BUSINESS AUXILIARY SERVICE

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This taxable service category is one of the most important categories because of the diverse nature of the services covered thereunder. If one considers the coverage, the taxability would extend not just to a pure service provider but even to a manufacturer who engages in processing not amounting to manufacture as per Central Excise Act 1944. Importance of this category also stems from the fact that very often assessees are also liable as service receivers when they receive a taxable service in India from abroad and this category falls under the recipient based categories under the Taxation of Services (Provided from outside India and Received in India) Rules 2006 for the purpose of determining whether a taxable service is received in India or not. I.e. service is taxed where the recipient is located in India and place of performance of the service is not relevant.

Definitions

As per section 65(105)(zzb) of Chapter V of Finance Act 1994 as amended from time to time, taxable service means any service provided or to be provided to a client by any person in relation to business auxiliary service.

The term "business auxiliary service" has been defined under section 65(19) to mean 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
(iii) any customer care services provided on behalf of the client; or
(iv) procurement of goods or services which are inputs for the client; or
(v) production or processing of the 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 the clauses (i) to (vi) above 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.

It includes services as a commission agent but does not include any activity that amounts to “manufacture” with in the meaning of clause (f) of section 2 of the Central Excise Act 1944.

“Goods” has the meaning assigned to it in section 2(7) of Sale of Goods Act 1930 as per Section 65(50).

For the purpose of clause (ii) services 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 or bingo would also be covered from this year (wef. 16.05.08)

While going through the aforesaid definition one should note that the activities falling under clause (vii) would be liable under this category where such activities are incidental or auxiliary to the ones specified in clauses (i) to (vi). This has also been reiterated by the Tribunal in Federal Bank Ltd Vs CCE Calicut case (2008 (01) LCX 138).

What is taxable?

The activities falling under clauses (i) to (vi) in the definition above would be taxed under this category as well as activities (in clause (vii)) incidental to the main activities taxable under the said clauses. The incidental activities covered here are not exhaustive and are only illustrative and would have to be seen as per facts and circumstances of each case. A review of the clauses would reveal that marketing of goods or services provided by the client would be taxed under this heading.

Agency Commission for Exporters Outside India

One important aspect to be remembered here is that very often marketing of goods or services of a service receiver located abroad is taken up for which the service provider in India receives commission in convertible foreign exchange. The question that is raised in such cases is whether the service provided is regarded as having been exported out of India in accordance with the Export of Service Rules 2005. In Blue Star Ltd Vs CCE

Bangalore (2008(03) LCX 73) the Tribunal resolved the issue by holding that where services of booking orders for a foreign principal is undertaken and the buyers in India directly get in touch with the principal who supplies goods and pays the service provider in India commission in convertible foreign exchange, the service would be regarded as having been exported out of India. This should also be seen in light of Circular 111/05/2009-ST dated 24.02.2009 which clarifies the position in case of export of taxable service. In case of services falling under Rule 3(1)(iii) of Export of Service Rules 2005, the phrase "used outside India" is to be interpreted to mean benefit of service should accrue outside India. Thus even where all the activities are undertaken in India, the taxable service can be regarded as having been exported if the benefits of this service accrues outside India.

Market Development Activity

The activity of holding of investors meeting and making arrangements for collecting of money from investors and issuing them deposit certificates can also be regarded to be liable under Business Auxiliary service as per decision of the Tribunal in Shri Ram Overseas Finance Ltd. Vs CST Madurai (2007(01) LCX 209)

Commission Agent Vs Clearing & Forwarding Agent

This category also seeks to tax services of a commission agent. "Commission agent" as per the explanation to section 65(19) 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 activity relating to such sale or purchase of such goods or services

Readers should note that commission agent is one who has to be differentiated from a clearing and forwarding agent (including a consignment agent) whose services would be taxed under the clearing and forwarding agent's service. Just because a commission

agent stores and forwards the goods to customers, he cannot be taxed as a clearing and forwarding agent as per the decision of the Tribunal in M/s Chandan Chemicals Vs CCE Allahabad (2007-TIOL-724-CESTAT-DEL). The distinction between the two was also brought out in Marigold Paints (P) Ltd Vs CCE Bangalore (2008-TIOL-1315-CESTAT-Bang).

Dealers of SIM Cards

Moreover, profit on purchase/sale should be distinguished from the commission a commission agent gets for his services. In South East Corporation Vs Commissioner of Central Excise, Customs and Service Tax Cochin (2007 (05) LCX 308) the Tribunal held profit on purchase and sale of SIM cards was not liable to service tax. A number of notices have been issued to the dealers of SIM cards of BSNL etc. which presently are in various stages of appeal/ adjudication.

Service by Vs On behalf of

The category also taxes ***services provided <u>on behalf</u> of the client***. This is an important clause which should be borne in mind while reviewing agreements and contracts for provision of service. Where taxable services <u>are provided to a client</u> by a service provider, the same would have to be classified under the appropriate clause falling under section 65(105) of Chapter V of Finance Act 1994 as amended from time to time. Readers may refer the decision of the High Court of Punjab and Haryana in Dr Lal Pathlabs (P) Ltd Vs CCE Ludhiana (2007 (09) LCX 0011) wherein it was established that once there was a specific entry for an item in the tax code, the same could not be taken away from that entry and sought to be taxed under another entry.

But where the same service is provided on behalf of the client, to a third party who could be the client's customer or client, the liability to tax for the service provider would be under this category. Thus while reading the agreement, one would have to first of all ascertain who would constitute the service provider and who can be regarded as a service receiver. This would be critical for the purpose of correct classification.

Import of Services

This distinction as stated above would assume higher significance where the service provider is resident abroad and the service receiver is in India in which case the service

receiver in India would be subjected to service tax in accordance with the Taxation of Services (Provided From Outside India and Received in India) Rules 2006 as a recipient of taxable service. There have been instances where the assessees got the classification wrong and held services as having been performed outside India whereas in reality the same was liable in the hands of the recipient and consequently faced a liability under this category.

Production or processing of goods

Readers may note that even production or processing of goods for or on behalf of client would be taxed under this category. The production or processing involved however, should not amount to manufacture as per Central Excise Law. Where the production or processing amounts to manufacture, the same would be taxed under the Central Excise Act 1944 and would not be subject to levy of service tax. This would have to be seen in light of sub contracting of production processes undertaken by a sub contractor. The sub contractor could be liable to service tax unless the activity undertaken by him amounts to manufacture. Where it does it maybe ensured that there is no liability under central excise as the raw material supplier would not considered as the manufacturer under law.

Exemption

The Central Government has come out with an exemption notification 8/2005 ST dated 01.03.05 which provides exemption from service tax to a job worker where he engages in production or processing of goods for a principal who sends him the raw materials/semi finished goods. The goods processed should be returned to the said principal who is to use the goods for/in relation to manufacturing of excisable final products which would be cleared on payment of excise duty.

BAS Vs BSS

a. In Fifth Avenue Vs CST Chennai (2008 (03) LCX 190), the Tribunal held that when clause (104c) was inserted under Section 65 of the Finance Act, no amendment whatsoever was made to pre-existing entry viz. clause (19) dealing with Business Auxiliary Service. Most of the services rendered by appellants were the same as those specified under Section 65(104c). Services specified under clause (104c) could hardly be classified under clause (19), pre-existing entry in as much as, when clause (104c)

was inserted, no amendment was made to clause (19). Therefore the activities were not liable under BAS prior to 01.05.06

b. Usual back office operations necessary to support business have to be distinguished from the activities pertaining to developing software. This was held in Deloitte Tax Services India (P) Ltd Vs CCE Hyderabad (2008 (03) LCX 187) where the back office operations were held not to fall under information technology service enjoying exemption under BAS prior to amendment by Finance Act 2008. Here the activities in question had been provided prior to 01.05.06. With effect from 01.05.06, the category of business support services has been introduced and in the opinion of the authors, for support services, this category would be relevant unless the activities fall under clause (vii) incidental to activities falling under clauses (i) to (vi)

c. The Kolkata Tribunal in Pebco Motors Ltd Vs CCE Jamshedpur (2008 (03) LCX 46) had held that the same would be liable under the category of business auxiliary service. In the opinion of the authors, the same would now have to be seen in light of the amendment made by Finance Act 2008 to the category of operational assistance in marketing covered by Business Support Services or Renting of Immovable Property.

Computerized data processing

Generation of MIS reports and data processing was distinguished from the activity of promoting the client's service in Bellary Computers Vs CCE (Appeals) Mangalore (2007 (08) LCX 0096). In this case, the aforesaid activity was held to fall under information technology service which enjoyed exemption under business auxiliary service category. This in the opinion of the authors would now been seen in a different light consequent to the introduction of Information Technology Software Service under service tax and also the exclusion of the information technology service as an exempted activity under Business Auxiliary Service.

BAS Vs Share Transfer Agents

In Sathguru Management Consultants (P) Ltd Vs Commissioner Central Excise and Customs Hyderabad (2007 (04) LCX 363), registrar and share transfer agents' services was held not to be liable under BAS. The same would now be taxable under two different categories – Registrar to an issue and share transfer agent from 01.05.06

BAS Vs Works Contract

a. Prior to the introduction of works contract service category under service tax with effect from 01.06.07, margin enjoyed by the contractor on procurement of goods or inputs for the client was not to be taxed by breaking up the composite works contract as per the Chennai Tribunal's decision in Cethar Vessels Ltd Vs CCE Trichy (2007 (03) LCX 344).

b. In CMS (India) Operations & Maintenance Company (P) Ltd Vs CCE Pondicherry (2007 (05) LCX 0095), the contention of the department regarding breaking up of a operation and maintenance contract for operating and maintaining a facility for generating and supplying electricity to TNEB was discarded by the Tribunal which held the said contract to be a works contract for manufacture of goods viz., electricity.

BAS Vs Transportation of goods through pipeline

In Oil India Ltd Vs CCE Dibrugarh (2008 (03) LCX 151), the Tribunal held that transport of goods by pipeline was covered under the category transport of goods other than water through pipeline or other conduit with effect from 16.06.05 and that the same could not be taxed earlier under BAS.

Sharing of Expenses

It is quite often to find cases where expenses are shared between independent units. This happens where units happen to fall within the same group or in other words happen to be associates. One line of thinking could be that the question of taxability would arise only when there is a service involved and that in the absence of one, pure reimbursements cannot be taxed. The assessees would however be better off trying to see whether there is any activity involved which could be brought under any of the categories falling under Section 65(105) of Chapter V of Finance Act 1994 as amended from time to time in which case, the reimbursements could be taxed under the appropriate category.

Brand ambassadors liable?

In the opinion of the paper writers, the brand ambassadors who provide their service could be liable under clause (i) and (ii) of this category since the amendment to the

definition of taxable service with effect from 01.05.06 whereby taxable service provided by any person was sought to be taxed unlike the earlier position of taxing only commercial concerns.

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