

Updates-ST-February, 2009

(A) Notification No. 8 /2009 – Service Tax

W.e.f. 25-02-2009 Central Government has reduced the rate of service tax from 12% to 10% on all taxable services.

(B) Gist of Circular No. 109/03/2009 dated 23/02/2009.

It is clarified through Circular No. 109/03/2009 dated 23/02/2009 that screening of a movie is not a taxable service **except where** the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor. The facts of each case and the terms of contract must be examined before a view is taken. In all other cases it is not a taxable service.

Other cases are as follows:

- (a)** Where the contract between the theatre owner and the distributor is on revenue sharing basis- No service tax liability.
- (b)** The theater owner buys the print/CD of the film on payment of a fixed price and thereafter screens it in his theater. This transaction is also *not subject to service tax being in the nature of sale of goods.*
- (c)** The arrangement most commonly entered into between a theater owner and a distributor is that the theater owner screens the movie for fixed number of days under a contract. The proceeds earned through sale of tickets go to the distributor but the theatre owner receives a fixed sum depending upon the number of days of screening. Under this arrangement, the fixed amount contracted is given to the theater owner by the distributor irrespective of the fact whether the movie runs well or not. However, there is no rental arrangement between the theater owner and the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord. That being the case such an activity cannot fall under 'Business Support Service'. *Therefore no service tax liability.*

(C) Circular No. 110/4/2009-ST (dated 23rd February, 2009)

Commercial or industrial construction service [section 65(105) (zzq)] specifically excludes construction or repairs of roads. While construction of road is not a taxable service, management, maintenance or repair of roads are in the nature of taxable services, attracting service tax.

Examples of Maintenance activities & construction activities are given:

(1) Maintenance or repair activities:

- Resurfacing
- Renovation
- Strengthening
- Relaying
- Filling of potholes

(2) Construction Activities:

- Laying of a new road
- Widening of narrow road to broader road.
- Changing road surface (gravelled road to metalled road/ metalled road to blacktopped/ blacktopped to concrete etc)

Comments: The alternative classification under Work Contract – Repair of Civil Structures (more specifically roads) could be argued as all the contracts are with materials being provided. If so then there would be no liability since roads are excluded. There are already disputes in this regard in stages of adjudication and appeal.

(D) Circular No.111/05/2009-ST (24th February, 2009)

The Circular illustrates certain typical activities carried out by service exporters which have been disallowed the benefits of refunds of input taxes by the service tax authorities on the ground that they did not constitute ‘exports of services’; under the Rules. With regard to the residual third category of services, under which the activities illustrated in the Circular are covered, it is clarified that the conditions that are required to be fulfilled in order for such activities to qualify as exports are: They should be provided from India and used outside India and they should be provided to a recipient located outside India

The Circular states that the law has to be read harmoniously in order to avoid contradictions and, as a result, the expression 'used outside India' has to be understood in that context. Consequently, the expression is to be interpreted in order to require that the benefit of the services should accrue outside India. Thus, the conditions relating to exports of services will be met even where all relevant activities take place in India, as long as the benefits of these services accrue outside India.

It is important to recognise here the wide amplitude of this beneficial Circular. This is for two reasons. Firstly, it illustrates the services typically carried out under Category 3 through a description of four specific activities. The most important one is that relating to marketing activities carried out in India. The Circular holds that such activities would qualify as exports even if they were to entirely take place in India, as long as the benefits were to accrue to a principal outside the country.

Comments: The Circular follows a number of Tribunal decisions and appears to be in line with the law.

(E) FEB, 2009 important case laws

1. The Commissioner of Central Excise & Customs, Vadodara II Vs Schott Glass India Pvt Ltd. (2009-TIOL-82-HC-AHM-ST).

Facts: Assessee is required to pay service tax on services received from a sister company in Germany on basis of reverse charge mechanism. Services were received between Nov 2001 & March 2002 while invoice was raised & settled in Sep 2003. Revenue raised demand for the period when there was no tax payable, simply for the reason that payment was received when it was taxable.

Issue: What is taxable event?

Decision: Taxable event is rendering of taxable service; not rising of Invoice or payment. In the absence of substantial question of law, HC of Gujarat dismissed the appeal. Revenue lost the case.

2. M/s UB Engineering Ltd Vs CCEX, Rajkot (2009-TIOL-208-CESTAT-AHM)

Facts: There was delay in payment of service tax. Appellant failed to pay interest as required u/s 75. Half yearly return was also filed belatedly (after 35 days). Revenue imposed penalty u/s 76.

Issue: When tax with interest has been paid on own whether SCN u/s 73(3) is sustainable.

Decision: As per Sec 73(4) unless there is an intention to evade tax SCN cannot be issued. Therefore SCN for penalty does not arise. Tribunal granted Appellant waiver of pre-deposit.

3. M/s M P Water & Power Management Institute Vs CCE, Bhopal (2009-TIOL-290-CESTAT-DEL)

Facts: Appellant is a society registered under Society act, undertakes technical testing & research work assigned by Government departments. Revenue raised demand of service tax against scientific or technical consultancy & technical testing & analysis.

Issue Involved: Appellant contested demand of tax on merit as well as on limitation.

Decision: CESTAT set aside demand of tax as it is barred by limitation.

4. M/s Moni colours pvt Ltd Vs CCE, Bhopal (2009-TIOL-291-CESTAT-DEL)

Facts: Appellant was engaged in rendering photography services. He paid service tax on value excluding value of photography materials. Revenue demanded tax on value inclusive of photography materials.

Issues involved:

- (i) Whether value of photography materials can be included in taxable value?
- (ii) Whether extended period of limitation can be invoked?

Decision: It was held that non inclusion of material value is in accordance with law. As appellant was paying service tax in accordance with law there is no suppression of facts & hence the extended period of limitation can not be invoked.

5. Wardha Coal Transport Pvt Ltd Chandrapur Vs The UOI, CCE, Nagpur & CESTAT (Mumbai). (2009-TIOL-79-HC-MUM-ST)

Facts: Revenue considers Appellant's services as falling under Cargo handling services. Appellant went on appeal to Tribunal. Tribunal directed assessee to predeposit as condition for hearing appeal.

Issue Involved: Whether to allow waiver of predeposit?

Decision: When the Tribunal has granted waiver in two similar cases it would not be proper to take a different view & deny full waiver of pre deposit. Mumbai HC waived the predeposit of amount in question.

6. M/s Pasha Educational Training Institute Hyderabad Vs The CCE, Customs & service tax (appeals) Hyderabad (2009-TIOL-288-CESTAT-BANG)

Facts: The Appellant imparts very comprehensive training for insurance agents. Appellant is approved by IRDA. It collects nominal fees from candidates.

Issues Involved:

- (i) Whether training falls under 'Commercial training or coaching'?
- (ii) Whether exemption under Notification 9/2003 giving benefit exemption to vocational training is applicable?
- (iii) Whether extended period of limitation can be invoked?

Decision: It was held that the training falls under category of commercial training or coaching. Tribunal held that training is vocational training & will be eligible for exemption under Notification 9/2003. Tribunal did not find any justification for invoking extended period of limitation. Tribunal allowed the appeal.

7. Commissioner of Service tax, Delhi Vs M/s Silvertone Motors Pvt Ltd (2009-TIOL-273-CESTAT-DEL)

Facts: The respondents on behalf of financial institutions & banks were sourcing loans for prospective buyers of cars & getting commission. They deposited service tax on such services. Subsequently they filed refund claim for erroneous refund under the category of business auxiliary services.

Issue Involved: Whether passing on of commission to buyers of cars is includible in taxable value?

Decision: Tribunal held that Commissioner (Appeals) was correct in his finding that respondent received the reduced amount & directing adjudicating authority for verification. Tribunal rejected the application filed by revenue.

8. CCE Aurangabad Vs Skypak Services Specialities (2009-TIOL-280-CESTAT-MUM)

Facts: Respondent was a courier service company which collected service tax but did not remit it to Government for 4 years. Commissioner (Appeals) reduced mandatory penalty u/s 76. Revenue appealed against this.

Issue involved: Whether penalty u/s 76 is mandatory, which can not be reduced?

Decision: Tribunal observed that there was no case for reducing penalty & the order in original was restored.