EDUCATION SERVICES – SUSTAINABLE INTERPRETATION

– BY ANIRUDHA R J NAYAK,

TUITION / COACHING CLASSES / TEACHING SHOPS – NOT LIABLE TO GST

The recent decision of the Authority for Advance Ruling (AAR) in Rajendra Shukla's case wherein the issue to be decided was – "*whether services related to providing coaching for entrance examination will come in the ambit of Goods and Services Tax*" is the subject matter of this paper The deliberation herein should, in my view apply to any tuition /coaching class / teaching shop in India.

The AAR at para 4.1 abstracts sl.no.30 of notification no.11/2017-CT (Rate) to arrive upon a conclusion that education services is taxable at the rate of 9% under CGST Act and SGST Act. At para 4.2 notification no.12/2017-CT (Rate) sl.no.66 is abstracted. Para 4.3 abstracts the definition of educational institution. At para 4.4 it is held that the tutorial institution is in no way covered in the definition of Educational Institution as given in the notification no.12/2017-CT (Rate). It is further held in the decision of the AAR that "*the private institute does not have any specific curriculum and does not conduct any examination or award any qualification recognised by any law which would be covered in the above notification. The activity of the applicant is not covered by the specific* *definition provided for interpretation of exemption notification."* In the light of these findings it is ordered that the activity is liable to GST.

LEGAL FALLACY IN THE AAR DECISION

To better understand the scope of exemption under notification no.12/2017-CT (Rate) the relevant part is abstracted below:

Exemption from CGST on specified intra-State services

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 of description as specified in column (3) of the Table below from so much of the central tax leviable thereon under sub-section (1) of section 9 of the said Act, as is in excess of the said tax calculated at the rate as specified in the corresponding entry in column (4) of the said Table, unless specified otherwise, subject to the relevant conditions as specified in the corresponding entry in column (5) of the said Table, namely:-

TABLE

Sl. No.	*Chapter, Heading,*	*Description of Services*	*Rate*	*Condition*

(1)	(2)	(3)	(4)	(5)
66	Heading 9992	Services provided - **(a) by an educational institution to its students, faculty and staff;** (b) to an educational institution, by way of,- (i) transportation of students, faculty and staff; (ii) catering, including any mid-day meals scheme sponsored by the Central Government, State Government or Union territory; (iii) security or cleaning or housekeeping services performed in such educational institution; (iv) services relating to admission to, or conduct of examination	Nil	Nil

		by, such institution; up to higher secondary: *Provided that nothing contained in entry (b) shall apply to an educational institution other than an institution providing services by way of pre-school education and education up to higher secondary school or equivalent.*		

2. Definitions. - For the purposes of this notification, unless the context otherwise requires, -

(y) "educational institution" means an institution providing 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 recognised by any law for the time being in force;

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

4. This notification shall come into force on the 1st day of July, 2017.

[Notification No. 12/2017-Central Tax (Rate), dated 28-6-2017]

The part in bold above are the relevant portions / entries which is examined herein keeping in mind well settled principles of statutory interpretation. There are certain imperatives culled out from the notification supra detailed below for ease of reference:

a. The exemption is without any condition precedent or subsequent.

b. The rate specified against the entry is NIL.

c. The description of service which is exempted is *services provided (a) by an educational institution to its students, faculty and staff.*

d. There are no qualifications to the word services. Which is to state, the types of services to be provided to students, faculty and staff are not specified. When there is no specificity to the type of services provided what follows is that the exemption is available to any and all types of services the only condition being that such services ought to be provided by the educational institution to its students, faculty and staff. As long as this stipulation is satisfied the benefit of exemption cannot be denied.

The operative word however in the description of services is the word "***educational institution.***" This word is defined in the notification to mean firstly *an* *institution.* An institution as is commonly understood is a large important organization such as an university, church, or bank. It may be noted that the manner of holding of the institution is not specified in the notification i.e. whether the institution is a private institution or a public institution or whether the institution is for profit motive or commercial or for the benefit of society at large or a trust etc., etc., etc., is of no consequence to the operation of the notification as long as it fulfils the definition of being an institution. An institution is commonly understood as an organization founded for a religious, educational, professional or social purpose. For example *an academic institution.*

In the context of the deliberation herein Simmple Shukla's Tutorials, in my determined view qualifies to be an institution as per common parlance. This is because it is a place where education is imparted relating to a curriculum which is prescribed by various Universities / Boards which results in obtaining a qualification recognised by law. The test of common parlance being important because the word institution is not defined and hence recourse to the common parlance test. The question therefore to be asked is - Whether Simmple Shukla's Tutorials is an institution and is understood as such by the people involved in similar activities. My view is in the affirmative and I believe that there may be others who may digress with this view. Be that as it may, and reverting to the discussion, the notification stipulates - An institution *providing services by way of*. It may be appreciated that the words used are not providing services. The words used are - *providing services by way of*. By way of what? By way of ***(ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force***. In other words - An institution which provides services by way of education (like a tutorial / coaching class (including commercial / teaching shop) as a part of a curriculum. The notification deliberately does not specify therein that the institution has to be a recognised college or university or that it has to award degrees or qualification recognised by law or that it has to have its own curriculum. All that it stipulates is that the services ought to be by way of education which is a part of a curriculum which results in the award of a qualification recognised by law. The notification does not in its body stipulate that the institution has to be a college, institution, University prescribing its own curriculum. The notification, at the cost of repetition does not stipulate that the degree recognised by law ought to be awarded by the institution imparting the services by way of education. All these inferences in the decision of the AAR are unwarranted and uncalled for. It appears that the AAR failed to take cognizance of the absence of specificity in the entry in the notification relating to education services. In my view, the curriculum postulated in the notification is that of the college where the student attending the tutorial / coaching class / teaching shop is enrolled for obtaining a qualification recognised by law for the time being in force. What is important is to appreciate that as long as the education which is imparted to a student forms a part of the curriculum anywhere not necessarily in the institution where the education is imparted, which education results in the obtaining of a qualification recognised by law necessarily has to be entitled to the benefit of the exemption. The notification nowhere stipulates that the educational institution has to have its own curriculum or that it has to impart a qualification recognised by law and the like as held in the decision of the AAR at para 4.4. What further butresses the above understanding is the fact that the definitions in relation to educational services were defined completely differently under the earlier laws relating to services. It appears that the understanding under the earlier law has swayed the decision against the applicant. The decision makers have failed to appreciate that the understanding under the earlier dispensation was in the text, sub-text and context of the definitions and wordings used in the earlier enactment. That the clarifications issued by the Board were for the purposes of the earlier enactment and not for the purposes of the present dispensation. That the decision is a perfect of how a quasi-judicial decision ought not to be. The decision goes against the grain of every decision holding that a quasi-judicial decision ought to be a speaking order. That it's verdict has to be sustained based on logic and reason given the words used in the law. However, the AAR's decision fails this litmus test since it brings into its reasoning non-existent criteria to hold against the applicant. It is equally well-settled in law that nothing can be read into the notification, if on a plain reading the applicant is entitled to the benefit however much the loss is to the revenue. That revenue loss cannot be the basis to interpret law. That the exemption as it stands today cannot be interpreted as it was earlier since the words, phrases and sentences used presently are not similar / identical with the words, phrases and sentences used earlier. This is made clear by abstraction of the definitions under the earlier enactment infra.

The decision of the AAR is therefore a decision which cannot be said to have appreciated the notification and its contents in perspective as also that the AAR cannot be said to have appreciated the description of the services keeping in view the definition of educational institution as defined. In short the decision of the AAR leaves much to be desired by the act called Advance Ruling.

The interested reader may refer to the earlier definitions relating to education services for better appreciation of what is stated supra.

PERIOD: APRIL 2010 TO 1.05.2011. S. 65 (26) AND (27) -

65 (27) "commercial training or coaching centre" means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes [but does not include pre-school coaching and training centre or any institute or establishment which issues any certificate or diploma or degree or any educational qualification recognised by law for the time being in force];

A mere perusal to the definition above and the exemption entry in notification 12/2017-CT (Rate) will establish the fallacy of the finding of the AAR. The decision of the AAR does not stand to reason given the provisions of law but appears to be an opinion which is unsupported by reason in law.

In my view, the import of the definition for the period April 2010 to 1.05.2011 entailed that even if one of the courses offered by the institute / centre was recognised by law for the time being in force service tax could not be levied on any other course/s offered by the institute / centre since the exclusion in the definition was institute / centre specific.

PERIOD: 2.05.2011 to 1.07.2012

(27) "commercial training or coaching centre" means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons on any subject or field other than the sports, with or without issuance of a certificate and includes coaching or tutorial classes. The underlined portion above was omitted and the exclusion was exempted by virtue of an exemption notification i.e. 33/2011-ST dated 25.04.2011. abstracted herein to better appreciate the metamorphosis of the category of service

Commercial coaching or training centre providing pre-school coaching and training or coaching or training leading to grant of certificate or diploma or degree or any educational quantification recognised by law —

Exemption w.e.f. 1-5-2011

In exercise of the power conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government on being satisfied that it is necessary in the public interest so to do, hereby exempt,-

> *(i) any pre-school coaching and training;*
>
> *(ii) any coaching or training leading to grant of a certificate or diploma or degree or any educational qualification which is recognised by any law*

for the time being in force; when provided by any commercial coaching or training centre from the whole of the service tax leviable thereon under section 66 of the Finance Act, 1994.

2. This notification shall come into force on the 1st day of May, 2011.

[Notification No. 33/2011-S.T., dated 25-4-2011]

The import of this notification made it clear that the government had made the exemption specific to the course and not the institution rendering the service. In other words the exemption was dependent on whether the courses offered by the institute / centre were recognised by law for the time being in force.

PERIOD: 1.07.2012 TO MARCH 2012 –

During this period there was no specific definition of the activity and there was one definition of service in section 65B(44). However the government in its wisdom also listed a list of negative services which though were activities were outside the ambit of the definition of service by virtue of the dispensation of service tax being based on the negative list of services i.e. all other activities by one person to another was a service when the same did not result in an actionable claim or goods. The relevant portion from the negative list is abstracted herein for better appreciation:

SECTION [66D. Negative list of services. *—The negative list shall comprise of the following services, namely :—*

(l) 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 recognised by any law for the time being in force;

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

The import of the above service in the negative list is that the scope of the entry in the negative list is not dependent on the qualification being recognised by law but as long as the education is imparted for the purposes of obtaining a qualification recognised by law the activity would not be exigible to service tax. In other words even if a student goes to a coaching or training centre outside the college which college grants a degree / qualification recognised by law such education / coaching / training would be covered within the ambit of the entry in the negative list of services. The ambit as of today is therefore phenomenally wide and the intent of the government in exempting education services is also clear.

The next aspect which merits mention is that the expression "*law in force*" should not receive any technical meaning but should be understood in a sense which gives the phrase a fair measure of amplitude. The meaning of the expression *laws in force* cannot be construed to be exhaustive but only illustrative. The expression *law* has to be understood as per common parlance and usage to include custom, regulation, byelaw, order, administrative instructions and the like. The noticee submits that the expression 'recognized by law' is a very wide one. The legislature has not used the expression "conferred by law" or "conferred by statute". Thus even if the certificate / degree / diploma / qualification is not the product of a statute but has approval of some kind in 'law', the same would be exempt. The expression "*recognize'* is defined, in Black's Law Dictionary, 8th Edition as confirmation of an act done by another person as authorized, formally acknowledging the existence; and, in Concise Oxford Dictionary as acknowledging the existence, validity or legality of. Even if universities / state governments recognize the diploma to be equivalent to those provided by the State Governments / universities is sufficient for the education to be recognised by law. Even if the recognition is for the purpose of eligibility for obtaining ultimate qualification / jobs / post-graduation etc, it should suffice the requirement of law. The word *law*, is defined in Black's Law Dictionary, 8th Edition as the aggregate of legislation, judicial precedents and accepted legal principles and the set of rules or principles dealing with a specific area of legal systems. The Supreme Court in *Narsingh Pratap Singh Deo* v. *State of Orissa* - AIR 1964 SC 1793 held that a law generally is a body of rules which have been laid down for determining legal rights and legal obligations which are recognized by Courts. Similarly, in the celebrated decision of *R.S. Nayak* v. *A.R. Antulay* - (1984) 2 SCC 183 it was held that law includes any Ordinance, By-law, Rule, Regulation, Notification, Custom or Usage having force of law. All of these aspects have not been taken into account by the AAR while advancing unsubstantiated allegations as findings in the order.

The Great American Psychologist B. F. Skinner said *education is what survives when what has been learned has been forgotten.*

ANIRUDHA R J NAYAK

Bengaluru