

The Fate of 'Business' under GST Laws

Introduction:

Under the erstwhile regime, levy of VAT on sale of goods is applicable only when such sale has been undertaken in the course of business. On the contrary, levy of excise duty or service tax are not connected with the existence of business. Under GST laws, the phrase 'business' assumes a lot of significance, for the reason that levy in general is on supply of goods or services while the definition of 'Supply' as given in Section 7 of Central Goods & Services Tax Act, 2017 (for brevity CGST Act) provides that they should be undertaken in the course of or furtherance of business. In this backdrop, let us analyse the term 'Business' in connection with supply and try to understand the possible scope for ambiguity and litigation.

Scope of Supply:

Before we proceed to understand the scope of the term 'Business', let us go through the definition of 'Supply' as given under section 7.

7 (1) For the purposes of this Act, the expression 'supply' includes –

- a) all forms of supply of goods or services or both such as sale, transfer, barter, exchange, licence, rental, lease or disposal made or agreed to be made for a consideration by a person **in the course or furtherance of business**

From the above, it is evident that 'supply' includes all forms of supply of goods or services or both such as to be made for a consideration by a person in the course or furtherance of business. Hence, a transaction would be called as 'supply' only if such transaction is made in course or furtherance of business and accordingly subject to tax under section 9. If it is not made in course or furtherance of business, it would not be regarded as 'supply' (unless such transaction fits into other sub-sections of Section 7) and no tax would be levied.

Hence, the phrase 'Business', assumes significance as stated in the introduction. The definition of 'Business' is provided in Section 2(17) of CGST Act, 2017 and is reproduced hereunder;

Scope of 'Business':

The definition of 'business' is given under Section 2(17) of CGST Act, 2017. The relevant part is reproduced hereunder:

(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;
- b) any activity or transaction in connection with or incidental or ancillary to sub-clause (a);
- c) any activity or transaction in the nature of sub-clause (a), whether or not there is volume, frequency, continuity or regularity of such transaction;
- d) supply or acquisition of goods including capital goods and services in connection with commencement or closure of business;

- 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;*
- f) *admission, for a consideration, of persons to any premises;*
- g) *services supplied by a person as the holder of an office which has been accepted by him in the course or furtherance of his trade, profession or vocation;*
- h) *services provided by a race club by way of totalisator or a licence to book maker in such club ; and*
- i) *any activity or transaction undertaken by the Central Government, a State Government or any local authority in which they are engaged as public authorities;*

The definition is laid down in an inclusive manner. Clause (d) to clause (i) contains items which are expressly considered/clarified as activities of business under GST law in order to tax these activities. Clause (a) to clause (c) provides the meaning and scope of the term 'Business' in general for the purpose of GST laws.

The sub-clause (a) includes any trade, commerce, manufacture, profession, vocation, adventure, wager or any other similar activity, whether or not it is for a pecuniary benefit. It covers the expressly mentioned items and all other similar activities whether such activities are done for pecuniary benefit or not. The sub-clause (b) states that any activity or transaction in connection with or incidental or ancillary to sub-clause (a) is also called as 'business'. Further, sub-clause (c) states that irrespective of the frequency, volume, continuity or regularity of transaction or activity mentioned in sub-clause (a), the said activity or transaction shall still be called as 'business'. Further sub-clause(i) provides that any activity or transaction undertaken by Central Government or State Government or any local authority would be considered as business even though their engagement in such activities is as public authorities.

Upon perusal of the above discussed sub-clauses of the definition, the following questions arise for consideration;

- (a) Whether an activity/transaction which is incidental or ancillary to a main activity which is not business would come under the ambit of 'Business' on its own if such incidental or ancillary activity has attributes of trade, commerce, manufacture, profession, vocation, adventure, wager?
- (b) Whether an activity/transaction which is incidental or ancillary and not connected with the entities primary activity/transaction of the nature of trade, commerce would come under the scope of 'Business'?
- (c) Whether an isolated activity/transaction of the nature referred in sub-clause (c) would be considered as 'Business' even though the said activity per se would not be of the nature of any trade, commerce, manufacture, profession, vocation, adventure, wager?
- (d) Whether the transactions or activities undertaken by Government as public authority would be considered as 'Business' even though the ingredients of trade, commerce, manufacture etc are missing in the said transactions?

Under the erstwhile VAT laws also, the term 'Business' has been defined in the same manner as the present definition under GST law. The jurisprudence of erstwhile decisions would be of help in understanding the meaning and scope of business and to address the above questions.

In the case of Commissioner of Sales Tax vs. Sai Publication Fund (Civil Appeal No. 1716 of 1999), the Supreme Court vide para 11 has held— *"No doubt, the definition of "business" given in section 2(5A) of the Act even without profit- motive is wide enough to include any trade, commerce or*

manufacture or any adventure or concern in the nature of trade, commerce or manufacture and any transaction in connection with or incidental or ancillary to the commencement or closure of such trade, commerce, manufacture, adventure or concern. **If the main activity is not business, then any transaction incidental or ancillary would not normally amount to "business" unless an independent intention to carry on "business" in the incidental or ancillary activity is established.** In such cases the onus of proof of an independent intention to carry on "business" connected with or incidental or ancillary sales will rest on the department. **Thus, if the main activity of a person is not trade, commerce, etc., ordinarily incidental or ancillary activity may not come within the meaning of "business. To put it differently, the inclusion of incidental or ancillary activity in the definition of "business" pre-supposes the existence of trade, commerce, etc.,** The definition of "dealer" contained in Section 2(11) of the Act clearly indicates that in order to hold a person to be a "dealer", he must "carry on business" and then only he may also be deemed to be carrying on business in respect of transaction incidental or ancillary thereto. We have stated above that a main and dominant activity of the Trust in furtherance of its act is to spread message"

In the case of State of AP vs. Sri Bhramaramba Mallikarjuna Temple, (1989) 73 STC 321(APHC DB), it was held that if dominant activity of an institution such as a religious or charitable institution is not a business activity, the secondary activity which has elements of commerce or trading activity, will be exempt from tax if it is integral part of main activity. In this case, it was held that the following incidental or ancillary activities are held to not taxable

- (a) Sale of food in canteen run by temple was not taxable as it was for supply of foodstuffs to visiting pilgrims at reasonable prices. It was integral to main activity and is not taxable.
- (b) Similarly, temple was running motor vehicles for transporting pilgrims at reasonable rates. Hence, sale of unserviceable parts is not taxable as it has a character of functional integrity.
- (c) Sale of human hair offered by pilgrims to the temple is not a commercial activity.

In the case of Manipal University vs State of Karnataka, STRP NO.412/2013 & STRP.NOS.795-850/2013, the Karnataka High Court has considered the issue whether sale of prospectus by University would be subject to VAT wherein the primary activity/objective of University is education which is not a business. In this case it was held – *"It is not the case of the University that they sale or sold the prospectus and application forms at cost. The price, as contended by learned counsel for the University, of the prospectus during the relevant period was ranging from Rs.350-Rs.500. We have perused the prospectus for the relevant period, which, in our opinion, was on the higher side. Therefore, it cannot be stated that there was no profit motive as claimed by the University. Merely because, the University was established for imparting education does not mean that it is not indulging in the business so as to make profit out of the sale of prospectus and application forms. Their intention to make profit is clear from the facts and figures placed on record."*

Upon perusal of the above decisions, the following principles emanate;

- a) When the main activity is not business, then the incidental or ancillary activity which is integral to main activity cannot be considered as business.
- b) Even when the main activity is not business, the incidental or ancillary activity would be considered as business if an independent intention to carry business in such incidental or ancillary activity is evident.

The next important question to be considered is that every business is going to generate some sought of miscellaneous revenue which is insignificant, or which is not attributable to the primary

business activity. Will these activities be also considered as incidental or ancillary to the main activity of business?

In the case of Panacea Biotech Limited vs. Commissioner of Trade and Taxes & Otrs, 2012(12)TMI826-Delhi High Court, wherein it was held vide para 2—*"In the present case, the main business of the petitioner is manufacture and sale of pharmaceutical products and the vehicles are used by it in the course of business (as written by Respondent No.-2 in the impugned order (Annexure A-1)). This may lead to the inference that proceeds from the sales of such vehicles should have been included in the turnover and must be taxed accordingly. But the selling of used cars cannot by any stretch of the imagination be characterized as "ancillary" or incidental to the business of a pharmaceutical company. It is not shown that the cars were of a special character e.g. air-conditioned vehicles especially designed to store and ferry pharmacy products. They were purchased for use of company employees and executives, for office purposes. At the stage of purchase, they suffered sales tax, which the assessee, as buyer, was bound to pay. However, the assessee never held them for the purpose of sale and purchase, but for using them. After their use, having regard to lapse of time, and their wear and tear, the assessee decided to replace them. These cars were then sold. Their sales, in a sense are twice removed from the business of the assessee. They cannot be called "incidental" or "ancillary" to the manufacture and sale of pharmaceutical products, which the assessee is engaged in."*

In the case of Morarji Brothers (I&E) (P) Ltd vs. State of Maharashtra, (1995) 99 STC 117 (Bom HC DB) wherein the assessee is engaged in the business of manufacture of chemicals and other products and is a registered dealer. The assessee has sold used motor cars. The issue before the Bombay High Court was whether such sale of used cars becomes incidental or ancillary to the main activity of business and accordingly liable to pay VAT. It was held that the sale of motor cars by a dealer who is engaged in the business of manufacturing, selling and supplying of chemicals cannot be considered as incidental or ancillary activity to the main business. Accordingly, held that no tax is payable on such sale.

In the case of State of Tamil Nadu vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd, 1972(10)TMI95-Supreme Court of India, wherein it was held – *"In the view we hold the scrap sold is certainly connected with the business of the company and the turnover in respect of this commodity is liable to tax. It cannot also be said that the turnover in respect of the sale of the assessee's advertisement materials at cost price or less than cost price is not connected with the business of the assessee. Calendars, wallets and key chains are all given by the dealers to its customers for purposes of maintaining and increasing the sales of the products of the assessee and is therefore connected with the business. What the assessee is doing is to facilitate the dealers to acquire at their cost such advertising materials of a uniform type approved by the assessee-company which, instead of allowing each of them to have these separately printed or manufactured, itself undertook to do so and supplied them to its dealers. The supply of such material is in our view being connected with the business is liable to be included in the turnover of the assessee."*

In view of the above reproduced decisions, it has been settled under the erstwhile VAT laws that incidental or ancillary activities must have direct nexus or resultant of the main business activity. Thus, supplies arising out of activities which has no direct nexus with the business activity of a tax payer will not be considered to be incidental or ancillary to their main business. Accordingly, such supplies may not be considered as 'Supply' as defined under section 7 of CGST Act, 2017 for levy of GST for the reason that they are not arising in the course of or furtherance of business.

Extrapolating the above understanding of 'Business' to various scenarios:

We will now extrapolate the above understanding of the term 'Business' to the following activities and accordingly analyse the implications of GST.

- a) **Educational institution renting out immovable property:** Let us say that a University which is established for the purpose of education, being their primary activity may not be considered as business. The University has given a space on lease to a canteen to be maintained in University. Whether the said leasing activity would amount to business? In view of the above decisions, leasing of space for canteen is ancillary or incidental to main activity of education which is not a business. Further leasing of space for canteen is integrally connected to education in order to arrange the facility of food supply to students and faculty at campus. Therefore, the said activity may not be business and accordingly it may not be subject to GST.
- b) **A Software Company Providing Food to Employees at a Concessional Rate:** The primary business activity of a software company is software development which is a business. The incidental or ancillary activity would be something connected to the primary business. Providing food to employees may not be considered as incidental or ancillary to the software development. Accordingly, the said activity may not amount to business in order to subject them to GST. However, the recent AAR in the case of Caltech Polymers Limited 2018 (4) TMI 582 – AAR Kerala has considered this activity of food supply to employees as ancillary or incidental to main activity of business and accordingly held that GST is payable. However, Advance Ruling Authority has not analysed the phrase 'incidental or ancillary' in detail and has not considered the propositions laid down by various courts under the earlier VAT laws.
- c) **Sale of motor vehicles:** Sale of motor vehicle is undertaken by a company which is in the business of tours and travels. Then such sale would become ancillary or incidental to their main business and accordingly subject to GST. The said proposition was upheld in the recent AAR CMS Info Systems Limited, 2018 (5) TMI 649 – AAR Maharashtra wherein sale of old vehicles by a company which is in the business of cash management services for banks as incidental or ancillary to main business. On the contrary, sale of motor vehicles by a company which is in the business of software would not be considered as incidental or ancillary activity as motor vehicles is unconnected to the business of software development. Therefore, the same may not be subject to GST.
- d) **Activities undertaken by Government as public authority:** The important question to be considered is any activity undertaken by Government or local authority as public authority would come under the ambit of business even if the ingredients of trade, commerce, manufacture etc are missing. Let us take an example that a Municipal Corporation has let out their commercial buildings to various business entities. On the other hand, they have collected fee towards permission to construct a building. In the first activity of renting, there are ingredients of trade, commerce etc and accordingly it may come under the ambit of 'Business'. In case of second activity, the same is a statutory function and the elements of trade, commerce etc are missing. If the said activity is said to be a business, then it can be said that Government or local authorities are asked to pay GST (either by direct charge or reverse charge) on those activities which are not of the nature of trade, commerce etc while on the contrary the other entities are not required to do so. Whether this distinction has any rationale and is within the vires of Article 14 of the Constitution?

Conclusion:

In view of the above discussion on the ambiguity existing on various sub-clauses of 'Business' definition, the jurisprudence existing under VAT laws and extrapolating the same to various scenarios, it is clearly evident that this definition under GST laws is prone to lot of litigation in the times to come. Let us wait and see the fate of 'Business' under GST laws.