

**Vote on Account / Budget 2009- Suggestion under Service Tax.**

This exhaustive notation from our side covers the issues which have been brought to our notice or those where there is a doubt in the minds of the officers/ tax payers. These suggestions would also assure the tax payer that his interests are being emphasized and trust is being reposed in him to pay his just taxes. Issues which have resulted in litigation which could have been avoided had the provisions/ instructions been clear have also been included.

The purpose of this exercise is to see that there is clarity in law along with fairness for the tax compliant assesseees who are creating wealth for the nation.

After consideration the clarifications maybe issued as a master circular on the legal portion and the procedural portion.

**I. Legal Provisions**

1. Territorial Jurisdiction- Section 64 - Services provided and consumed outside India are also booked in the accounts of the Indian Company. Under the reverse charge provisions of Section 66A we understand this is not liable as it would infringe on to the taxability of that service in the relevant country. The example could be the manpower recruitment outside India for staffing need of branch in Germany, learning Chinese language in Beijing, China by an employee of Indian Company.
2. Taxable Service – Section 65 (105) – a) Where there is a service which is provided of negligible import/ value in provision of a sale, the same can be specifically excluded. This would avoid needless litigation. The decisions in the case of Imagic Creative and BSNL maybe the base for this. The type of services maybe explained by way of example. Illustration: In the sale of Domestic appliance the service of installing at consumers premises the value of which has been included for the purpose of paying the local VAT. b) All the definitions to be reviewed to omit entries/ description appearing in two services to make the same

- unambiguous. c) The critical terms used in the definitions which require to be explained maybe defined to avoid litigation. While doing this exercise the understanding of the people in the trade as well as the common man maybe given due weightage. Examples of this could be: Turnkey Contract
3. Classification – Section 65A – a).What constitutes an indivisible/ composite service contract is in doubt. Where the values for each separate service is available it maybe considered as divisible and liable to ST for the taxable services. Where only one lumpsum value exists then the same maybe a composite service wherein interpretation under 65A is to be taken up. b) The reference to the WTO based on which new services are being identified would align the coverage of services to the rest of the world as in case of reference to HSN in central excise. This may also be given strength in Circular/ section.
  4. Charge of Service Tax – Section 66 – Whether the fact that it is an indirect tax on the consumption and is destination based and legally payable by the receiver can be built in. This would mitigate the hardship of the provider who enters into long term contracts. Many Government agencies / PSUs and Companies in the Private Sector themselves refuse to pay the same as it does not form a part of the contract/ work order/ purchase order.
  5. Non Resident Service – Section 66A – a) Definition for business ( clarification whether non profit initiatives/ organization covered) and permanent establishment ( whether as per the Income Tax or specific DTAT) b) Sharing the cost of multi national organizations for taxable services maybe deemed to be service. Otherwise a mere recovery of cost may not be considered as a service at all. Clarification that non taxable services would not be liable may also be made clear.
  6. Valuation – Section 67 – a) It maybe explained that in normal course the gross value of goods could form part of the value at the option of the service provider. b) The definition of associated enterprise is to be inserted considering reason/ reality and not making it another source of perennial litigation as in case of IT.

7. Best Judgement Assessment – Section 72 - Similar provisions have been in the Income tax for several years. The experience maybe considered in framing instruction for actual implementation to ensure fairness while safeguarding revenue.
8. Recovery of ST – Section 73 – This provision maybe made exactly in line with the provision of central excise with no attempt to make it wider or with an intention to expand the situations leading to invocation of longer period. It maybe considered that this tax is and would depend on voluntary compliance and should not be more rigorous than central excise.
9. Provisional attachment – Section 73C – This should be made applicable only after confirmation of the notice at 1<sup>st</sup> appeal stage. The actual loss to the revenue due to tax payer disappearing after the notice is issued maybe quantified and then decided. Present safeguards should continue.
10. Publication of names – Section 73D – As in the previous point this should be applicable after confirmation of demand at the 1<sup>st</sup> Appeal stage. Here there maybe a need to fix responsibility as if a name is maligned there is a long term impact on business and family. Not even one innocent citizen should be subjected to this. Similar cases where names published under other laws maybe examined to see how many demands were later set aside.
11. Rectification of mistake – Section 74 – Safeguards to ensure that large scale notices issued in bulk for similar cases maybe ensured through instructions in this regard. The fate of the action taken ( for example for penalties at Bangalore) may also be assessed.
12. Penalty – Section 76, 77,78 – This tax being a voluntary one and supposed to be more permissive than central excise the provision of total penalty not exceeding the tax amount maybe put in place.
13. Penalty not to be imposed – Section 80 – There are a number of instances when there is a genuine reason for not complying with the law in service tax as against

- central excise. Some of them are: lack of awareness, initial lack of clarity of matter ( even officers may have advised [ including the help line / PRO] orally), number of clarifications/ withdrawals and changes in the definition/ circulars, contrary decisions of the Tribunals/ Courts, Inaction in regard to that category from inception by department,
14. Power to Search – Section 82 – Though the CCP has been made applicable independent witnesses rarely available from the start. Instruction / training including the effect of a vexatious search should be highlighted to the officers. In case of recording of a statement, mandatorily a copy of the same maybe provided to counter few revenue officers zeal.
  15. Application of CEA – Section 83 – a) Examine those demands where there have been general non compliance and issue 11C for the same. Illustration could be:  
.... b) Inclusion of the Chartered Accountant for audit under Section 14A & 14AA.  
c) Section 35F – pre deposit ( uniform policy – preferable no pre deposit)
  16. Powers of adjudication – Section 83A – There is an urgent need to see the efficacy of this provision which appears very important but results are that for various reasons it has become an empty formality in 90% of the cases.
  17. Appeals to the Commissioner of Central Excise Appeals – Section 85 – While across the country these appeals are heard without pre deposit in Bangalore there is a practice of hearing of stay and in many cases pre deposit is insisted. An analysis of the number of such cases being finally favouring revenue may indicate the need for such a requirement to be reviewed. The industry looks on this provision as SCN issued by Ceaser, adjudicated by Ceaser and appeal also disposed of by Ceaser. Especially for service tax where majority of the demands being set aside, this provision maybe kept in abeyance for at least 5 more years or done away with.
  18. Advance Ruling – Chapter VA – This should be extended to any Company

## II. Service Tax Rules

1. Centralised Registration – Rule 4 (2) – Meaning of centralized accounting. To include offices where individual trial balances are combined?
2. Input Service Distributor – Rule 4A (2) – The Invoice so issued is a valid document in itself. There is no need of copies of invoices on which the same has been passed at the place of the recipient.
3. Issue of Consignment Note – Rule 4B – Consignment note would not be issued in a contract of carriage between fixed places for fixed sum or per kilometers. Such service providers maybe more aptly described as GTO who have not been intended to be covered in the levy.
4. Provision of Information – Rule 5A – Audit officers and IAP sometimes demand the entire accounts in a pen drive. This practice maybe dissuaded. Provision for remote audit maybe incorporated in the law as technology would allow the same. Audit then would be less intrusive and more effective.
5. Payment of Service tax – Rule 6 – a) Excess payment should be allowed to be adjusted freely without any intimation and elaborate procedure. b) Adjustment of property tax – Intimation and time limit to be done away with. c) Provisional assessment – time limit of maximum 1 year beyond which it would be deemed to be finalised.
6. Revision of Return – Rule 7B – The time limit should be 1 month after the accounts are finalized under Companies Act or the due date of the same. Alternatively at least 180 days i.e. the next possible date when the same would be revisited.

## III. Cenvat Credit Rules 2004

1. Capital Goods - Rule 2 (a) - The definition of capital goods to make the same in line with other regulatory and tax laws is imperative to avoid confusion and errors. The subsuming of all three into one entry as in Vat

may also be preferable. b) The capital goods for a service provider such as furniture, office facilities should be expressly provided in all fairness. c) Motor Vehicles credit for Mining, supply of tangible goods and Construction are to be included as they are the major users for the same and the purpose would be served.

2. Inputs - Rule 2 (k) – The definition for inputs used in providing a service should include provisions similar to accessories which set out that as long as the value is included in the value of service the credit would be available. Specifically input credit for R&D activity to be allowed considering the importance.
3. Input Services – Rule 2 (l) – The definition would lead to numerous disputes akin to the 1990-2000 on inputs and capital goods. It maybe suggested to make it simple and short. The Dept circular be issued to clearly state the purpose of this scheme. [ Presently in the discussion with officer in RAC it appears that the dept would use every means to deny unless explicitly set out]
4. Transitional Credit – Rule 3 (2) – Similar provisions for services to be put in place especially where the central excise duty credits are available for paying the service tax where deduction for materials not availed.
5. Capital Goods Credit or inputs reversal – Rule 3 (4) – Transaction value a much simpler option, rather than the various alternatives of no payment, payment as scrap, depreciated payments. Today the capturing of the credit availed in past 5 years may or may not be practicable. ( especially where transactions are numerous)
6. Credit eligibility for exporter of exempted products. Many senior officers not aware and refuse the registration. Circular to clarify this with the objective be put in place.
7. Input credit for service tax – Clarify situations in which the same would be available.
8. Refund for exporters of service- World over refunds are available of the taxes paid almost instantly. In India after almost 3 years ( from 2005) small part of the eligible input service credits are being sanctioned. What is the purpose served by this? Will this sector also be chained back by the

bureaucracy? Rather than give reasons for the delay, state how, when and what would be eligible as export refund/ rebate?

9. Reversal of Credit – Non taxable: Too many issues, too complicated a definition, too many possible exclusions, would spawn litigations. Without any exclusion straightaway % age of non taxable value of goods/ services as in Vat maybe better.

10. The option

IV. Service Tax ( Determination of Value Rules ) 2006

1. Where the expenses are merely shared and there is no expenditure / cost incurred **in the course of providing the taxable services the rule should not be applicable.**
2. Value- Works contract – Rule 2A – The charges for obtaining on hire machinery/ tools used for the works would be a subject matter of VAT and should not be included for ST. Maybe omitted.
3. Where the value under VAT has been arrived at on the basis of the standard deduction for labour, services and like charges, that value at times is being questioned on the ground that the same is not on actual basis. This matter maybe resolved.
4. The option of availing the credit on the inputs and paying the service tax on the gross amount has not been expressly set out. The same maybe incorporated or circular issued as it is in line with Section 67.
5. Rule 5 (2) is too theoretical and the following conditions are to be omitted / clarified
  - The need to bring in the obligation of the service receiver being taken up by the service provider due to convenience has to be built in otherwise the same maybe outside the scope of taxable service in terms of Section 67. This vital aspect has not been addressed.
  - The eligibility as pure agent where the agent does not use the same may not be proper. Uses the same for and on behalf of the service receiver maybe more practical.
  - the recipient is liable to make the payment to third party- the very purpose of outsourcing the activity is to avoid the time and effort involved. There may not be any legal obligation for the

ultimate receiver as the contract would be with the intermediary.

- The specific authority to pay on his behalf may not be there for each service provided.
- Knowledge of the third party – as stated above the very purpose of asking someone else to pay / get the work done should be enough. The need for the service receiver to know who is the service provider is practically not necessary.
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6. Inclusions/ Exclusion – Rule 6- Need to add to exclusions deposits (KEB/ Water Deposits/ legal fees paid to government department) specifically while providing the service.
7. Actual consideration – Rule 7 – May specifically exclude the reimbursements as the provision only indicates.

#### V. Export of Services Rules 2005

1. Recognising that services can be provided from India without performance for the services of maintenance, testing, certification considers the technological capability of providing the same remotely. Other services where the same could apply are services such as: consultancy / advise provided by CA/ ICWAI/CS, credit rating, market research, fashion designer, commercial training ( using virtual classrooms) These maybe examined to remove the present inequity. Alternatively these could be shifted to the recipient based criterion.
2. The criterion of “used outside India” has caused innumerable disputes. The same maybe clarified considering that the client outside India may not provide details of the usage to the service provider.
3. The criterion of receipt in CFE may be examined where the amount receivable is adjusted with the amount payable and the balance only paid.
4. The services provided to SEZ whether eligible for this export benefit may also be clarified.

- VI. Payment for Services from non resident received from outside India Rules 2006
1. There is a doubt whether the performance based services where the entire work is done outside India and not performed in India which is used in India would be liable in the hands of the recipient. The matter maybe clarified.
  2. The treatment of all the services received by a branch office located outside India for its operation and functioning , the accounts of which are consolidated with Ho in India should not be a part of the service received in India. This may also be clarified.
- VII. Works Contract Rules 2007
1. There is a major doubt and administrative difference for ongoing contracts. The circular stated that option earlier exercised has to be continued. This raises the following issues which require to be resolved:
    - Ongoing contracts entered into prior to 1.6.2007 which are more specifically covered under WC – should they not be allowed to change. Especially where the some contractors did not get registered till June 2007.
    - If above is ok then does it mean that ongoing contracts wherein no ST was paid till 1.6.2007 are not liable after that date. This may also have an implication since the customer may not be willing to pay for the same since it is not in the contract.
    - The government department ( central / state) as well as the PSUs themselves do not pay the service tax imposed after the contract.
    - Most of the service providers have not opted for the composition scheme. Many of them have been paying the ST on an ad hoc basis on billing.
    - A declaration now with instruction to opt, provide details maybe examined to set right these anomalies since the service providers/ officers themselves are unsure of what to do in which circumstances.

2. In large contracts especially in infrastructure the changes in the rates of composition bought about on 1.3.2008 may not be contractually recoverable. Further changes in the same are to be avoided. Alternatively the rate applicable at the time of contract maybe applicable till the completion of the project.
3. There are a number of works contract which have not been specified in this entry like electroplating, repairs, powder coating, photography ( developing). It is ideal that the entry be expanded to cover all works contract as long as they are treated as that under VAT.

The above may not be all the issues which arise. Readers are encouraged to see where they are affected and take this up with the local association/ professional associations to make this law simpler and clearer. Be a cause in the matter of change that you wish to see.