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All India Ophthalmological Society
8A, Karkardooma Institutional Area,
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Karkardooma,
New Delhi-110092

Sirs,

Applicability of Service Tax

This has reference to your original mail dated 24/1 2/ 2014, later telecons and based on the documents provided for our perusal; this communique sets out our written comments in the captioned matter:

1. Facts

All India Ophthalmological Society (hereinafter referred to as AIOS) is a society registered under section 12AA of the Income Tax Act, 1961. The society is divided into various committees viz. Scientific Committee, Academic and Research Committee, Editorial Committee-Journal and Editorial Committee-Proceedings.

2. Issue

The service tax implications on the various revenue streams received by AIOS during the year; more particularly in the negative list based taxation of services which came into force from July 01, 2012

3. Our comments

3.1. Aims and objectives of the society that are provided in the Memorandum of the Society id summarized as follows:

- AIOS is a society engaged in cultivation and promotion of study and practice of ophthalmic science, research of manpower development with a view to render services to the community and to promote social contacts among the ophthalmologists of the country.

- Annual conferences are held indifferent parts of the country which includes number of scientific programmes, Symposia, Seminars, Workshops, Refresher Courses, Wet Labs etc. for the promotion and mutual exchange of knowledge in the field of Ophthalmic Science. Further, various incentives in the form of awards are provided to the members in recognition of their services.

- Promoting, teaching, training and continuing education in ophthalmology by establishing and maintaining reference library, publishing journals and proceedings of the Society and other such materials.

3.2. The various financial receipts of the society have been dealt with separately for the sake of simplicity and ease of reference. However, before analyzing the service tax implications on each receipt it is essential to understand the relevant statutory provision of service tax law contained in Finance Act, 1994 (the Act).
The term service as defined u/s 658(44) of the Act. "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include:-

(a) an activity which constitutes merely,-

(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or
(ii) a transaction in money or actionable claim;

(b) a provision of service by an employee to the employer in the course of or in relation to his employment;

c) fees taken in any Court or tribunal established under any law for the time being in force.

Explanation 1.

Explanation 2

Explanation 3 For the purpose of this chapter,-

(a) an unincorporated association or body of persons, as the case may be, and a member thereof shall be treated as distinct persons:

(b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

Explanation 4

3.3 The details of the various receipts of the society are as under:

1. Life Membership Fees and Admission fees from new members (Doctor)

o Rights of the Members

The payment of the life membership fee/Admission fee entitles the members to participate in the meetings, cultural/educational functions and other lawful gatherings which are arranged by the society. Unless these fees are paid, they cannot avail of these facilities/advantages at the club.

o Service Tax implications

- AIOS is formed and run by the members for the mutual exchange of information and knowledge and thus it is an established fact that all the incomes, earnings of the society shall be applied for the promotion of the aims and objectives of the society for the benefit of all the members. The principle of mutuality has been accepted time and again by various courts and tribunals across India including the High Court of Jharkhand in the case of Ranchi Club Ltd Vs. Chief Commissioner of Central Excise & Service Tax, Ranchi [2012] 22 taxmann.com 2 1 7where it has been categorically held that "In view of mutuality and in view of the activities of the club, if club provides any service to its members may be in any form including as mandap keeper, then its not a service by one to another as foundational facts of existence of two legal entities in such transaction is missing". Similar decision was delivered in the case of Sports Club of Gujarat Ltd /Rajpath Club II. Union of India [2013] 35 taxmann.com 557 (Gujarat)where the hon'ble High Court relying on the decision of Ranchi Club Ltd (supra) has held that provisions of levy of service tax on the services provided by unincorporated association to its members is ultra vires. We also refer to a recent decision of the Mumbai CESTAT in the case of Cricket Club of India Ltd V. Commissioner of Service Tax [201 5] 62 taxmann.com 2 (Mumbai-CESTAT) wherein the tribunal relying
on the decision of the Sports Club of Gujarat (supra) held that 'Clubs or associations' are entities that need funds to exist in the form that they have assumed or evolved. Wages of employees and costs of running the establishment, such as energy charges, maintenance and repairs etc., are necessary expenses for such sustenance. Implicit in membership of clubs and associations is the obligation to share in such expenses. These are required for maintaining the assets of the club or association for which a service provider may or may not be contracted but the contributing members are not the direct beneficiaries of such services. Contribution to expenses cannot, by any stretch, be deemed to be consideration for any identified service rendered to individual members by access to the facilities or advantage that is within the wherewithal of the "club or association: However, to the extent that it is possible to identify the facilities, advantage or services of the "club or association" utilized without further payments specifically attributable to such facility, advantage or service, the subscription will be taxable."

• However it may be noted that the Revenue is already in appeal before the Supreme court challenging the Jharkhand High Court's decision in Ranchi Club (supra) which has been relied upon in all the aforesaid judicial pronouncements. Moreover, all the decisions cited above relate to the period prior to July 12. W.e.f. 01 /07 / 201 2, an Explanation 3 has been inserted to the definition of service providing that "an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons'. However, it is pertinent to note that even under the pre-negative list regime before 01 / 07/2012, the explanation provided after the erstwhile section 65(105) of the Act was based on similar lines. The explanation provided that a "taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof, for cash, deferred payment or any other valuable consideration". Inspite of this explanation the various High Courts have held in favour of the Assessee as the principle of mutuality always prevails between the dealings by a club/society/association with its members. Though, it is beyond doubt that an association and its member are distinct persons as both have separate identities, separate PAN etc. The explanation, however cannot per se take away mutuality vis-a-vis the facility created at the Association for mutual benefit collectively by members themselves. However, this matter involves interpretation of statutory provisions. As the service tax law is substantially amended w.e.f. 01/07/2012 the implication of the said explanation is yet to be tested judicially.

• Further it is also important to consider that service tax authorities have already begun initiating action of issuing notices to societies, various associations and clubs to inquire as to their service tax compliance. Hence understanding that litigation is definite, relying on the judgments above for non-payment of service tax would mean long drawn litigation and receiving show cause notices year after year and involvement of a long time in the matter before reaching finality. Besides this also considering the high rate of applicable interest (incase of adverse judgment), in our view, the risk factor is high. Further, since service tax is an indirect tax, the burden is passed onto the members. Non-collection of service tax would mean contingent liability on AIOS, cost of litigation at higher forum and also to some extent the responsibility of present managing committee of AIOS until finality is reached at the level of the Supreme Court.

• Accordingly in the scenario taking a conservative view, the comments set out below are based on the contention/ assumption of the definition of service to cover the relationship and transactions between a club or an association on one side and members on the other as separate persons and accordingly the life membership fees and Admission fees collected from the new members shall be exigible to service tax. The said assumption would also entail benefit of CENVAT credit as most of the input services received by AIOS are subject to service tax. The extra burden if any will be restricted to the value addition on the input services.
2. Sponsorship received from the trade (Pharma and other companies) for the seminars/workshop for members and amounts received for distribution of awards for medical excellence/research

Service Tax implications

- The term sponsorship has not been defined under the new provisions of law, however it should be noted that if the sponsorship is only in the form of a donation or a gift where the service provider i.e. AIOS is under no obligation to provide anything in return to such donors than in absence of any reciprocity or a contractual obligation towards the consideration received from the sponsors the activity would not qualify to be a service and thus shall not be exigible to service tax.

- However, if there is any activity which has to be performed by the service provider (AIOS) viz. naming of the event after the sponsor, displaying the logo of the sponsor, giving prizes or trophies for any competition etc. the activity will qualify to be a service within the terms of section 658(44) of the Act. However, as per Notification 30/2012-ST, it has been provided that when the services of sponsorship are provided to any body corporate or partnership firm, 100% of the service tax liability is required to be discharged by such body corporate or partnership firm under reverse charge mechanism under "Sponsorship Service".

- As per the facts of the case, the sponsors have been identified as pharma & other companies these being body corporates, they would be required to discharge 100% of the service tax under reverse charge mechanism, if AIOS has agreed to perform any activity or advance any privileges as narrated above in exchange of the consideration received. For AIOS, the activity is taxable under the law. However the obligation to pay service tax to the government vests under the law on the recipients of sponsorship service viz. the sponsoring companies or firms as the case may be.

3. Stall Booking receipts from Trade during Annual Ophthalmic Conference

The Annual Ophthalmic conference organized by AIOS provides a platform to the various exhibitors to show case their company, profile and their various products. The exhibitors are provided with the required infrastructure viz. the stall containing the tables, chairs, name plates, electricity, security services etc. at the venue of the event or conference.

Service Tax implications

In order to provide this opportunity as well as the basic facilities (activity), stall booking charges (consideration) are received by AIOS (service provider) from various exhibitors (service receivers). Since the said activity qualifies to be a service u/s 658(44) of Act, the stall booking receipts are exigible to service tax under "Business Exhibition Service".

4. Delegate fee from Members for attending Annual Conference and/or GME Program (Continuous Medical Education Program).

Service Tax implications

The receipt of the admission fees enables the medical practitioner/member of AIOS to maintain competence and learn about new and developing areas in the field of ophthalmology. The Delegate fees are a consideration for the learning activity to be undertaken by the various delegates/members of AIOS. For the sake of critical examination, on viewing this service as education or professional training on an on-going basis i.e. from time to time whether it would fall under the negative list or under mega exemption notification no. 25/2012-STI The services which are not taxable or exempt are only the following :-
66D (I) - 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 recognized by any law for the time being in force;

(iii) education as a part of an approved vocational education course;

Thus, the professional training by way of workshops/conference/seminars etc. not forming a part of any curriculum recognized by law is considered to be a service. Further, organizing conference· with a convention set up would also include charges for meals etc. All these collectively or as a bundle would form part of value of service u/s 658(44) of the Act and liable to service tax under "Convention Service". Notification 26/2012-ST (Entry- 4) provides for an abatement of 30% of the gross amount charged in case of a bundled service by way of supply of food or any other article of human consumption or any drink in a hotel or convention center on a condition that CENVAT credit on any goods has not been taken.

5. Advertisement receipts for Scientific Journals/News Letters and Website

o Service Tax Implications

• Section 660 of the Act-Negative list declares (g) selling of space for advertisement in print media as a non-taxable service.

• The term "print media" has been defined as :

(i) "book" as defined in sub-section(!) of section 7 of the Press and Registration of Books Act, 1867 (25 of 1867), but does not include business directories, yellow pages and trade catalogues which are primarily meant for commercial purposes.

(ii) "newspaper" as defined in sub-section (!) of section I of the Press and Registration of Books Act, 1867 (25 of 1867)

Since the activity of selling of space in Scientific Journals/ Newsletters which are not meant for any commercial use but only for the purpose of sharing knowledge and ideas of the various members is squarely covered by entry (g) of section 660 and thus is not exigible to service tax.

6. Library/Conference Room Hire Charges Receipts

o Service Tax implications

The hire charges received by AIOS is a consideration for allowing temporary occupation of the library room or a conference room for organizing any official/ social or business function and thus is an activity for a consideration which qualifies to be a service and is exigible to service tax under the category of "Mandap Keeper Service".

• Further, if meals etc. are also served at the library room or conference room, notification 26/2012-ST (Entry-4) provides for an abatement of 30% of the gross amount charged in case of a bundled service by way of supply of food or any other article of human consumption or any drink at a place specially arranged for -organizing a function on a condition that CENVAT credit on any goods has not been taken.
7. Receipts from sale of Members List to trade

Service Tax implications

The sale of members list enables the trade to promote its products and services in relation to ophthalmology to a particular group of people also known as target audience. Normally the trade incurs a huge expenditure for the purpose of identifying target customers in order to sell its products and/or services. This list provides the trade with a ready-made information of various prospective customers on payment of charge and thus is a service within the meaning of section 65(44) of the Act taxable under "Mailing List Compilation and Mailing services". Under the earlier law containing specific taxable services also the services were defined as a taxable service under section 65(1 OS)(zzzg).

8. Hotel accommodation Receipts from members for arranging hotel stay on behalf of members on reimbursement basis (no profit no loss basis) or at nominal profit

From the facts provided, it appears that AIOS per se is not in the activity of providing hotel accommodation to its members. It is done as an extension of convenience or incidental to its service of organizing conference/seminars etc. and hence as a part of overall coordination. Thus it is an outsourced facility extended to members depending upon each members individual preference.

Service Tax Implications

(a) No Profit No Loss- Re-imbursements

As per section 67 of the Act, the value of taxable service shall be the gross amount charged for the services provided or to be provided. Further, the service tax (Determination of value Rules, 2006) can be invoked only when the consideration is not merely in money terms. Therefore when the charges are recovered on a no profit no loss basis the charges recovered will not form a part of the value of taxable service for the reason that AIOS is not engaged in providing hotel accommodation services. Simply by being a conduit to obtain such service it does not form part of the service provided by AIOS. However, appropriate documentary evidence is required to be maintained by AIOS viz. correspondence authorizing AIOS to make the arrangements on behalf of the members, the hotel bills to fortify that charges are recovered from members at actuals.

Further, even if the valuation rules are invoked the value of taxable service, excludes the expenditure or costs incurred by the service provider as a pure agent of the recipient of service by virtue of Rule 5(2) of the service tax (Determination of value Rules, 2006) provided all the following conditions are satisfied:

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;

(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;
(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

The above indicates in a nutshell that the charges for hotel accommodation are reimbursed by the members on an actual basis to AIOS, in our view the transaction satisfies all the conditions laid down in Rule 5(2) of the Service Tax (Determination of Value) Rules, 2006 and therefore the reimbursements will not be exigible to service tax. However, it is pertinent to note that reimbursement being a matter which is commonly disputed by the revenue authorities, litigation cannot be ruled out and therefore appropriate documentary evidence as narrated above is required to be maintained by AIOS in support thereof.

Note: Section 67 of the Act as recently amended by the Finance Act, 2015 with effect from 14/05/2015 includes any reimbursable expenditure or cost incurred by the service provider in the course of providing or agreeing to provide a taxable service. However, if a strong documentary evidence is maintained demonstrating that the expenses incurred have suffered the applicable tax and the same are recovered at actual from the delegates the said expenses need not form part of the value of taxable service.

(b) Hotel accommodation arranged at a Normal Profit

• When the Hotel accommodation has been arranged at a nominal profit, AIOS shall not qualify to be a pure agent of the member as AIOS collects excess amount from the members as compared to the payments made by it to the Hotel and thus the activity would be exigible to service tax under the category of "Hotel, Inn, Club & Guest House Service" as it may mean that such service is provided by AIOS by outsourcing the same for its members.

• By virtue of Notification 26/2012-ST dated 20/06/2012, AIOS would be eligible to take an abatement of 40% of the gross amount charged and discharge service tax on 60% of the amount charged for providing the taxable service. AIOS shall also be eligible to take the CENVAT Credit of the service tax charged by the Hotel to it, subject to overall provisions of CENVAT Credit Rules, 2004.

9. Receipts from sale of food coupons to trade and members during the conference

o Service Tax implications

The sale of food coupons entitles the members in the conference to purchase food of the denomination mentioned in the coupon. The food coupons therefore provide the members with an entitlement to goods and therefore cannot be considered as a service. Further it is pertinent to note that generally the food is sold across the counter and is not served to the customer and therefore in the absence of any service portion in respect of the sale of food coupons the same is outside the purview of service tax.

10. Receipts from Members for a get together party

o Service Tax implications

• This is a part of facility or advantage etc. extended to members by "AIOS and therefore cannot escape the definition of service discussed above in more than one context.

However, the receipts from the members for the get together party is assumed to be inclusive of food and can be considered as a bundled service of Renting of the premises + supply of food. Notification
26/2012-ST dated 20/06/2012 - Entry (4) provides an abatement of 30% of the gross amount charged on a condition that CENVAT credit on any goods has not been taken and thus the same would be taxable under the category of "Mandap Keeper Service" at the said abated rate.

11. Conference halls and 5 guest rooms for overnight accommodation

o This also forms a part of facility to members and thus a service discussed mainly at 10 above.

12. Tax implication for the local organizing committee (LOC) organizing the conference on behalf of the society

o From the facts provided, it appears that the local organizing committee is basically a committee formed under the AIOS which has been allotted the function of organizing conferences at a respective local place. All members who are a part of the governing council of the society are also a part of the local organizing committee. Further, the audited statement of accounts of the conference are required to be made available to the society by the local organizing committee and thus it is inferred that the local organizing committee is a committee which functions for the AIOS and by the AIOS itself.

o Service Tax implications

For a transaction to be considered as a service under section 658(44) of the Act, it should satisfy the basic condition of presence of a service provider and service receiver. As per the facts of the case narrated above, the local organizing committee functions for the AIOS and by the AIOS and thus in absence of a contractual relationship as it prevails between two parties to the transaction, the same cannot be taxable under the service tax law since the basic requirement of having two separate persons to tax any transaction is missing— one does not provide service to oneself. However, if the local organizing committee is a separate body preparing separate set of accounts which do not get consolidated in the accounts of AIOS, then such body could be considered service provider for the consideration flowing, if any depending on the fact s.

FAICO online examination fee/Hon. FAICO fee

o FAICO [Fellow All India Collegium of Ophthalmology] - The Fellowship Certification Programme is organized by AIOS. The candidates desirous of obtaining a FAICO certification is required to enroll with AIOS and AIOS makes the necessary arrangements for organizing the examination. The examination fee charged by AIOS is Rs 5000/- per candidate per subject.

o Further, the FAICO certification is also granted by AIOS to doctors without an examination on the basis of their credentials and the experience in the respective field of ophthalmology. AIOS organizes elections wherein the deserving candidates are awarded certificates on the basis of the election results. AIOS charges a fee for awarding such certificates to the selected candidates.

o Service Tax implications

• Certification granted on the basis of an Examination

AIOS arranges the examination with the aim of encouraging academics and for standardization of knowledge and skills in ophthalmic sciences. AIOS undertakes the examination at various centers and deputes its own supervisors and observers for the said purpose. The examination includes written test, vivas etc. A fee of Rs 5000/- is charged from the candidates. Thus since AIOS undertakes the online examination (activity) for a consideration of Rs 5000/- for the candidates desirous of obtaining a FAICO
certification the transaction qualifies as a service within the meaning of section 658(44) of the Act. Accordingly the activity is exigible to service tax.

• Certification granted without an examination

The candidates possessing a certain level of experience in a particular speciality of ophthalmology may contest elections organized by AIOS. Depending upon the election results, the selected candidates are granted FAICO certification on the payment of a fee. Thus AIOS arranges for the elections (activity) for the candidates and recovers fees from the selected candidates for granting the FAICO certification. Thus in our view the aforesaid transaction will also qualify to be a service exigible to service tax.

3.4. To sum up all the receipts of the AIOS qualify to be value of taxable service except the sale of food coupons which is a sale of goods and in respect of the conference organized by the local organizing committee which being a part of AIOS itself is basically a self-service and therefore outside the purview of the service tax law itself. Further, the society is also eligible to claim an abatement in respect of the Hotel accommodation service as well as the receipts towards the get together party as explained above. Further it is advised that all the expenditure incurred in relation to sale of food coupons for instance the printing of the coupons be accounted separately and no CENVAT Credit be taken on such expenses since the sale of coupons is not a taxable service.

3.5. Further the society also has an option to claim the benefit of a small service provider available under notification 33 / 2012 - ST dated 20/06/2012 if the aggregate value of taxable service (The abated value to be considered) does not exceed Rs ten lakh rupees in the preceding financial year. Further it may be noted that the option once exercised by the society cannot be changed in the remaining part of the year. If the benefit of notification 33/2012-ST is claimed by the society, it shall not be eligible to take CENVAT credit of any inputs, input services or capital goods.

(Note: Conclusions reached and views expressed here are a matter of opinion. Our opinion is based on our understanding of the law and past experience with the revenue authorities. However, there is no guarantee that the tax authorities may not take a contrary view.)

Legislation, its judicial interpretation and the policies of the regulatory authorities are also subject to change from time to time and therefore it may have bearing on the views expressed above. Accordingly any amendment in law or an instruction through circular would necessitate a review of the comments. Therefore we do not hold any responsibility for changes occurring after the date of issue of this communication.

We trust the above explains & deals with the issue brought for our consideration.

You may feel free to revert for anything further in the matter.

Thanking You,

Yours faithfully

Puloma Dalal