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CIRCULAR NO : 148/17/2011-ST

Dated: 13th December 2011

Subject : - Clarification on levy of service tax on distributors/sub-distributors of films & exhibitors of movie - regarding.

1. Representations requesting clarification on taxability of consideration earned by the distributors/sub-distributors/area distributors of Indian & Foreign films in the form of 'revenue share' from the exhibitors of the movie, and on revenue retained as percentage by the exhibitors of the movie from the sale of tickets have been received from certain sections of service providers in the light of recent changes in the law and CBEC Circular No 109/03/2009 dated 23.02.2009 issued under F. No. 137/186/2007-CX.4.

2. These representations have been examined. Subsequent to issuance of CBEC Circular No. 109/03/2009 dated 23.02.2009 significant changes in the law have taken place. Temporary transfer or permitting the use or enjoyment of, any copyright defined in the Copyright Act, 1957 (14 of 1957) , except the rights covered under sub-clause (a) of clause (1) of section 13 of the said Act were made taxable w.e.f . 01.07.2010 under the sub-clause (zzzzt) of Sec 65(105) b y the Finance Act of 2010. Also, for the words 'operational assistance for marketing', the words 'operational or administrative assistance in any manner' were substituted in the clause (104c) of Sec 64 of the Act by the Finance Act, 2011, w.e.f . 01.05.2011.

3. The normal business practice in the industry is that the producer of the film, who owns the intellectual property rights of the film, temporarily transfers the rights to a person [normally distributor or any other person] who directly or indirectly enters into an agreement with the exhibitor [normally theater owner] for screening of the film. There are also other variant modes of transaction in the industry.

4. In cases where distributor transfers the rights to sub-distributor, area distributor, exhibitor or theatre owner, the distributor is liable to collect the service tax under copyright service & deposit it with the government exchequer. Similarly when the sub-distributor or area distributor etc further transfers the rights to any person, he is also liable to collect the service tax under copyright service & deposit it with the government exchequer.

5. In cases where no such copyrights are transferred by the distributor or sub-distributor or area distributor to the exhibitor or theatre owner, the same is not chargeable to service tax under Copyright Services. However the business transaction needs to be examined for leviability of service tax under other heads. Depending upon the arrangement whether the theatre owner has merely let out its premises to the distributor or is also involved in giving support services for the business of the distributor, there can be a case of leviability of service tax on the remuneration retained by such theatre owner under "Business Support service" or "Renting of Immovable Property". The definition of

“Business Support service” has been amended in Budget 2011 to include “ operational or administrative assistance in any manner” in its definition.

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 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 persons 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 Sec 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 Sec 65 of the Finance Act, 1994 wherein the taxable service includes any taxable service provided or to be provided by any unincorporated association or body of persons to a member thereof.

8. Such a joint venture is also recognized as a legal & juristic entity in the nature of a partnership of the constituent companies by the hon'ble Supreme Court of India in the case of New Horizons [1995 SCC (1) 478; 1994 -TMI – 83686] wherein it was held that “ *the expression 'joint venture' connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses.* The independence of joint venture as a separate legal entity, away from its constituent members, has further been fortified in the case of M/s Gammon India Ltd. Vs Commissioner of Customs, Mumbai, 2011-TMI - 204309 wherein the hon'ble Supreme Court categorically denied the benefit of exemption to the JV as the impugned goods were directly imported by constituent member .

9. Thus, where the distributor or sub-distributor or area distributor enters into an arrangement with the exhibitor or theatre owner, with the understanding to share revenue/profits and not provide the service on principal-to-principal basis, a new entity emerges, distinct from its constituents. As the new entity acquires the character of a “person”, the transactions between it and the other independent entities namely the distributor / sub-distributor / area distributor and the exhibitor etc will be a taxable service. Whereas, in cases the character of a “person” is not acquired in the business transaction and the transaction is as on principal-to-principal basis, the tax is leviable on either of the constituent members based on the nature of the transaction and as per rules of classification of service as embodied under Sec 65A of Finance Act, 1994.

10. To sum-up the above, the arrangements entered into by the distributor or sub-distributor or area distributor etc and the exhibitor or theatre owner etc in exhibiting the film produced by the producer, the original copyright holder, the arrangements and their respective service tax classification is tabulated as under:

Type of Arrangement	Movie exhibited on whose account	Service Tax Implication
Principal –to – Principal Basis	Movie being exhibited by Theatre Owner or Exhibitor on his account – i.e. the copyrights are temporarily transferred	Service Tax under Copyright Service to be provided by Distributor or Sub-Distributor or Area Distributor or Producer etc, as the case may be
	Movie being exhibited on behalf of Distributor or Sub-Distributor or Area Distributor or Producer etc – i.e. no copyrights are temporarily transferred	Service Tax under Business Support Service / Renting of Immovable Property Service, as the case may be, to be provided by Theatre Owner or Exhibitor
Arrangement under unincorporated partnership/ joint/ collaboration basis	Service provided by each of the person i.e. the ‘new entity’/ Theater Owner or Exhibitor / Distributor or Sub-Distributor or Area Distributor or Producer etc, as the case may be, is liable to Service Tax under applicable service head	

11. It is understood that the Circular dated 23.02.2009 has been misinterpreted to exclude all ‘revenue sharing’ arrangements from the levy of service tax. Remuneration or payment arrangements on basis of fixed or revenue sharing or profit sharing or hybrid versions of these may exist. However, the nature of transaction determines the leviability of service tax. Each case may be looked into on its merits and decision be taken on case to case basis.

12. The arrangements mentioned in this Circular will apply *mutatis mutandis* to similar situations across all the services taxable under the Finance Act.

(Samar Nanda)
Under Secretary (TRU)