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HEALTH CARE SERVICES : EXEMPT UNDER GST ACT

Prior to GST i.e., under Sales Tax Acts or Value Added Tax Acts of all States of India, Health Care Services were not specifically exempted, but courts never upheld any order or judgement levying tax on dispensaries or hospitals providing medicines to patient.

For the first time in the history of taxation in India Health Care Services were exempted vide **Notification No. 12/2017 – Union Territory Tax (Rate) : New Delhi, the 28th June, 2017.**

74	Heading 9993	Services by way of – (a) health care services by a clinical establishment, and authorised medical practitioner or para-medics; (b) services provided by way of transportation of a patient in an ambulance, other than those specified in (a) above.	Nil	Nil
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On the careful reading of the above Notification, it clearly comes to our view that under Heading 9993 followings have been declared exempt :-

Services by way of –

- (a) health care services
- (b) by a clinical establishment, and
- (c) authorised medical practitioner or para-medics;
- (d) services provided by way of transportation of a patient in an ambulance,
- (e) other than those specified in (a) above.

While interpreting scope and ambit of Heading 9993, as above, we should have to keep in mind that there are many other descriptions in the same Heading but, what has been declared exempt is reproduced above.

Background :

THE CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016.

The above constitutional amendment paved the way for introduction of GST in India. Earlier the constitution provided separate powers to Central and State to levy tax on interstate and intrastate transaction, but a composite formula was prepared in the shape of GST Act, 2017, because of amendments vide THE CONSTITUTION (ONE HUNDRED AND FIRST AMENDMENT) ACT, 2016.

The 101st Amendment in the Constitution amended various Articles of the Constitution of India, including Article 366(29A), adding Clause (12A) to define Goods & Service Tax. Accordingly, the goods and services were defined.

Amendment of Article 366 -

14. In Article 366 of the Constitution, the Amendment Act, 2016 inserted the following :-

- (i) (12A) “*goods and services tax*” means any tax on supply of goods, or services or both except taxes on the supply of the alcoholic liquor for human consumption;
- (ii) (26A) “*Services*” means anything other than goods;

In tandem with above constitutional amendments following definition is provided in the GST Act -

Section 2(52) :

“**Goods**” means every kind of movable property other than money and securities but includes actionable claims, 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.

Section 2 (102) :

“**Service**” 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.

At this juncture, it may be noted that GST Act exempted Health Care Service as above, this exemption was due to long drawn battle on this issue discussed in the subsequent part of this Article.

Additional Dimensions in GST

Vide Notification No. 12/2017- Central Tax (Rate) dated 28th June, 2017

Following definitions are provided for the purpose this Notification :

- (k) **“authorised medical practitioner”** means a medical practitioner registered with any of the councils of the **recognised system of medicines** established or recognised by law in India and includes a medical professional having the requisite qualification to practice in any recognised system of medicines in India as per any law for the time being in force;

- (s) **“clinical establishment”** means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases;

Section 2(h) of Clinical Establishments (Registration and Regulation) Act, 2010 defines **“recognised system of medicine”** means Allopathy, Yoga, Naturopathy, Ayurveda, Homoeopathy, Siddha and Unani System of medicines or any other system of medicine as may be recognised by the Central Government;

Now, in view of the definitions reproduced above, it is clear that Health Care Services as described above, are not exigible to GST.

However, the scope and ambit of the term *Health Care Services* cannot be properly appreciated unless we travel through related judgements such as Bharat

Sanchar Nigam Ltd., M/s. Fortis Health Care Ltd. and others discussed in the subsequently in paras of this Article.

PRIOR TO GST

- (i) It has always been a matter of great debate in courts and outside that the medicine dispensed by the Doctor/Hakim (earlier they use in their own dispensary) is within the purview of sale as per sale of Goods Act 1930 or not.
- (ii) Where completion of work involved expertise and involvement of material in finishing the job, this proposition was questioned and was dealt in Gannon Dunkerley's case (Construction/Engineering Company). In the said case Hon'ble Apex Court held (A.I.R. 1958 S.C. 560) that a transaction, in order to be subject to levy of sales tax under Entry 92A of the Union List or entry 54 of the State List, should have the following ingredients, namely, (i) parties competent to contract, (ii) mutual assent (iii) transfer of property in goods from one of the parties to the other party.
- (iii) This stand first followed by the Hon'ble Apex Court without deviating in any manner and was further affirmed in **M/s. Bharat Sanchar Nigam Ltd. and Another vs. Union of India and others [2006] 29 NTN DX 307/145 STC 91 (SC)** while interpreting provisions of (FORTY-SIXTH AMENDMENT) in the Constitution of India, whereby definition clause was added in Article 366 (29A) of the Constitution of India.
- (iv) This question was dealt in detail by 3 Members Judges Bench of Hon'ble Supreme Court in the case of **Bharat Sanchar Nigam Ltd. [2006] 29 NTN DX 307/145 STC 91 (SC)**. The Hon'ble Bench considered clause of Article 366 (29A) of the Constitution of India in the context of 46th Amendment.
- (v)(a) In the said judgement Hon'ble Court held that after Forth-sixth Amendment, the sale elements of those contracts which are covered by the six sub-clauses of Article 366 (29A) of the Constitution are separable and may be subjected to

sales tax by the States under entry 54 of List II of the Seventh Schedule and there is no question of the dominant nature test applying.

(b) The Hon'ble Court added, in para 43 of the said judgement that Gannon Dunkerley survived the 46th Constitutional Amendment in two respects. First with regard to the definition of “sale” for the purposes of the Constitution in general and for the purposes of Entry 54 of List II in particular except to the extent that the clauses in Article 366 (29A) operate. By introducing separate categories of “deemed sales”, the meaning of the word “goods” was not altered. Thus, the definitions of the composite elements of a sale such as intention of the parties, goods, delivery etc. would continue to be defined according to known legal connotations.

(c) The Hon'ble Court further added that of all the different kind of composite transactions the drafters of the 46th Amendment chose three specific situations,

- (A) a works contract,
- (B) a hire purchase contract and
- (C) a catering contract

to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in clauses (b) and (g) of Clause 29A of Art. 366,

(vi) The law laid down and referred as above, was later on discussed and followed by various High Courts. Hon'ble High Court of Jharkhand in **Tata Main Hospital vs. The State of Jharkhand & Ors [2008] 36 NTN DX 149** and **Aswini Hospital Pvt. Ltd. vs. C.T.O. Thrissur and others [2013] 51 NTN DX 29** including **International Hospital Pvt. Ltd. vs. State of U.P. & Ors. [2014 (Vol.55) NTN 16]** by the Hon'ble High Court Judicature at Allahabad and recently in **M/s. Fortis Health Care Ltd. and Another vs. State of Punjab and Others [2016 (Vol.61) NTN 122]**.

- (vii)(a) The Apex Court's judgement was very well taken into consideration by the Division Bench of Punjab Haryana High Court in the case reported as *M/s. Fortis Healthcare Limited and Another vs. State of Punjab* and others dated 23-01-2015.
- (vii)(b) A perusal of the definition of “sale” reveals that both statutes define “sale” to include transfer of property in goods for cash etc. and includes composite contracts as set out in Article 366 (29A) of the Constitution of India. The States of Punjab and Haryana may levy VAT on only such transactions as fall within the definition of “sale” whether as a sale of goods or as composite contract. Where, however, the contract does not possess the element of a sale as set out in these sections nor is it a composite contract the State cannot by a legal fiction infer sale and seek to tax the so-called element of sale.
- (viii)(c) In order to appreciate the facts of *M/s. Fortis's* it will be better to travel through the said Judgement of Punjab and Haryana High Court and therefore, quoting the passages liberally :

The petitioners are business entities that run hospitals in the private sector and provide medical care, but at a price. One may disagree with the commercialisation of medical services or the exorbitant prices charged but these facts are irrelevant as there is no denying the fact that the petitioners provide all types of medical services, that include surgical procedures which require administering drugs and may involve installing stents, implants etc. as an essential part of such procedures, like open heart surgery, angiography, knee surgery, hip replacement etc.

A medical procedure commences with a patient visiting a hospital to elicit a doctor's opinion regarding his medical condition and in case he requires a medical procedure, information regarding the particulars of the procedure and the cost. The patient is, thereafter, informed of the particulars of the medical procedure, the drugs, implants, stents etc. that are required for his treatment/ medical procedure and the cost. The patient accepts the offer and opts for a particular procedure. Once having opted for a particular procedure, the choice of the drugs, implants, stents etc. would depend upon

medical advice and only where, medically permissible, the choice of the patient. The question posed before us would, therefore, have to be further refined, namely, whether a medical procedure can be severed into separate elements of service and sale with service being the medical advise and medical procedure and the sale being the supply of medicines, surgical items, implants, to patients whether as part of a package or to an individual patient?

We therefore, have no hesitation in holding that medical procedures/services offered by the petitioners are a service. The supply of drugs, medicines, implant, stents, valves and other implants are integral to a medical services/procedures and cannot be severed to infer a sale as defined under the Punjab or the Haryana Act and therefore, are not exigible to value added tax.

Conclusions : Suggestions :

1. Specific mention of services by way of transportation to the patient from a clinical establishment should include air taxies also.
2. There is no mention of food services provided to the patients only, but the same being an essential part of life/health of patient, should be included in health care services provided by the clinical establishment.
3. Any transplant or surgery which is for the purpose of beautification is not allowable for exemption.
