B" for customs clearance work in respect of an import consignment.

• The clearance of import consignment and delivery of the consignment to A would also require taking service of a transporter.

• So A, also authorizes B, to incur expenditure on his behalf for procuring the services of a transporter and agrees to reimburse B for the transportation cost at actuals.

• In the given illustration, B is providing Customs Brokers service to A, which would be on a principal to principal basis.

• The **ancillary service of transportation** is procured by B on behalf of A as a pure agent and expenses incurred by B on transportation should not form part of value of Customs Broker service provided by B to A.

• **This, in sum and substance is the relevance of the pure agent concept in GST.**

illustration:

Suppose a Customs Broker issues an invoice for **reimbursement of a few expenses** and for consideration towards agency service rendered to an importer.

The amounts charged by the Customs Broker are as below:

Sr. No.	Component charged in invoice	Amount
1.	Agency Income	Rs. 10000/-
2	Traveling expenses; Hotel expenses	Rs. 15,000/-
3.	Customs Duty	Rs. 5,000/-
4.	Docks Dues	Rs. 5000/-

• In the above situation, agency income and travelling/ hotel expenses shall be added for determining the value of supply by the Customs Broker whereas Docks dues and the Customs Duty shall not be added to the value, provided the conditions of pure agent are satisfied.

Prepared by: National Academy of Customs, Indirect Taxes & Narcotics

UNQUOTE:

The aforesaid clarification, states that if a Service Provider "during the course of his rendering service" to the recipient (on principal to principal basis), also receives and incurs expenditure on some other ancillary supply on behalf of the recipient and claims reimbursement (as actual, without adding it to the value of his own supply) for such supplies from the recipient of the main supply, he is said to be acting as pure agent. The concept of pure agent theory has no application in the case of CHS as the Society is not, strictly speaking, in the business of providing services, though the service it provides is "treated" as falling under the definition of term "business".

What is the Scope of Exemption under Entry 77?

27. The Entry, on analysis, reads:

(A) Service by a non-profit entity registered under any law for the time being in force,

(B) to its own members

(i) by way of reimbursement of charges or

(ii) share of contribution –

(a) up to an amount of five thousand rupees per month per member

(b) for sourcing of goods or services

(c) from a third person

(d) for the common use of its members

(e) in a housing society or a residential complex.

28. It is a settled principle of law that the eligibility criteria laid down in an "exemption" provision in a statute or a rule or a notification has to be construed strictly, and when there is a doubt, construe it in favour of the State and not the tax-payer; but once it is found that the applicant is covered by the same, the exemption notification should be construed liberally. Secondly, the words and expressions defined in the Act have to be assigned the same meaning in the entire enactment unless the context requires otherwise. Similarly, the rules of English language/grammar have to be followed and the meaning ascribed in "common parlance understanding" of those who deal with the subject is to be adopted.

29. The terms of Exemption entry **when re-phrased would read**:

- **Service provided by Housing Society to its members for procuring from third party goods/services for the common use of members by way of reimbursement of charges or share of contribution up to Rs. 5000 per month per member**

Now, the expression, services to Members by way of "reimbursement of charges" or "share of contribution", has to be interpreted:

- Both are un-identical expressions.
- The term "charge" in legal connotation means: To impose a tax, duty.
- In the context, it would mean the tax or levy by Government or Local /Municipal or other Body.
- It follows that all levies on the Society, (be it Property Tax, Water tax or Non-Agricultural Assessment) which are "paid" by the Society, are being "reimbursed by Members", through Monthly Maintenance Bills.
- **Second expression**, "share of contribution", which would refer to the "expenditure" incurred by the Society for providing common benefits, facilities. e. g. sweeper, lift, water pump, common area lights, and other expenses made in terms of the Bye-laws.
- "Share of contribution" is also mentioned in the Bye-laws, e.g. Bye-law 69 (a) reads:

  69. (a) **The Committee shall apportion the Share of each member towards the charges of the Society on the following basis:**

  (i) Property taxes: As fixed by the Local Authority.

  (ii) Water Charges: On the basis of total number and size of inlets provided in each flat.

(iii) Expenses on repairs and maintenance of the building/ buildings of the Society: At the rate fixed at the General body from time to time, subject to the minimum of 0.75 per cent per annum of the construction cost of each flat for meeting expenses of normal recurring repairs.

(iv) Expenses on repairs and maintenance of the lift, including charges for running the lift: **Equally by all the members** of the building in which lift is provided, irrespective of the fact whether they use the lift or not.

30. Now, the term: "up to" an amount of `5000. The expression "up to" is used to say that something is less than or equal to but not more than a stated value, number, or level: Therefore, if the Bill crosses the mark, the entire exemptions is lost.

31. Coming to **different types of Funds** envisaged by the Act, Rules and the Bye-laws, it is seen that the Society includes in its "monthly maintenance Bill", stated amount towards the named Fund. This amount cannot be called "share of contribution", because the amount is not "appropriated" against any specified expenditure incurred for sourcing goods or services, but is a provision for future. Let us take illustration:

e.g. SINKING FUND

Sinking fund, noun: **sinking fund**; plural noun: **sinking funds**

1. a fund formed by **periodically setting aside money** for the gradual repayment of a debt or replacement of a wasting asset.

- So although one may "contribute" or "share" as "a member", the "amount", specified in the Bill, the Society which received it, has not earmarked it for a "particular supply of goods or services". >>>**it will be retained as "deposit" for future "expenditure"** for procuring supply from the third parties. Therefore, it is not a "consideration", for any service provided by the Society. In the definition of the term consideration in section 2(31) , a Proviso is there:

  Provided that "**a deposit" given** in respect of the supply of goods or services or both *shall* not be *considered* as payment made for such supply **unless the supplier applies such deposit as consideration for the said supply**;

- So, in presenti, the amount Billed /paid towards 'sinking fund' cannot be treated "as contribution" for sourcing supply of goods or services for the benefit of members. However, when the fund is utilized, yes, taxability may arise >>>subject to threshold etc.

When the Amount Paid By the Member (a) Exceeds Exemption or (b) Retained by the Society

32. It has been clarified by the Board, that if the amount collected from each Member per month exceeds the threshold of ‘5000 even by say ‘100, then the Value of taxable supply is NOT just ‘100, but the entire amount of ‘5100.

- The next question is how one must treat the amounts Billed or included in the Monthly Maintenance Charges, which are not collected by the Society for defraying it to the Third Parties for the sourcing of goods & services for the common use by the Members. In other words, the amounts collected are retained as such by the Society itself for eventually sharing it on mutuality principle.

  For example: Parking Charges are a sort of rent for user of the open common area and that amount is collected from those who keep their four-wheelers, with the permission of the Society, in the open area in the Society compound, and such amount is not paid over to anyone, but is retained with the Society itself.

- What are the other services for which society collects amounts from members, who are the beneficiaries, and retains such amounts as its own:

  1. Late payment fees
  2. Parking charges
  3. Rebates received from outsider for specific class conducted in society
  4. Non occupancy fees
  5. Guest room booking
  6. Club house booking
  7. Any other receipts
  8. Transfer Fee
  9. Admission Fee
  10. NOC Charges

33. In the light of the above discussion, a ready to use Table is prepared indicating which items are to be included **in the ceiling limit of rupees five thousand:**

Monthly Co-op. Housing Society Bill:

Maintenance charges & other components of Bill

Sr. No.	By way of "reimbursement of charges" or "share of contribution"	Applicability	Whether includable in Rs. 5000: Y or N
1.	Service charges (housekeeping, security, electricity for common areas, equipment, sweeper)	Equally divided among the flats	Y
2.	Expenses on repair and maintenance of elevators	Equally divided among the flats	Y
3.	Non-occupancy charges	For flats which are rented, calculated at 10% of service charges	N
4.	Use of Open space, Terrace, community Hall	As decided by the General Body	N
5.	Entrance Fee, Share Transfer Fee and Premium	As per Bye-law: '100, ' 25000 & as decided by the General Body (but within limits as Govt. Resolution) , respectively	N
6.	water charges	Actual consumption of each flat, or number of water inlets	Y
7.	Property tax: Co-Partner	Actual as determined by BMC	Y
8.	Ownership Society	Bill on Member, Society may act as an agent	N
9.	Insurance Premium	As per General Body	Y
10.	Non-Agri. Assessment	At the rate fixed under MLRC,1966	Y
11.	**Creation of the Repairs and Maintenance Fund**	0.75% per annum of the construction cost of each flat	N
12.	Sinking fund	Minimum of 0.25% per annum of the construction cost of each flat	N
13.	Major repairs fund	As decided by the General Body	N

34. In conclusion, it can be said that for the Services rendered by the Society the amounts paid by the Members by way of reimbursement of charges/share of contribution, fall under three categories:

(a) Amounts includible in the ceiling limit of ‘ 5000, and as such exempt,

(b) Amounts excludible from the ceiling limit of ‘ 5000 as being in the nature of “Deposits”, like contribution towards Funds, and liable to be taxed, when “appropriated” against any supply of goods/ services, subject to exemption/s,

(c) Amounts ineligible for Exemption, as being retained by the Society, and hence liable to taxation under GST Law.

35. Once the Housing Society crosses the Exemption limit and the aggregate value exceeds the threshold of ‘ 20 Lakhs, the Society is obliged to obtain Registration, pay GST, file periodical Returns and comply with all the procedures and formalities under the law, by taking requisite assistance from the Tax experts, if need be.

36. As would be evident from the analysis of the legal provisions of the GST law, clarifications of the Board (CBEC) that there are many arguable issues, and the last word can be said by the Board (CBEC) or the Courts of law. Till then keep your fingers crossed.

• Until that time, the views expressed in this analytical note may serve as a useful guide to arrange the affairs of the Housing Society so as be within the framework of new dispensation under the good & simple Tax regime, called GST Regime.

Bandra,

21st August 2017