SERVICE TAX

There is no separate enactment for Service Tax. Since beginning, it is governed by the provisions (Section 65 to 96) of Chapter V of the Finance Act, 1994 and Service Tax Rules, 1994. The concept of Service Tax was for the first time introduced in India in 1994. Its scope has gradually increased, in view of the revenue earning potentials. Service Tax is growing faster than other sectors; the service sector accounted about half of the Country's Gross Domestic Products (GDP).Today approximately 106 Services are covered under the Tax net. Being a professional, like Chartered Accountants, the scope of professional opportunities in Service Tax is enormous. Even after introduction of GST (Goods & Service Tax Act) in September, 2010, the scope would wider than ever for we professionals.

Here, I try to elaborate the scope of two major services like Business Auxiliary Services (BAS) & Work Contract Services. Both services have far reaching effect and impact as far as general assessees and professionals. Therefore, I will discuss them in details.

1. Business Auxiliary Services (BAS)

Section 65 (19): "**business auxiliary service**" means any service in relation to,

(i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or

(ii) promotion or marketing of service provided by the client; or

Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "service in relation to promotion or marketing of service provided by the client" includes any service provided in relation to promotion or marketing of games of chance, organized, conducted or promoted by the client, in whatever form or by whatever name called, whether or not conducted online, including lottery, lotto, bingo; *[Explanation inserted vide Finance Bill 2008 w. e .f. 16th May, 2008]*

(iii) any customer care service provided on behalf of the client; or

(iv) procurement of goods or services, which are inputs for the client; or

Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) production or processing of goods for, or on behalf of the client; or

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any activity that amounts to "manufacture" of excisable goods.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) "commission agent" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person —

(i) deals with goods or services or documents of title to such goods or services; or
(ii) collects payment of sale price of such goods or services; or
(iii) guarantees for collection or payment for such goods or services; or
(iv) undertakes any activities relating to such sale or purchase of such goods or services

(b) "Excisable Goods" has the meaning assigned to it in clause (d) of Section 2 of the Central Excise Act, 1944.

(c) "Manufacture" has the meaning assigned to it in clause (f) of Section 2 of the Central Excise Act, 1944.

CERTAIN CONTROVERTIAL ISSUES IN BUSINESS AUXILIARY SERVCIES

(1) Whether 'manufacture' of 'excisable goods' & Job work is liable to Service Tax?

The activities amounting to 'manufacturing' of "excisable goods" are specifically excluded from the scope of 'Business Auxiliary Service'. However, earlier the activity amounting to "manufacture" only was excluded from the levy of service tax. In other words, it was not necessary that the manufacture should result into the manufacturing of excisable goods.

The impact of this change is that if the process of goods is undertaken but the resultant product does not fall under the category of excisable goods, such as alcoholic beverages, service tax would be attracted, however, this is subject to the exemption granted to job workers under Notification No 8 / 2005 - ST, Dated 01.03.2005. Further the term "excisable goods" and "manufacture" have been given the same meaning as defined under the Central Excise Act, 1994.

Therefore, even if production or processing of goods for or on behalf of client has been made a taxable service but if the production / processing activity is covered within the meaning of term 'manufacture' of 'excisable goods' under the Central Excise Act, then it will not be covered within the ambit of service tax. Therefore, it is not necessary that the activity, which is amounting to 'manufacture' of 'excisable goods' must attract excise duty under the Central Excise Act, to exclude it from the provision of service tax, if the activity is covered within the meaning of term 'manufacture' of 'excisable goods', it will be out of the ambit of service tax even if no central excise duty is payable on it either because of exemption granted or there may be 'nil' excise duty on it or any other reason like exemption granted to job worker under Notification No. 214 / 86 - CE , Dated 25.03.1986. Therefore, if work is to be done on job work basis, which is not amounting to 'manufacture' of 'excisable goods', then it will be covered under Service Tax (however, subject to exemption granted in terms of Notification No 8 / 2005 - ST) otherwise there will not be any service tax on job wok merely on the ground that he is not liable to pay excise duty because of exemption granted to him. However, it is not very easy to decide as to whether a particular activity is 'manufacture' or not.

In a point raised before the Government, whether 'production of goods on behalf of the client' covers situation where the service provider undertakes job work for the client. The Government in its Department Instructions vide TRU's letter F. No. B 1 / 6 / 2005 - TRU Dated 27.07.2005 has clarified that "In view of the amendment, production or processing (not amounting to manufacture) done either for the client or on behalf of the client would be liable to Service Tax"

It is learnt that the Director General of Service Tax, Mumbai has issued a letter F. No. V / DGST / 21 / BAS / Misc-1 / 03 / 1812, Dated 06.01.2005 on the 'coverage of job working under the heading business auxiliary service'.

In the said letter it has been stated that "it is observed that the most of the assesses, registered under the Central Excise Act, 1994 besides manufacturing goods on their own, also carry out a number of processes on job work basis for others under the provisions of Notification No. 214 / 86 or 84 / 94 as amended. Such activities, not amounting to manufacture, are covered under the expanding heading. Service tax is recoverable on the value of such job charged recovered by the manufacturing units. The range officers and the auditing staff should be directed to ensure that service tax is paid by all such units". The activities carried out on job work basis by availing the exemption under Notification No. 214 / 86, implied that the activities are amounting to 'manufacture' of 'excisable goods' that is why exemption is granted otherwise there was no need for the said exemption . As excise duty is applicable only on the manufacture of excisable goods. In view of the paper writer, aforesaid letter issued by DG (Service Tax) is not in consonance with the law.

Further the Government with effect from 01.03.2005 has granted exemption for the Taxable Service of production or processing of goods for or on behalf of the client, to a person producing / processing goods, from the inputs received from a manufacturer and sending the resultant product to the same manufacturer for further manufacture of final products, which are cleared on payment of excise duty. The above change has come into effect immediately vide Notification No. 8 / 2005, Dated 01.03.2005.

(2) Whether service provided to a government department is a taxable service?

In the case of Smart Chips Ltd. v CCE, Bhopal 2008-TIOL-1726-CESTAT-DEL, the Appellant was engaged by the Transport Department of Madhya Pradesh Government for computerization of various activities like issuance of learning license, permanent traveling license, registration certificate for vehicle, etc. The Department alleged that this service is under "Business Auxiliary Services". The Tribunal held that the Appellant is definitely rendering some services to the Transport Department; however, such service is being rendered in relation to some statutory function carried out by the Government and it cannot be held that the same is in relation to business activities by the Government Department and Prima facie found a good case and waived the pre-deposit. Therefore, in view of the paper writer, any service provided to Government Department would be exempted if the said services are being rendered as a part of their statutory requirement on the ground mentioned herein above.

(3) Whether taxable service rendered on sub-contract basis is covered under sub-clause (vi) of clause (19) of section 65?

The answer is **No**. The issue may be raised whether services, which are covered under the sub clause (vi) i.e. "provision of service on behalf of the client" should be only a 'taxable service'. The 'taxable service' has been defined under sub-clauses of clause (105) of Section 65. When any such service is rendered directly to the customers then of course (unless otherwise exempted) service tax will be leviable. Therefore issue may be raised whether 'taxable service' rendered on sub contract basis is covered under the aforesaid sub-clause. The section 65 A provides the manner of determination of classification of taxable services. Thus, a service, which is already classified under a particular category of taxable service, the said taxable service cannot be categorized under the business auxiliary service merely because of

the introduction of new sub-clause (vi) ibid. A service has to be classified in accordance with the principles laid down in the section 65A.

The service rendered on sub-contract basis under the same category of taxable service and under different categories of taxable services has been dealt with in many circulars for many taxable services. For instance, 'Market Research Agency Service' vide CBEC Circular F. No. B – 11 / 3 / 98 - TRU, Dated 07.10.1998, 'Architect Service' vide CBEC Circular F. No. B – 11 / 3 / 98 -TRU, Dated 07.10.1998, 'Rent-a-Cab Scheme Operators service' vide CBEC Circular F. No. B 43 / 7 / 97 - TRU, Dated 11.07.1997.

Further the Government has exempted the taxable service in relation to agriculture, printing, textile processing or education which are in relation to the business auxiliary service in respect of inter alia 'provision of service on behalf of the client' vide Notification No. 14 / 2004 - ST, Dated 10.09.2004. If intention of the Government would have been to levy service tax under sub-clause (vi) ibid, only when a taxable service is rendered then there was no need to exempt the service in relation to 'agriculture, printing, textile processing or education', as these services are per se not covered under any of the taxable service. Therefore it is clear that under the sub-clause (vi) ibid, services rendered on behalf of the client are for those activities, which are otherwise not taxable under service tax. That is why exemption has been granted in respect of some of such activities like agriculture, printing, or etc.

Further, a taxable service under other category merely because rendered on sub-contract basis if classified under 'business auxiliary service' then it will violate the provisions of section 65A. Thus, it is not correct to say that, services which are covered under the sub-clause (vi) i.e. "provision of service on behalf of the client" should only be a 'taxable service'. Therefore, in my opinion, a 'taxable service' under the category of taxable service even if rendered on sub-contract basis cannot be categorized under the 'business auxiliary service'. Thus, it is clear that a service that is not covered under any category of taxable service rendered on behalf of the client is covered under sub clause (vi) ibid. However, the word and expression 'service' has not been defined either in the Finance Act, 1994 or for the purpose of this clause. Therefore, what constitutes 'service' for the purpose of sub-clause (vi) ibid could be subject matter of despite. In this regard, in the case of State of Uttar Pradesh v Union of India 2004 (170) ELT 385 (SC): 2006 (3) STR 98 (SC) the observation made by Supreme Court is quite relevant.

(4) **Whether a commission agent undertaking activities in relation to promotion of products would be termed as commission agent, or fall under the main entry of business auxiliary services?**

As per facts on record, the respondents are required to promote entire product range of the principal, which involves identification of customers, explain the utility of the product, obtain samples from the principal and provide for trial and if the customer finds the product suitable, transaction takes place thereafter between the principal and customer directly and respondent gets a fixed commission only after the sales takes place and payment is realized. They also submit a report about the customer to the principal. They don't hold stock of any product on behalf of the company. The Tribunal held that from the facts enumerated above, it is clear that the respondents get commission only when the sale materializes and payment is received from the customers. However, if business auxiliary services were the main activity, the revenues could not have been linked totally to the sale of the product.

We agree with the view taken by the Commissioner that primarily the respondent is a commission agent and other activities are to incidental to commission agency and therefore, their claim for benefit of exemption under the notification cited above is to be allowed. In view of discussion above, the appeal filed by the Revenue is rejected.

(5) **Whether verification of credential for Home Loan is taxable service?**

S. R. Kalyanakrishnan v CCE, Cochin 2007-TIOL-1914-CESTAT-BANG : 2008 (9) STR 255 (Tri. – Bang.) – In the instant case under the agreement with the ICICI bank, appellant's duty was to verify the correctness, fairness and authenticity of information furnished by those seeking loan. The types verification is residence verification, office verification and tele verification. According to the Department, such services were covered under business auxiliary services as it is in relation to promotion of services provided by the client. The Tribunal in this case held that the verification of the details given by the loan seeker for bank cannot be classified as business auxiliary service but fall within business support service on which tax is leviable w. e. f. 01.05.2006.

Malabar Management Services Pvt. Ltd. v CST, Chennai 2007-TIOL-1949-CESTAT-MAD : 2008 (9) STR 483 (Tri. Chennai) – In the instant case, the appellant was engaged in marketing of ICICI bank's loan products through tele-marketing or contacting prospective customers as well as processing documentation and evaluating the customer and forwarding application to the banks. The bank was paying service charges on monthly basis for the same. The tribunal held that such activities rendered by the appellant to the ICICI bank are covered under the business auxiliary services.

Oritrade Pvt. Ltd. v CCEC & ST, Bhubaneswar-1 2008-TIOL-142-CESTAT-KOL – In the instant case, there was an agreement with the ICICI Home Loan Finance Ltd. for verifying the credentials of the applicants and processing their application for grant of loan and issue of credit card etc. for which the customer directly pay to the ICICI and the appellant was receiving some amount from ICICI for such services. The Department alleged that this is the service of promotion and marketing covered under the business auxiliary service. The Tribunal upheld the liability to pay tax under the category of business auxiliary services.

Bridgestone Financial Services v CST, Bang. 2007-TIOL-810-CESTAT-BANG : 2007 (8) STR 505 (Tri. Bang.) – In the instant case, the appellant actually source customers for Citi Bank and Citi Financial Retail Services for personal loans and housing loans. The actual agencies which provide the financial services by giving loan are Citi Bank and Citi Financial Retail Services. In this case, the Tribunal held that the Citi Bank and Citi Financial Retail Services are the clients of the Appellant who source customers for them and such activities rendered by the Appellant would definitely fall within the category of Business Auxiliary Services as promotion or marketing of services provided by the client.

(6) **Whether sale or purchase of Sim Card is a taxable service?**

South East Corporation v CCCE & ST. Cochin 2007-TIOL-1574-CESTAT-BANG.: 2007 (8) STR 405 (Tri-Bang.) – In the instant case, appellants were purchasing BSNL post-paid/pre-paid cellular sim cards.

They had paid full value of it and the tax had been paid by BSNL. The Department alleged that this activity comes under business auxiliary services.

The stand of the appellants was that purchasing and selling of the sim card does not come under the taxable service. The Tribunal held that it is only a sale and purchase of sim card in which appellant makes profit. It does not come under business auxiliary services. The Tribunal also observed that on the value of the sim card, the BSNL is already paying tax and there cannot be double taxation. The Bombay High Court in the case of CST v Hutchison Mson Max Telecom Pvt. Ltd. 2008 (9) STR 455 (Bom.) upheld the decision of the Tribunal that levy of service tax in respect of sale of Sim Card is not free from doubt, therefore, penalty is not justifiable. The reader may note that now the Tribunal has held that the sale of Sim Card is not subject to service tax as mentioned in above cases.

The Tribunal in the case of Hindustan Associated Traders and Ors. V CCE, Cochin 2007-TIOL-1699-CESTAT-BANK relying upon its earlier decision in the case of South East Corporation v CC, CE&ST reported in 2007-TIOL-1574-CESTAT-BANK : 2007 (8) STR 405 (Tri.-Bang.) held that service tax cannot be levied on the sale of prepaid SIM card whereas the Department sought to levy the service tax on the above under the Business Auxiliary Service.

The Tribunal in the case of Karakkattu Communications v CCE, Cochin reported in 2007-TIOL-1374-CESTAT-BANK : 2007 (8) STR 164 (Tri.-Bang.) replying upon its decision in the case of South East Corporation (Supra) held that purchase of post paid / pre-paid cellular Sim Cards and selling the same to customer is not covered under Business Auxiliary Service.

The Tribunal in the case of RPG Cellular Services Ltd. v CCE, Chennai; 2008-TIOL-642-CESTAT-MAD held that service tax cannot be levied on the value of SIM Card sold by the Appellant and further held that service tax can be levied only on the activation charges. Hence sale and purchase of the SIM card cannot be treated as a taxable service.

(7) **Service as a Commission Agent?**

The Government, w. e. f. 01.07.2003, has exempted the 'business auxiliary services' provided by a commission agent from the whole of service tax vide Notification No. 13 / 2003, Dated 20.06.2003. The Government, w. e. f. 09.07.2004 (vide Notification No. 8 / 2004 - ST, Dated 09.07.2004) has amended the aforesaid Notification and restricted the aforesaid exemption only to business auxiliary services provided by commission agents in relation to 'agricultural produce'.

In Maheshwari Fish Seed Farm v T. Nadu Electricity Board and Anr. (2004) 4 SCC 705 : AIR 2004 SC 2341, the Court in regard to different meanings of 'agriculture' as noticed in different decisions held:

It may also be noted that earlier, as per the Explanation appended to the aforesaid Notification No. 13 / 2003, for the purpose of said Notification, the commission agent means a person who causes sale or purchase of goods, on behalf of another person for a consideration, which is based on the quantum of such sale or purchase. Now, w. e. f. 16.06.2005, the definition of 'commission agent' is omitted from this Notification (vide Notification No. 19 / 2005 - ST, Dated 07.06.2005) in view of the specific definition of 'commission agent' is provided under service tax by the Finance Act, 2005.

In the case, In Re: M.A. Menon & Co. 2006 (1) STR 69 (Commr. Appl.) it was held that the appellant is getting commission only when sale of materialised, therefore the appellant is primarily a commission agent and promotion of sale of the product is for the purpose of earning more commission by increase in sale of the product. Thus, promotion seems to be merely incidental to their activity as commission agent.

Further, as per the Explanation appended to the afore said Notification No. 13 / 2003, for the purpose of said Notification, agriculture produce means any produce resulting from cultivation or plantation, on which either no further processing is done or such processing is done by the cultivator like tending, pruning, cutting, harvesting, drying, which does not alter its essential characteristics but makes it only marketable and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra, sugar cane, jaggery, raw vegetable fibres such as cotton, flax, jute, indigo, un-manufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco.

(8) **Availability of Certain Exemptions**

(i) Exemption for Specific Services / activities.

The Government has exempted (vide Notification No. 14 / 2004 - ST Dated 10.09.2004, the taxable services provided in relation to agriculture, printing, textile processing or education, from whole of service tax, which are in relation to the business auxiliary services (which are brought under the tax net by the Finance (No. 2) Act, 2004) so far as it related to, -

a) procurement of goods or services, which are inputs for the client (not amounting to manufacture);
b) production or processing of goods for or on behalf of the client;
c) provision of service on behalf of the client; or
d) a service incidental or auxiliary to any activity specified in (a) to (c) above.

The terms 'agriculture', 'printing', 'textile processing' or 'education' have not been defined in the present context, therefore, they should be understood in commonly understood meaning and scope.

(ii) Exemption for service of production or processing of goods for or on behalf of client (exemption to job worker).

The Government, w. e. f. 01.03.2005, vide Notification No. 8 / 2005 - ST, Dated 01.03.2005 (which is amended w. e. f. 16.06.2005 by Notification No. 19 / 2005 - ST, Dated 07.06.2005 due to changes made in the definition of business auxiliary services by the Finance Act, 2005) has granted exemption, for the taxable service of production or processing of goods for or on behalf of the client, from whole of service tax. However, such exemption is available only when following conditions are satisfied.

a) such goods are produced / processed from the raw material or semi-finished goods supplies by the client, and
b) goods so produced / processed are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff Act, 1985, on which appropriate duty of excise is payable.

However, the final products shall not have nil rate of duty or exempt from duty of excise.

Further, the aforesaid exemption is available when production / process do not amount to "manufacture" of "Excisable Goods" under the Central Excise Act, 1944.

It may be noted that any activity that amount to "manufacture" of Excisable goods" under the Central Excise Act, 1944, is already excluded from the purview of Service Tax.

Therefore, a job worker is not liable to pay service tax in the following situations;

(1) if his activity amount to "manufacture" of "excisable goods" ibid even though on which excise duty is not payable as nil duty or exempt from duty of excise.

(2) if he is producing / processing of goods, from the inputs received from a manufacturer and sending the resultant product to the same manufacturer for use in or in relation to manufacture of any other goods / final products, which are cleared on payment of excise duty.

(3) if he is producing / processing the goods on job work basis on which excise duty is paid (when it amounts to "manufacture" of excisable goods") even though such goods is supplied to a person whose final product attract nil duty or exempt from levy of excise duty.

Therefore, a job worker who enjoy the exemption in terms of Notification No. 214 / 86, Dated 25.03.1986, is not covered under the Service Tax. As the exemption is applicable for the goods manufactured, in a factory as job work, falling under the First Schedule to the Central Excise Tariff Act, 1985, therefore, their activity itself is amount to "manufacture" of "excisable goods" ibid.

A doubt has been raised whether goods cleared for export is treated as exempted goods or not. Therefore, a question arises, when a job work is doing processing activities and returning the goods back to exporter who exports final product, whether exemption under aforesaid Notification is applicable or not. As such the goods which are cleared for export are not 'exempted goods' but are cleared without payment of duty in terms of Central Excise Rules. Therefore, in view of the author, such exemption shall be available to job worker who is doing processing activities for an exporter.

In the case of ANZ International v CC, Bangalore 2008-TIOL-346-CESTAT-BANG, the Department alleged that the goods exported does not target any duty, hence it is exempted goods. However, the Tribunal rejected this contention of the Department that even though export goods do not target duty, any tax paid on the input used for the manufacturing of such goods is available for CENVAT credit and refund.

2. *Works Contract Services*

Section 65 (105) (zzzza): "**Works Contract Service**" means execution of any contract wherein,

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

IMPORT OF SERVICES

Initially taxable services provided from outside India and received in India were charged to Service Tax under Explanation occurring at the end of the Sub-clause (105) of Section 65 of the Finance Act, 1994. However, member of trade and industry across the country protested to levy Service Tax on the Services received and consumed outside India and the Constitutional validity of these provisions was also questioned. In view of the same, the Government, in the Finance Act, 2006, w.e.f 01.05.2006 has omitted the said Explanation and inserted separate comprehensive provisions, namely, Section 66A, to levy Service Tax on services provided from outside India and received in India. Further, it may be noted that whereas Explanation occurring at the end of Sub-clause (105) of Section 65 was omitted w.e.f 01.05.2006 (from the date notified), but provisions of Section 66A came into force w.e.f 18.04.2006 (with the date of enactment of Finance Act, 2006), and Taxation of Services (Provided from outside India and received in India) Rules, 2006 w.e.f 19.04.2006.

1. Charge of Service Tax on Services received from outside India (Section 66A as introduced by the Finance Act, 2006 w.e.f. 18.04.2006)

66A.

(1) Where any service specified in clause (105) of section 65 is,—

(a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and

(b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India, such service shall, for the purposes of this section, be taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply:

Provided that where the recipient of the service is an individual and such service received by him is otherwise than for the purpose of use in any business or commerce, the provisions of this sub-section shall not apply:

Provided further that where the provider of the service has his business establishment both in that country and elsewhere, the country, where the establishment of the provider of service directly concerned with the provision of service is located, shall be treated as the country from which the service is provided or to be provided.

(2) Where a person is carrying on a business through a permanent establishment in India and through another permanent establishment in a country other than India, such permanent establishments shall be treated as separate persons for the purposes of this section.

Explanation 1.— A person carrying on a business through a branch or agency in any country shall be treated as having a business establishment in that country.

Explanation 2.—Usual place of residence, in relation to a body corporate, means the place where it is incorporated or otherwise legally constituted.'

*2. Charge of Service Tax on Services received from outside India (Taxation of Services (Provided from outside India and received in India) Rules, 2006)(***Notification No.11 / 2006 - Service Tax***)*

In exercise of the powers conferred by sections 93 and 94, read with section 66A of the Finance Act, 1994 (32 of 1994), the Central Government hereby makes the following rules, namely:-

1. Short title and commencement –

(1) These rules may be called the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. Definitions.– In these rules, unless the context otherwise requires,–

(a) "Act" means the Finance Act, 1994 (32 of 1994);

(b) "input" shall have the meaning assigned to it in clause (k) of rule 2 of the CENVAT Credit Rules, 2004;

(c) "input service" shall have the meaning assigned to it in clause (l) of rule 2 of the CENVAT Credit Rules, 2004;

(d) "output service" shall have the meaning assigned to it in clause (p) of rule 2 of the CENVAT Credit Rules, 2004;

(e) "India" includes the designated areas in the Continental Shelf and Exclusive Economic Zone of India as declared by the notifications of the Government of India in the Ministry of External Affairs numbers S.O.429 (E), dated the 18th July, 1986 and S.O.643(E), dated the 19th September 1996;

(f) words and expressions used in these rules and not defined, but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. Taxable services provided from outside India and received in India.– Subject to section 66A of the Act, the taxable services provided from outside India and received in India shall, in relation to taxable services,–

(i) specified in sub-clauses (d), (p), (q), (v), (zzq), (zzza), (zzzb), (zzzc), (zzzh) and (zzzr) of clause (105) of section 65 of the Act, be such services as are provided or to be provided in relation to an immovable property situated in India;

(ii) specified in sub-clauses (a), (f), (h),(i), (j), (l), (m), (n), (o), (s), (t), (u), (w), (x), (y), (z), (zb), (zc), (zi), (zj), (zn), (zo), (zq), (zr), (zt), (zu), (zv), (zw), (zza), (zzc), (zzd), (zzf), (zzg), (zzh), (zzi), (zzl), (zzm), (zzn), (zzo), (zzp), (zzs), (zzt), (zzv), (zzw), (zzx), (zzy), (zzzd), (zzze), (zzzf), and (zzzp) of clause (105) of section 65 of the Act, be such services as are performed in India:

Provided that where such taxable service is partly performed in India, it shall be treated as performed in India and the value of such taxable service shall be determined under section 67 of the Act and the rules made thereunder;

Provided further that where the taxable services referred to in sub-clauses (zzg), (zzh) and (zzi) of clause (105) of Section 65 of the Act, are provided in relation to any goods or material or any immovable property, as the case may be, situated in India at the time of provision of services, through internet or an electronic network including a computer network or any other means, then such taxable services, whether or not performed in India, shall be treated as the taxable service performed in India.

(iii) specified in clause (105) of section 65 of the Act, but excluding,–

(a) sub-clauses (zzzo) and (zzzv);

(b) those specified in clause (i) of this rule except when the provision of taxable services specified in clauses (d), (zzzc), and (zzzr) does not relate to immovable property; and

(c) those specified in clause (ii) of this rule,

be such services as are received by a recipient located in India for use in relation to business or commerce.

Provided that where the taxable service referred to in sub-clause (zzzzj) of clause (105) of section 65 of the Act is received by a recipient located in India, then such taxable service shall be treated as taxable service provided from outside India and received in India subject to the condition that the tangible goods supplied for use are located in India during the period of use of such tangible goods by such recipient

4. Registration and payment of service tax.– The recipient of taxable services provided from outside India and received in India shall make an application for registration and for this purpose, the provisions of section 69 of the Act and the rules made there under shall apply.
5. Taxable services not to be treated as output services.– The taxable services provided from outside India and received in India shall not be treated as output services for the purpose of availing credit of duty of excise paid on any input or service tax paid on any input services under CENVAT Credit Rules, 2004.

F. No. B1/4/2006-TRU

3. Import of Services (Reverse Charge) and Taxability

Section 66A provides charging of Service Tax on Taxable services received from outside India, from the recipient of services in India, under reverse charge method, came in to force w.e.f. 18.04.2006. Services received in India are taxable under Section 66A, 93 and 94 read with the Taxation of services (Provided from outside India and received in India) Rules, 2006. As per the provisions of Section 66A, services received by individuals other than for the purpose of use in business or commerce, are not taxable.

In consequence of the introduction of Section 66A and Taxation of services (Provided from outside India and received in India) Rules, 2006, the consequential amendments have also been made in the Notification 36 / 2004 – ST Dt. 31.12.2004, Rules 2 (1) (d) (iv) of the Service Tax Rules, 1994 and the Service Tax in this case shall be paid by the recipient of Taxable Services under the reverse charge method. As per Rule 4 of Taxation of services (Provided from outside India and received in India) Rules, 2006, in this case, the recipient of Taxable Services, being a taxable person, is required to take registration and comply with other provisions of the Finance Act, 1994 and Rules made thereunder.

4. Permanent Establishment outside India and in India is treated as two separate legal persons. Import of Services (Reverse Charge) and Taxability

Provisions of Services by a permanent establishment outside India to another permanent establishment of the same person in India is treated, for the purpose of charging service tax, as provisions of service by one person to another person. In other words, permanent establishment in India and permanent establishment outside India are treated as two separate legal persons for taxation of Service Tax.

5. Determination of Taxable Services provided from outside India and received in India.

As per Rule 3, all the taxable services have been categorized in three parts. (three different Rules) Categorization of services under Rule 3 is different from each other and the conditions prescriber under these rules are not similar.

(i) In first part (sub-rule), 13 specified taxable services, which are provided from outside India shall be treated as received in India if such services are in relation to an immovable property situated in India.

(ii) In second part (sub-rule), 49 specified taxable services falls, which involve physical performance and same are treated as services provided from Outside India and received in India if such services are partly or wholly performed in India.

(iii) In third part (sub-rule), rest of 33 taxable services, which are not covered under the above two parts and three services viz. general insurance, survey and map taking and auctioneer services only for other than services related to immovable property have been kept in this part.

6. Services are not treated as "Output Service" for the recipient.

The treatment of the recipient of service, as the deemed service provider under section 66A is only for the purpose of charging service tax on taxable service received from outside country. Rule 5 of the Taxation of services (Provided from outside India and received in India) Rules, 2006, specifically state that the services provided from outside India and received in India are not treated as output service (i.e. not treated as taxable service provided by the recipient) for the purpose of availing credit of duty of excise paid on input or service tax paid on any input service under CENVAT Credit Rules, 2004. However, where such service is used as an input for providing any taxable output service, the service tax paid on such service can be taken as input service credit. In view of this rule, explanation to clause (p) of Rule 2 of CENVAT Credit Rules, 2004 has been omitted vide Notification No. 8 / 2006 (NT), Dt. 19.04.2006.

7. Value of Taxable Services for this Rule.

If such services are partly performed in India, it shall be treated as performed in India and for charging service tax in such cases, the value shall be determined u/s 67 and the rules made thereunder. As per Rule 7 (2) of the Service Tax (Determination of Value) Rules, 2006, the total consideration paid by the recipient for such service including the value of service partly performed outside India is to be taken for the purpose of service tax. In all other cases for section 66A, the value shall be such amount as is equal to the actual amount of consideration charged for the services provided or to be provided.

8. Charge of Service Tax on Import of Services before 18.04.2006.

There were certain controversies as to leviability of Service Tax prior to 18.04.2006 as the Rules become effective from 18.04.2006. The explanation to Sub-clause (105) of Section 65 of the Finance Act, 1994 was 16.06.2005 and Rule 2 (1) (d) read with

Notification No. 36 / 2006 – ST Dt. 31.12.2004 created many confusions as to leviability of Service Tax on import of services from which date. Recently Hon'ble Supreme court affirms the Decision of Hon'ble High Court of Bombay who laid down the law and interpret the law in the case of **Indian National Ship Owners Association Vs. Union of India reported in 2009 (18) STT 212 (Bom.)** by which it has been made clear that only on the basis of Rule 2 (1) (d) (iv) Service Tax cannot be levied on services received from outside India. So all the controversies has been settled down by this landmark judgment that there was no liability of Service Tax on import of services prior to insertion of Section 66A i.e. 18.04.2006.