

AUTHORITY FOR ADVANCE RULINGS
(Central Excise, Customs and Service Tax)
Hotel Samrat, 4th Floor, Kautilya Marg, Chanakyapuri
New Delhi

Present:

Justice V.S. Sirpurkar (Chairman)
Shri S.S.Rana (Member)
Shri R.S.Shukla (Member)

The 06th day of May, 2016

Ruling No. AAR/ST/ 14 /2016

in

Application No. AAR/44/ST-1/10/2015

Name & address of the applicant : M/s Choice Estates and Constructions Ltd

Commissioner concerned : Commissioner of Customs, Central Excise &
Service Tax, C.R.Building, I.S.Press Road,
Cochin-682018

Present for the applicant : Shri Jose Jacob, Advocate

Present for the Department : Shri Amreesh Jain (AR)

Ruling

M/s Choice Estates and Constructions Limited (hereinafter also referred to as applicant) is a Public Limited Company having its registered office at Kochi. Applicant proposes to enter into a Partnering Agreement with Choice Foundation, a society registered under Travancore-Cochin Literary, Scientific and Charitable Societies Registration Act, 1955 to combine their mutual areas of expertise for the setting up and operation of an educational institution at Thiruvalla in Kerala. As per said Agreement, applicant would be responsible for the entire infrastructural requirement of the educational institution while Choice Foundation would be responsible for the entire academic aspect and related requirements of the educational institution. The agreement is for a term of thirty years and it has been agreed between the Parties that any revenue generated from the project, during the term, will be shared by the parties in the ratio agreed in the Agreement. For this purpose, the entire revenue relating to the school will be received in a joint account operated by the applicant and Choice Foundation jointly and revenue share would be drawn from this account by the applicant and Choice Foundation.

2. Applicant submits that they along-with Choice Foundation are partnering together to providing education services up to Higher Secondary School, which is a service mentioned in the Negative List under Section 66 D (1) of the Finance Act, 1994; that

the service falls within the Negative List, therefore, the revenue share relating to such service taken by both the applicant and Choice Foundation, is also not liable to Service Tax. Applicant inter-alia submits that they along-with Choice Foundation propose to jointly provide educational services to students; that in consideration to educational services, fees is paid by students, which is equally shared between the applicant and Choice Foundation. Applicant further submits that service recipient in the present case is the student and service providers are the applicant and Choice Foundation jointly; that no service is provided inter-se between the applicant and Choice Foundation; that construction of building by the applicant and its maintenance are in the nature of self service, thus not liable to Service Tax.

3. Applicant has raised following questions before this Authority;

- *Whether Service Tax is applicable on the revenue share relating to the Applicant?*
- *Whether Service Tax is applicable on the revenue share relating to Choice Foundation?*
- *Whether Service Tax is applicable on the fees collected from the students?*
- *If answer to any of the above questions is yes, then whether the applicable Service Tax can be recovered from the student?*

4. Revenue inter-alia submits that the proposed “Partnering Agreement” between the applicant and M/s Choice Foundation is that the applicant shall, on an exclusive basis, undertake construction and infrastructure development of the scheduled property in accordance with the architectural design and specifications provided by Choice Foundation within 30 days from the effective date and ensure the upkeep and maintenance of the infrastructure so developed for the Educational Institution during the term of the agreement; that the inference also from the “partnering agreement” is that M/s Choice Foundation shall be responsible for the overall Management and Operation of the Educational Institution from an academic perspective; that Choice Foundation shall on an exclusive basis undertake day to day administration and operation of the Educational Institution, including but not limited to obtaining affiliation certification, recruiting academic staff, determine the curriculum and other academic activities to be undertaken etc.; that applicant is proposing to construct the Civil Structure of the same which appears to be taxable; that as per 4.1. b of the said proposed “Partnering Agreement”, the nature of constructions and the materials used shall be sole discretion of M/s Choice Estates who shall be entitled to appoint its own architects, engineers, contractors, sub-contractors, workmen of all types and all other personnel for construction and completion of the building to be constructed by M/s Choice Estates; that the inference from here again is that many kind of service providers and service will be involved which will be taxable as per the different provisions; that as per Para 5 (Revenue Share) of the “Partnering Agreement”, the revenue will be shared equally between the parties; that as these natures of activities are not essentially related to imparting of education, it appears that the same is also subject to levy of Service Tax. Further, the exemption hitherto available to services provided by way of renting of immovable property to educational institutions stands withdrawn, with effect from 01/10/2014.

5. In order to appreciate the facts of the case, it is important to go through the relevant portions of "Partnering Agreement" submitted by the applicant which has been relied upon by the applicant as well Revenue. They are as under;

WHEREAS

I. *CHOICE FOUNDATION is engaged in the running of premier educational institutions in the state of Kerala:*

II. *CHOICE ESTATES is engaged in the business of partnering with educational institutions for taking up the infrastructural requirement of such educational institutions.*

III. *CHOICE ESTATES and CHOICE FOUNDATION have agreed to partner together to combine their mutual expertise for the setting up and operation of an educational institution, at Thiruvalla, Kerala, India in Schedule A property, hereinafter referred to as SCHEDULED PROPERTY, owned by CHOICE ESTATES.*

IV. *CHOICE ESTATES has undertaken to be responsible for the entire infrastructural requirement of the educational institution including developing the SCHEDULED PROPERTY in accordance with the design and specifications provided by CHOICE FOUNDATION and coordinating all activities thereto and also to undertake all infrastructural development and maintenance required arising there from during the term of this Agreement.*

V. *CHOICE FOUNDATION has undertaken to be responsible for the entire academic aspect and related requirements of the educational institution and be involved in the day to day administration and academic activities related to the operation of the educational institution during the term of this Agreement.*

3. ROLE OF BOTH PARTIES:

3.1 *CHOICE ESTATES shall be responsible for the provision and maintenance of all infrastructural requirements of the Educational Institution from time to time. CHOICE ESTATES shall, on an exclusive basis undertake, the construction and infrastructure development of the Scheduled Property in accordance with the architectural design and specifications provided by CHOICE FOUNDATION within 30 days from the effective date and ensure the upkeep and maintenance of the infrastructure so developed for the, Educational Institution during the terms of this Agreement.*

3.2 *CHOICE FOUNDATION shall be responsible for the overall management and operation of the Educational Institution from an academic perspective. CHOICE FOUNDATION shall on an exclusive basis undertake the day to day administration and operation of the Educational Institution, including but not limited to obtaining affiliation certificate, recruiting academic staff, determine the curriculum and other academic activities to be undertake etc.*

4. DUTIES AND OBLIGATION:

4.1 *Duties of CHOICE ESTATES: In accordance with the terms and conditions set forth in this Agreement, CHOICE ESTATES hereby agree to perform the following duties during the Term of this Agreement:*

a. *CHOICE ESTATES shall construct building/s and undertake the infrastructure development of the Educational Institution at the Scheduled Property in accordance with the design and specifications provided by CHOICE FOUNDATION and in accordance with any and all regulations applicable under the law for the time being in force.*

b. The nature of construction and the materials used shall be at the sole discretion of CHOICE ESTATES who shall be entitled to appoint its own Architects, Engineers, Contractors, Sub-Contractors, workmen of all types all other personnel for construction and completion of the building to be constructed by the CHOICE ESTATES.

c. All costs relating to the construction and infrastructural development of the Educational Institution shall be borne by CHOICE ESTATES.

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5. REVENUE SHARE

5.1 The revenue will be shared equally between the Parties.

5.2 The Parties shall open and maintain a Joint Account with any Nationalised Bank or other bank as may be mutually agreed which shall be jointly operated by the Authorised Signatories of the Parties. No drawings may be made from this account without the approval in writing of the Authorised signatories of both the Parties.

5.3 All revenue accruing relating to the Educational Institution shall be deposited into the Joint Account maintained by the Parties and shall be shared in the ratio envisaged in Clause 5.1

5.4 Each Party may draw revenue from the Joint Account on a quarterly basis for meeting their respective expenses, subject to approval in writing of the Authorised signatories of both the Parties.

6. From the preamble, paragraphs 3, 4 and 5 of the proposed Agreement, applicant inter-alia submits that both the parties are coming together to jointly provide services to the students, who are receiver of services; that there exists a service provider-service receiver relationship between the applicant and students as also Choice Foundation and students; that there is no service provider-service receiver relationship between the applicant and Choice Foundation; that provision of service and taking revenue share is different and distinct from engaging a sub contractor or service provider to provide service, which enable provision of service. Applicant further submits that they are rendering educational services and taking a revenue share which cannot be equated to a service provider; that mutuality of interest is absent in case of service provider; that service provider on the other hand is only concerned with fee payable to him by the service receiver.

7. It is observed that applicant submits that they i.e. Choice Estates & Constructions Ltd and Choice Foundation are coming together to jointly provide services to the students. Further preamble to the “partnering Agreement” inter-alia reveal that both parties have agreed to partner to combine their mutual expertise for the setting up and operation of an educational institution. Therefore, partnering of applicant with Choice Foundation (hereinafter also referred to as “partnering person”) would come under the ambit of “person” as defined under Section 65B (37) (VII) of the Finance Act, 1994, which includes an association of persons or body of individuals, whether incorporated or not. Applicant is a company and would fall under the definition of person as also Choice Foundation being a Society under Section 65 B(37)(iii) and 65B(37) (IV) of the Finance Act, 1994 respectively. Applicant, Choice Foundation and “partnering person” are all 3 separate persons. Therefore, service provided by the applicant (a person) to “partnering person” (another person) for consideration will be a service.

8. Applicant submits that in the present partnering agreement, the contracting parties do not provide services inter-se to each other, but merely act on principal to

principal basis to jointly undertake education services and to share the economic gains resulting from such activity. Applicant submits that they are covered by CBEC (Central Board of Excise and Customs) Circular No. 109/03/2009-ST dated 23.02.2009. The relevant paragraph is extracted as under;

Another type of arrangement is where the contract between the theatre owner and the distributor is on revenue sharing basis i.e. a fixed and pre-determined portion i.e. percentage of revenue earned from selling the tickets goes to the theater owner and the balance goes to the distributor. In this case, the two contracting parties act on principal-to-principal basis and one does not provide service to another. Hence, in such an arrangement the activities are not covered under service tax.

9. It is to be observed that the CBEC Circular dated 23.02.2009 relied upon by the applicant is prior to the introduction of Negative List regime in 2012, wherein paradigm shift was made in the Finance Act, 1994. The word "service" was defined first time under Section 65B (44) as also "person" under Section 65B (37) *ibid*. Further, Circular 148/17/2011-ST dated 13.12.2011 clarified the earlier Circular dated 23.02.2009. Relevant paragraphs are extracted from Circular dated 13.12.2011 are as under;

6. It is being represented that in certain situation the distributor and the theatre owner conduct business together and hence no service tax is leviable. Arrangement amongst two or more entities can either be on principal to principal basis or on partnership/ joint/collaboration basis. In the former, the constituent members are independent of each other and do not share any risk/revenue/profit/loss/liability of the other while in the latter the constituent members join hands for mutuality of interest and share common risk/profit together.

7. Unincorporated joint venture, not operating on principal to principal basis, will exist only if the arrangement entered into between the two independent members is also recognized as a person. It may be noted that the word "person" has not been defined in the Finance Act, 1994. As per Section 3(42) of General Clauses Act, 1897 "person shall include any company or association or body of individuals, whether incorporated or not". In this regard attention is invited to explanation to Section 65 of the Finance Act, 1994 wherein the taxable service includes any taxable service provided or to be provided by any incorporated association or body of persons to a member thereof.

10. It is observed that arrangement between the applicant and Choice Foundation is not on principal to principal basis and both the parties share revenue, as is evident from the clause "Revenue Share" in the "Partnering Agreement". Further, we have already held that "partnering person" would come under the ambit of "person" as defined under Section 65B (37) (VII) of the Finance Act, 1994, which includes an association of persons or body of individuals, whether incorporated or not. Applicant is a company and would fall under the definition of "person" as also Choice Foundation being a Society under Section 65 B(37)(iii) and 65B(37) (IV) of the Finance Act, 1994 respectively. CBEC in Circular dated 13.12 2011 have clarified that when arrangement is under unincorporated partnership/ joint/collaboration basis, then service provided by each of the person is liable to Service Tax. Therefore, in the present case, applicant-[a person under the meaning of Section 65 B(37)(iii)] if providing services to another person i.e. "partnering person", who is a separate person in terms of Section 65 B(37) (VII) *Ibid*, will be liable to Service Tax.

11. Another point raised by the applicant is that they are not receiving any consideration, other than from the students; that consideration received from the students cannot be consideration received from Choice Foundation as per Section 67(1) of the Finance Act, 1994 which inter-alia states that for the purpose of Service Tax, value shall be the gross amount charged by the service provider for such service provided or to be provided. Therefore, in absence of any consideration, no Service Tax can be levied.

12. It is noticed that the applicant and Choice Foundation have agreed to partner together to combine their mutual expertise for setting up and operation of an educational institution. Expertise of the applicant is providing infrastructural requirement like building etc., whereas Choice Foundation expertise is in the field of academics. Both parties are to have joint account and no withdrawal is to be made from said account without the approval of other party. Further, each party can draw from the Joint Account for meeting their respective expenses. It is clear from the 'Agreement' that revenue share has to be equal between the parties for meeting their respective expenses. Also "Revenue Share" clause in the said Agreement does not state that the drawal from revenue shall be only in respect of imparting education to students. In fact, the same would be for meeting respective expenses by both parties. In other words, revenue received with respect to expenditure incurred includes expenditure incurred on services etc. provided individually by the applicant and Choice Foundation to the Educational Institution, to be partnered by the applicant and Choice Foundation i.e. separate legal entity, is nothing but consideration. However, value of service will have to be determined in terms of Section 67 ibid read with rules made there-under.

13. Applicant further submits that the proposed Agreement is in the nature of a consortium and there can be no Service Tax levy on the revenue share between consortium members. In this connection, applicant relied upon the judgment in CCE, Vadodara vs. Ishikawajima-Harima 2009(13) STR 650 (Tri-Ahmd.), affirmed by the Apex Court 2015(39) STR 913(SC). It is noticed that Tribunal judgment in case of Ishikawajima-Harima was with respect to turnkey project, wherein it was held that part of the turnkey project cannot be bifurcated and subjected to Service Tax. The case before us does not involve turnkey project, therefore ratio of said Tribunal judgment is not applicable to the case before us.

14. Applicant submits that both the applicant and Choice Foundation are jointly providing education service which is exempted from payment of Service Tax by virtue of being mentioned in the Negative List; that revenue share received by both parties being Revenue share for provision of an exempted service cannot be taxed separately. It is to be observed that applicant shall construct building(s) and undertake infrastructural development of education institution. Choice Foundation is responsible for overall management and operation of the Educational Institution from academic perspective.

15. Section 66B ibid inter-alia envisages that Service Tax shall be levied on the value of all services, other than those services specified in the Negative List of services under Section 66D of the Finance Act, 1994. Section 66D (I) of the Finance Act, 1994 reads as under;

(l) Services by way of -

- (i) pre-school education and education up-to higher secondary school or equivalent;*
- (ii) education as a part of curriculum for obtaining a qualification recognized by any law for the time being in force;*
- (iii) education as a part of an approved vocational educational course;*

16. It is clear from Section 66D (l) of the Finance Act, 1994 that service provided by way of pre-school education and education up-to higher secondary school or equivalent is not liable to Service Tax being in the Negative List. In the subject case, applicant and Choice Foundation propose to enter into a Partnering Agreement. Applicant and Choice Foundation would be formed for a specific purpose of providing education to students up-to higher secondary school, wherein role of both the parties have been specified in said Agreement. Further proposed Agreement clearly mentions that the applicant and Choice Foundation would partner together to combine their mutual expertise for setting up and operation of an educational institution at Thiruvalla. Therefore, service provided by the "partnering person" would come under the Negative List and would not be liable to Service Tax.

17. Further, Revenue has pointed out 3 areas wherein Service Tax is leviable. They are;

- a) Construction of Civil Structure
- b) Renting of immovable property
- c) Construction of Civil Structure would entail services of architect, engineer etc.

Construction of Civil Structure

18. Revenue submits that Notification No. 6/2015-ST dated 01.03.2015 has amended S. No. 12 of Notification No. 25/2012-ST withdrawing earlier exemption on services provided to Govt., a Local Authority or a Govt. Authority by way of construction etc. of structure meant predominantly for use as an educational, clinical or an art or cultural establishment. It is to be observed that this Notification is with respect of services provided to the Govt., a Local Authority or a Govt. Authority. In the case before us, services are not being provided to Govt., Local Authority or Govt. Authority. Therefore, said Notification No. 06/2015-ST dated 01.03.2015 is not applicable to the present case. Applicant submits that both land and building are owned by the applicant; that Section 66 E(b) of the Finance Act, 1994 would apply only where the building is intended for sale and where at least some consideration is received prior to issuance of Completion Certificate. In this connection, Section 66E (b) is reproduced, as under;

SECTION 66 E. Declared services – The following shall constitute declared services, namely:-

- (b) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority....*

19. It is observed that Section 66 E (b) of the Finance Act, 1994 clearly envisages that construction of civil structure etc., shall be a declared service and thus liable to Service Tax provided it is intended for sale to a buyer. Further, construction of civil structure etc. even if intended for sale would not be declared service, where the entire consideration is received after issuance of completion certificate. In the case before

us, civil structure is not intended for sale and further, no amount shall be received by the applicant before issuance of completion certificate by the competent authority. Therefore, we agree with the applicant that the construction of complex etc., in this case will not come under the ambit of declared service and not be liable to Service Tax.

Renting of Immovable Property

20. We have held that construction of civil structure etc., by the applicant for the Educational Institution (partnering of applicant with Choice Foundation) will not be liable to Service Tax. Revenue has raised another issue that renting of immovable property (Civil Structure etc.) by the applicant for said Educational Institution will be liable to Service Tax especially when the exemption Notification No. 3/2013-ST dated 01.03.2013 available to services provided by way of renting immovable property to educational institutions, stands withdrawn vide Notification No. 6/2014 dated 11.07.2014. Applicant submits that renting of immovable property by the applicant is self service, hence not liable to Service Tax. We have already held in preceding paragraph that the applicant, Choice Foundation and “partnering person”, are all 3 separate persons under Section 65 B (37) of the Finance Act, 1994. Therefore, service of providing of renting of immovable property by applicant to “partnering person” will not be “self service”. The consideration for renting said property would be received as per the “Revenue Share” clause in the said Agreement. Therefore, renting of immovable property would be liable to Service Tax.

Construction of Civil Structure would entail Services of Architect, Engineer etc.

21. Revenue submits that construction of Civil Structure etc would entail services of architect, engineer etc., which would be liable to Service Tax. Applicant in their written submissions has stated that they are engaging contractors, architects etc. for construction of building, which is a separate and distinct service and would be liable to Service Tax. As architects, engineers etc., would be providing service to the applicant, in construction of building for consideration, the same would be liable to Service Tax. Further, service of maintenance and other infrastructural services rendered by the applicant (person) to “partnering person” (another person) would be liable to Service Tax unless same is exempted or in the Negative List.

22. After closure of matter for ruling by this Authority on 01.04.2016, applicant in written submissions dated 12.04.2016 has raised new issue regarding students getting bundled education service comprising of both academics and infrastructure. This issue has not been considered by the Authority, as it is raised only after closure of the matter.

23. In view of above, we rule as under;

- a) *Service Tax is applicable on the revenue share relating to the applicant to the extent it is relatable to rendering of taxable service.*
- b) *Service Tax is applicable on the revenue share relating to Choice Foundation to the extent it is relatable to rendering of taxable service.*
- c) *Service Tax is not leviable on the fees collected from the students to the extent it is covered under the Negative List in terms of Section 66D (I) of the Finance Act, 1994.*
- d) *Service Tax is payable by a person providing taxable service in terms of Section 68(1) of the Finance Act, 1994. Therefore, in this case, Service Tax will not be payable by the students, as they are not providing any service.*

(S.S. Rana)
Member(R)

(V.S. Sirpurkar)
Chairman

(R.S.Shukla)
Member(L)