Can RWA Collect GST When The Monthly Subscription is Below Rs. 7500?

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G. Viswanathan
Director, Accounting & Business Support and Indirect Tax, ASA Corporate Catalyst India Pvt. Ltd.

The concept of Resident Welfare Association (RWA) has become an integral part of the life for many who stay in High Rise Apartments / Complex or Gated Communities. The RWA collects monthly subscriptions from the occupants which they use for the maintenance of the Apartments, Complex or Gated Communities.

The taxing of such subscriptions was introduced in the Service Tax Regime in June 2005 and the trend continues even in the GST Regime. RWA's engage third party service providers for procuring Goods and Services for maintenance activities and in many cases the RWA's charge a sum below Rs 7,500/- per month as subscription for its members which is exempt from tax by virtue of the exemption provided in Notification 12/2017 – Central Tax (Rate)

On account of the aforesaid exemption the GST paid on the amounts charged by the Third Party Service Providers to RWA's are not available as Input Tax Credit (ITC) in the hands of the RWA's.

Certain RWA's have been toying with the idea of charging GST on the subscription amounts below Rs 7,500 per month for utilizing the ITC and also passing on the benefits of these credits by reducing the monthly subscription and thereby reducing the monthly Cash outflow to the members of the RWA's.

This article is an attempt to analyze whether the collection of GST on monthly subscriptions which are below Rs 7,500 per month is permissible under the legal framework.

Notification 12/2017 – Central Tax (Rate) is an Exemption Notification which has been which has been issued in exercise of the powers conferred by sub-section (1) of section 11 of the Central Goods and Services Tax Act, 2017 (12 of 2017), the Central Government, on being satisfied that it is necessary in the public interest so to do, on the recommendations of the Council, hereby exempts the intra- State supply of services from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act,

Serial No 77 of the said Notification reads as under

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 seven thousand five hundred 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.

From the above it is clear that there is an exemption from the charge of tax when the amount collected per member is up to an amount of Rs 7,500/. The contrary view to this is exemption is optional and hence RWA's are entitled to tax the transaction as at the end of the day the exercise would be positive from a Revenue Standpoint. It is therefore essential to understand the rules of interpretation of an exemption notification

This was explained by the Supreme Court in the matter relating to Commissioner of Customs (Imports) Mumbai Vs Dilip Kumar and Company. The salient highlights of this judgement is provided below

1. The purpose of interpretation is essentially to know the intention of the Legislature. Whether the Legislature intended to apply the law in a given case; whether the Legislature intended to exclude operation of law in a given case; whether Legislature intended to give discretion to enforcing authority or to adjudicating agency to apply the law, are essentially questions to which answers can be sought only by knowing the intention of the legislation. Apart from the general principles of interpretation of statutes, there are certain internal aids and external aids which are tools for interpreting the statutes.
2. The well settled principle is that when the words in a statute are clear, plain and unambiguous and only one meaning can be inferred, the Courts are bound to give effect to the said meaning irrespective of consequences. If the words in the statute are plain and unambiguous, it becomes necessary to expound those words in their natural and ordinary sense. The words used declare the intention of the Legislature.
3. In applying rule of plain meaning any hardship and inconvenience cannot be the basis to alter the meaning to the language employed by the legislation. This is especially so in fiscal statutes and penal statutes. Nevertheless, if the plain language results in absurdity, the Court is entitled to determine the meaning of the word in the context in which it is used keeping in view the legislative purpose Not only that, if the plain construction leads to anomaly and absurdity, the court having regard to the hardship and consequences that
flow from such a provision can even explain the true intention of the legislation.
4. After thoroughly examining the various precedents some
of which were cited before us and after giving our anxious consideration, we would be more than justified to conclude and also compelled to hold that every taxing statue including, charging, computation and exemption clause (at the threshold stage) should be interpreted strictly. Further, in case of ambiguity in a charging provisions, the benefit must necessarily go in favour of subject/assessee, but the same is not true for an exemption notification wherein the benefit of ambiguity must be strictly interpreted in favour of the Revenue/State.
5. Exemption notification should be interpreted strictly; the burden of proving applicability would be on the assessee to show that his case comes within the parameters of the exemption clause or exemption notification.
6. When there is ambiguity in exemption notification which is subject to strict interpretation, the benefit of such ambiguity cannot be claimed by the subject/assessee and it must be interpreted in favour of the revenue.

Given the above facts let us look at the exemption notification and whether there was any intention of the Legislature to permit charging of tax on a transaction which was exempt.

The enhancement in the basic exemption limit from Rs. 5000 to Rs. 7500 was considered in the 25th GST Council meeting held on 18th January 2018 and the decision of the council was as under

To enhance the exemption limit of Rs. 5000/- per month per member to Rs. 7500/- in respect of services provided by Resident Welfare Association (unincorporated or nonprofit entity) to its members against their individual contribution.

From the above it is clear that there was an intention to increase the exemption limit.

The intention of the Legislature was further clarified vide Circular No.109/28/2019- GST dated 22nd July 2019 issued by CBIC in an answer to a specific query which is reproduced below

Question

Where a person owns two or more flats in the housing society or residential complex, whether the ceiling of Rs. 7500/- per month per member on the maintenance for the exemption to be available shall be applied per residential apartment or per person?

Answer

As per general business sense, a person who owns two or more residential apartments in a housing society or a residential complex shall normally be a member of the RWA for each residential apartment owned by him separately. The ceiling of Rs. 7500/- per month per member shall be applied separately for each residential apartment owned by him. For example, if a person owns two residential apartments in a residential complex and pays Rs. 15000/- per month as maintenance charges towards maintenance of each apartment to the RWA (Rs. 7500/- per month in respect of each residential apartment), the exemption from GST shall be available to each apartment

From the above what is clear is that there was an intention only to provide exemption and the wordings in Notification 12/2017 – Central Tax (Rate) are clear.

We shall now look at the charging section 9 of the CGST Act

Subject to the provisions of sub-section (2), there shall be levied a tax called the central goods and services tax on all intra-State supplies of goods or services or both, except on the supply of alcoholic liquor for human consumption, on the value determined under section 15 and at such rates, not exceeding twenty per cent, as may be notified by the Government on the recommendations of the Council and collected in such manner as may be prescribed and shall be paid by the taxable person.

(2) The central tax on the supply of petroleum crude, high speed diesel, motor spirit (commonly known as petrol), and natural gas and aviation turbine fuel shall be levied with effect from such date as may be notified by the Government on the recommendations of the Council.

The provisions of Section 9 provides that a tax can be collected only for goods or services which are notified by the Government.

The operation of Section 9 cannot be done unless the goods or services are notified and a tax collection cannot be more than the effective rate. This being the case the collection of taxes on service which is exempt by virtue of the operation of Section 9 read along with Notification 12/2017 – Central Tax (Rate) has to be construed as ultra vires.

It is clear and unambiguous that the Notification 12/2017 – Central Tax Rate relating to the entry in S. No 77 is only to provide an exemption and further Section 9 of the CGST Act does not permit charging a tax which is more than the effective rate which in this case is NIL.

Therefore the charge of the tax on a specific exempted activity is not permissible under law and hence RWA’s cannot charge GST on subscription up to Rs 7500/- per month which is not permitted under law and will fail the test.

RWA’s who have charged such amounts will not be entitled to ITC claims and they will be called upon to pay the entire tax collected from the members as in an Indirect Tax regime the RWA’s are only acting as an Agent of the Government so far as it relates to collecting the tax.