

Service Tax- Budget proposals- 2009

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In the Finance (No. 2) Bill, 2009, three new titles of services have been proposed besides the modification in three existing titles. The revision power under sec 84 has been proposed to be replaced by the provision of filing of appeal as in case of the Central Excise.

Titles of Services

Business Auxiliary Service-Sec 65(19)

In this title, the processing or production of goods that amounts to manufacture, has been proposed to be limited to the extent of excisable goods only. There is no fundamental change. It is only a clarification to avoid disputes about imposition of the levy on non-excisable goods like country liquor on job-work basis. For excisable goods, there must be three tests –

- (i) It shall be specified in the Schedule I and Schedule II of the Central Excise Tariff Act, 1985;
- (ii) It must be result of the manufacture process as defined under sec 2(f) of the Central Excise Act, 1944;
- (iii) It must be marketable one.

Now, at this point again, whether excise duty is leviable or exempted, is not the matter. Only point is whether it is excisable or not. The reason being, an excisable goods could be classified into three categories-

- one is subject to Nil rate of duty or there is no rate of duty;
- second is exempt through an exemption notification, though in the Tariff, there is a rate (other than Nil rate) of duty; and
- third is the goods on which the excise duty (other than Nil rate) is to be paid.

Transportation of goods by Rail -Sec 65(105) (zzzp)

The existing sec. 65(105) (zzzp) is as follows: -

"taxable service" means any service provided or to be provided –

to any person, by any other person other than Government railway as defined in clause (20) of section 2 of the Railways Act, 1989, in relation to transport of goods in containers by rail, in any manner;

Now, by clause 112 (A) (3) of the Bill, 2009, the following substitution has been proposed-

for sub-clause (zzzp), the following sub-clause shall be substituted, namely:—

“(zzzp) to any person, by any other person, in relation to transport of goods by rail, in any manner;”;

Now at this point, still on transportation made by the Indian Railway is not taxable. Only service in relation to such transportation is taxable.

Stock-Brokers-Sec 65 (101)

The proposed sec 65(101) is as follows

"stock broker" means a person who has either made an application for registration or is registered as a stock-broker as the case may be, in accordance with the rules and regulations made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);

Since in the existing provision, the expressions—"sub-brokers as the case may be," has been proposed to be deleted. It means now sub-brokers would become outside the scope of the sec 65(101).

Information Technology Software –Sec65(105) (zzzze): -

It item No. (V) and (VI), w.e.f. May 16, 2008, the word “acquiring” shall be replaced from the word “providing”, now the existing definition shall be modified as follows: -

“taxable service" means any service provided or to be provided –

to any person, by any other person in relation to information technology software for use in the course, or furtherance, of business or commerce, including,—

- (i) development of information technology software,
- (ii) study, analysis, design and programming of information technology software,
- (iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,
- (iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary information technology software,

(v) providing the right to use information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products, (vi) providing the right to use information technology software supplied electronically;

COSMETIC PLASTIC SURGERY –Sec 65(105) (zzzzk)

By clause 112(A) (4) (c), the following name title has been proposed:

Taxable service means service provided or to be provided to-

to any person, by any other person, in relation to cosmetic surgery or plastic surgery, but does not include any surgery undertaken to restore or reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, degenerative diseases, injury or trauma;

Now the cosmetic or plastic surgery for beauty etc [other than any surgery any surgery undertaken to restore or reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, degenerative diseases, injury or trauma;] shall become taxable from the notified date.

Transportation from water- Sec 65(105) (zzzzl)

By clause 112 (A) (4) (c), a new title under sec 65 (105) (zzzzl) of the Finance Act, 1994 has been proposed –

Taxable service means service provided or to be provided to-

to any person, by any other person, in relation to transport of —

- (i) coastal goods;
- (ii) goods through national waterway; or
- (iii) goods through inland water.

Explanation.— For the purposes of this sub-clause,—

- (a) “coastal goods” has the meaning assigned to it in clause (7) of section 2 of the Customs Act, 1962;
- (b) “national waterway” has the meaning assigned to it in clause (h) of section 2 of the Inland Waterways Authority of India Act, 1985;
- (c) “inland water” has the meaning assigned to it in clause (b) of section 2 of the Inland Vessels Act, 1917;

Service on Legal Consultancy- Sec 65(105) (zzzzm)

By clause 112 (A) (4) (c) of the Finance No.2 (Bill) 2009, the following new title has been proposed –

Taxable service means service provided or to be provided to-

to a business entity, by any other business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner:

Provided that any service provided by way of appearance before any court, tribunal or authority shall not amount to taxable service.

Explanation.—For the purposes of this sub-clause, “business entity” includes an association of persons, body of individuals, company or firm, but does not include an individual;’;

Now legal consultancy given to or by an individual [including sole ownership business title] shall not be taxable. And on that ground, any legal consultancy given by a practicing Chartered Accountant, Cost Accountant or a Company Secretary shall not become non-taxable because of the effect of sec 65 (A) (2) (a) of the Finance Act, 1994 due to specific title.

Though in taxation matter, if there are two views, which in favour of the assessee, would prevail- CIT Vs. NAGA HILLS TEA CO LTD AIR 1973 SC 2524, but one should regard the strict letter of the law-A. Vs. FERNANDEZ Vs. STATE OF KERELA, AIR 1957 SC 657, so because of specific provision of the law, it could not be said that there are two views, and now the Finance Ministry should amend the law for some specific titles to exempt the services provided to or by individual by considering the social economic conditions of large part of the country.

CENVAT CREDIT: -

- (1) Now the scope of capital goods under rule 2(k) of the CENVAT Credit Rules, 2004, the following items

“but shall not include cement, angles, channels, Centrally Twisted Deform bar(CTD) or Thermo Mechanically Treated bar(TMT) and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods”.

shall not be eligible to take credit as capital goods- refer Notification No. 16/2009 CE (NT) dt 7-7-2009. However, the specified duty paid on such goods could still be subject to CENVAT Credit as input by taking the effect of sec 65 (105) (zzzza)

of the Finance Act, 1994, sec. 65(25b) or sec 65(39a) as the case may be , it is the subject matter of tax planning.

- (2) Rule 3 (5B) of the CENVAT Credit Rules 2004 [refer Notf No.16/2009 CE(NT) dt7-7-2009], stipulates that

If the value of any,

(i) input, or

(ii) capital goods before being put to use,

on which CENVAT credit has been taken is written off fully or where any provision to write off fully has been made in the books of account, then the manufacturer or service provider, as the case may be, shall pay an amount equivalent to the CENVAT credit taken in respect of the said input or capital goods:

Provided that if the said input or capital goods is subsequently used in the manufacture of final products or the provision of taxable services, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules.”.

- (3) And at last, under rule 6(3) of the Credit Rules 2004, w.e.f. July 7, 2009, now,

the manufacturer of goods shall pay an amount equal to five per cent. of value of the exempted goods and the provider of output service shall pay an amount equal to six per cent. of value of the exempted services; or”.

where the input/input service is common and has not adopted the option of proportional payment.

Exemption Notification:-

Tour Operators:-

The services provided by the tour operators undertaking point-to-point transportation of passengers in a vehicle bearing contract carriage permit is being fully exempted from service tax, provided such transportation is not in relation to tourism or conducted tours, or charter or hire. (Notification No. 20/2009-ST dated 07.07.09

Foreign Exchange-sale-purchase Sale and purchase of foreign exchange/money changing were made taxable in the past. The inter-bank transactions of purchase or sale of foreign currency, when undertaken by scheduled banks, is being exempted. (Notification No. 19/2009-ST dated 07.07.09 refers). Scheduled banks under this notification mean the banks, which are included in the Second Schedule of the Reserve Bank of India Act, 1934

Exempted to association: - Associations, including trade associations, are taxable under clubs and association service. Federation of Indian Export Promotion Organization (FIEO) and twenty-one specified export promotion councils sponsored by the Department of Commerce or by the Ministry of Textiles are being exempted from the levy of service tax under the said service. This exemption would remain valid till 31.03.2010. (Notification No. 16/2009-ST dated 07.07.09)

Exemption to taxable service: - The following two services have been exempted, if they are used for export of goods and where the liability to pay the tax on such services is on the exporter himself, on reverse charge basis, -

- (i) Transport of goods by road, from the place of removal to any ICD, CFS, port or airport; or from any CFS or ICD to the port or airport; and
- (ii) Services provided by a foreign commission agent for procuring orders.

This has been done in order to avoid the circuitous route of first paying the tax and then receiving the refund. An exporter registered with an export promotion council, sponsored by Ministry of Commerce or Ministry of Textiles, having Import-Export Code Number and registered with the Department under section 69 of the Finance Act, 1994 for his liability under reverse charge is eligible to claim this exemption. (Notification No. 18/2009-ST dated 07.07.2009)

Refund of service tax to Exporters – Notification No. 41/2007-ST is being superseded by Notification No. 7/2009-ST dated 07.07.2009 prescribing refund scheme in respect of 16 taxable services. Service of ‘terminal handling’ has been added in the existing list of taxable services. The service ‘transport of goods through road’ is also included in this list to cover such exporters who are not liable to pay service tax under reverse charge mechanism. The services of foreign commission agents have been deleted from the list, as it is comprehensively covered under Notification No. 18/2009-ST dated 07.07.2009. While the general structure of the notification is similar to that of Notification No. 41/2007-ST, the new scheme is essentially trust based i.e. refund is to be granted on self-certification/certification by Chartered Accountant.

Works Contract: -

In the Works Contract (Composition Scheme of Payment of Service Tax) Rules, 2007 by Notification No.23/2009 S.T. dt 7-7-2009, the following explanation to Rule 3 (1) has been substituted: -

For the purposes of this sub-rule, gross amount charged for the works contract shall be the sum,-

- (a) including-
 - (i) the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and
 - (ii) the value of all the services that are required to be provided for the execution of the works contract;
- (b) excluding-

(i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved; and

(ii) the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire:

Provided that nothing contained in this Explanation shall apply to a works contract, where the execution under the said contract has commenced or where any payment, except by way of credit or debit to any account, has been made in relation to the said contract on or before the 7th day of July, 2009.”;

By sub-rule (4), it has also been stipulated that The option under sub-rule (3) shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract.”.

Other Changes in the Finance Act, 1994

- a. While most of the procedures under service tax law are aligned to that of the central excise, one of the exceptions is the treatment to an order-in-original passed by an officer subordinate to Commissioner, if the same is not acceptable to the Commissioner on account of its lack of legality or appropriateness. While section 35E of the Central Excise Act, 1944 prescribes a departmental appeal being filed against such order before the Commissioner (Appeals), section 84 of the Finance Act, 1994 prescribes revision of such orders, which amounts to recalling the order and re-adjudicating it. Field formations as well as trade has requested that the service tax procedure should be amended to make it in line with the central excise procedure. The same has been done by suitably amending section 84 with certain consequential amendments in section 86. This provision would come into effect from the date of enactment of the Finance (No. 2) Bill, 2009. All cases decided before this date would continue to be governed by the existing provisions.
- b. The service tax rules suffer from the deficiency of not having provisions relating to (1) relevant date for determination of rate of service tax and (2) place of provision of taxable services. For this purposes section 94 of the Act is being amended to empower the Central Government to make rules in this regard. This provision would come into effect from the date of enactment of the Finance (No. 2) Bill, 2009.
- c. Goods Transport Agents (GTAs) receive several services from other service providers (such as warehouse keeper, cargo handlers, C&F agents) during the movement of goods, en-route. While these individual services are taxable at the hands the service providers, the GTA cannot take credit of tax paid on such services, as the abatement allowed to them is subject to condition that no credit should be availed. This matter was agitated by the GTAs, and the government agreed to exempt such services. Consequently, notification No. 1/2009-ST dated 05.01.2009 was issued. It was, however, pointed out by GTAs that litigation is pending for the past period. In this regard Board’s letter F. No. 137/175/2007-CX.4 (Vol. II) dated 22.04.2009 was sent to the field formations to identify such cases, as the Government has promised to drop all past demands/litigation on this

matter, latest by the end of August, 2009. In order to enable the field formations to dispose of the pending demands and discharge the notices issued for the past period, the said notification No. 1/2009-ST is being given retrospective effect (with effect from 01.01.2005) through changes made in the Finance (N0. 2) Bill, 2009. Upon the enactment of the Bill, field formations must be directed to take up these cases on priority and ensure that all such cases are disposed of latest by 31st August, 2009.

Now, at the end, by considering the un-organised structure of tax payers, where large part of the tax payers are individuals, the penal provisions should be curtailed accordingly.

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