SERVICE TAX

SALIENT FEATURES OF BUDGETARY CHANGES

The Finance Minister has introduced the Finance (No. 2) Bill, 2009 in the Lok Sabha on the 6th of July, 2009. Clause 112 of the Finance (No 2) Bill, 2009 covers all the changes relating to Chapter V of Finance Act, 1994. Changes are also being proposed in the provisions of the,-

- CENVAT Credit Rules, 2004;
- Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007; and
- Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

Notification Nos. 16/2009-ST to 23/2009-ST and 16/2009-CE (NT) all dated 7th July, 2009 refer. Details of the changes are explained in the Explanatory Notes.

The salient features of the changes are discussed hereinafter.

1. New Services included in the list of Taxable Services

The following new services are proposed to be included in the list of taxable services. These services would get covered under the list of taxable services from a date to be notified after the enactment of Finance (No. 2) Bill, 2009.

1.1 Transport of Goods through Rail: Presently, transportation of goods in containers by rail, by other than Government railways is taxable under section 65(105)(zzzp) since 2006. It is now proposed to impose service tax on goods transported by railways including Government railways, whether in containers or otherwise. Suitable abatement and exemption to specified goods would be provided through issuance of notification at the appropriate time.

1.2 Transport of Coastal Goods; and Goods transported through Inland water: Coastal goods (as defined under the Customs Act) and transport of goods through National Waterways, and inland waters are proposed to be brought under tax net. Suitable abatement and exemption to specified goods would be provided through issuance of notification at the appropriate time.

1.3 Legal Consultancy Service: As in the case of management consultancy or engineering consultancy service, any consultancy, advice or technical assistance provided in any discipline of law is proposed to be subjected to service tax. However, the tax would be limited to services provided by a business entity to another business entity. It has been defined that a business entity includes firms, associates, enterprises, companies etc. but does not include an individual. Thus, services provided by an individual advocate either to an individual or even to a business entity would be outside the scope of the taxable service. Similarly, the services provided by a corporate legal firm to an individual would also be outside the purview of taxable service. Any service of appearance before any court of law or any statutory authority would also be kept outside this levy.

1.4 Cosmetic and Plastic Surgery service:

1.4.1 Beauty treatment service provided by saloons, beauty parlors and beauticians are taxable since 2002. The service now proposed to be taxed is cosmetic surgery and plastic surgery undertaken to preserve or enhance physical appearance or beauty. As per common definition, surgery is a medical technology consisting of a physical intervention on tissues. As a general rule, a procedure is considered surgical when it involves cutting of a patient's tissues or closure of a previously sustained wound. Commonly surgery is performed in a sterile environment with anesthesia and antiseptic conditions using surgical instruments. It also includes 'non-invasive' surgery.

1.4.2 Some of the commonly known aesthetic/cosmetic surgeries are abdominoplasty (tummy tuck); bletharoplasty (eyelid surgery); mammoplasty; buttock augmentation and lift; rhinoplasty (reshaping of nose); otoplasty (ear surgery); Rhytidectomy (face lift); liposuction (removal of fat from the body); brow lift; cheek augmentation; facial implants; lip augmentation; forehead lift; cosmetic dental surgery; orthodontics; aesthetic dentistry; laser skin surfacing etc.

1.4.3 However, any reconstructive surgery undertaken to restore one's appearance, anatomy or bodily functions affected due to congenital defects, developmental abnormalities, degenerative diseases, injury or trauma would be outside the scope of this service. These processes could be

undertaken to correct impairment caused by burns, fractures or congenital abnormalities like cleft lip etc.

2. **Alteration in the scope of existing taxable services:**

The following alteration/modifications have been done in the existing taxable services. These changes would come into effect from a date to be notified after the enactment of the Finance (No. 2) Bill, 2009.

2.1 Modification in Business Auxiliary Service (BAS) [section 65(19)]: It may be recalled that production or processing of goods for or on behalf of a client falls within the purview of this service. However, if any such activity amounts to manufacture within the meaning of section 2(f) of the Central Excise Act, the same is excluded from its purview. This exclusion has been modified to state that it would apply only if the activity results in manufacture of 'excisable goods'. Both the words/phrases i.e. 'manufacture' and 'excisable goods' would have the same meaning as defined under the Central Excise Act. The impact of this change would be that even if a process of manufacture is undertaken for the client, but the resultant product does not fall under the category of excisable goods, such as alcoholic beverages, the service tax would be attracted. Certain other goods which would also fall under BAS on account of the proposed change would be kept outside the tax net by way of exemption notification, to be issued at the appropriate time.

2.2 Modification in Stock-broker Service [section 65(105)(a)]: The present definition of a stockbroker [section 65(101)] includes sub-broker as well. A number of cases have been booked in the recent past where the sub-brokers have been asked to pay tax on the remuneration they receive from the stockbroker. Previously, the sub-brokers could issue contract note and receive amounts from the investors. With effect from 01.06.2005, SEBI regulations have prohibited sub-brokers from these activities. The role of sub-brokers has thus reduced substantially. Considering that the entire broking charges are anyway taxable at the hands of stock-broker and a large number of small sub-brokers have to comply with the service tax laws, the sub-brokers have been excluded from the purview of service tax by making suitable amendment in the definition of stock-broker. It is also clarified that such sub-brokers should also not be charged to service tax as commission agents under Business Auxiliary Service. For this purposes, specific exemption notification would be issued at the appropriate time.

2.3 Modification in Information Technology Software Service [section 65(105)(zzzze)]: A correction has been carried out in the definition of the taxable service by replacing the word 'acquiring' by the word 'providing', considering the fact that it is the providing of 'right to use' and not the acquiring of 'right to use' is a taxable service. This amendment would have retrospective effect from 16.05.2008, when the service came into effect.

3. Other changes in the Finance Act, 1994:

3.1 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. The alignment to this effect has been carried out 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.

3.2 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.

3.3 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.

4. Amendments in Rules (pertaining to service taxpayers):

4.1 Changes in the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007: These rules provide a simplified procedure for working out the tax liability by the service providers providing works contract service. Instead of working out the service element from the value of works contract and paying service tax at full rate (i.e. 10%) the service provider is allowed to pay 4% on the 'gross amount charged' for the works contract. The reason for prescribing the lower rate under the scheme is that the service provider need not bifurcate the gross value of works contract. It was expected that the gross value should be shown to include the total value of materials as well as services used in providing the taxable services. However, it has been reported that in certain cases, the taxpayers are not including the full value of the goods required for execution of works contract for working out service tax liability under the Composition Scheme by either excluding the value of goods received free of cost from their client or splitting the contract into a sale contract (for a portion of goods required to execute the works contract) and works contract (for only a portion of the total value of goods and the labor charges), thus reducing the value of works contract for the purposes of calculating service tax. In order to plug this loophole, the Explanation appearing in sub-rule (3) is being amended to provide that the composition scheme would be available only to such works contracts where the gross value of works contract includes the value of all goods used in or in relation to the execution of works contract whether received free of cost or for consideration under any other contract. This condition would not apply to those works contracts, where either the execution of works contract has already started or any payment (whether in part or in full) has been made on or before the date of the amendment, i.e. 07.07.2009, from which the said amendment becomes effective (refer notification No.23/2009-ST dated 07.07.2009).

4.2 Amendments made in CENVAT Credit Rules (pertaining to service tax)

4.2.1 Rule 3(5B) of the CENVAT Credit Rules provide that, if value of any input or capital goods on which CENVAT credit has been taken, is written off fully or where provision to write off has been made in the books of account before being put to use, the 'manufacturer' shall pay an amount equivalent to the CENVAT credit taken on such item. Similar provision is presently not prescribed in case of taxable service provider. The said sub-rule is being amended to bring taxable service provider within the ambit of the said restriction. This provision would come into force immediately (Refer notification No.16/2009-CE (NT), dated 07.07.2009).

4.2.2 Rule 6(3) provides an option for a provider of taxable as well as exempt services, using common inputs or input services, but opting not to maintain separate accounts to pay an amount of 8 per cent of the value of exempted service. This provision was made when the rate of tax on taxable services was 12 per cent. Since the service tax rate has been reduced to 10 per cent, the said amount payable on the exempted services is being reduced from 8 per cent to 6 per cent of the value of exempted service. This provision would come into force immediately (Refer notification No16/2009-CE (NT), dated 07.07.2009).

4.2.3 For changes made in the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, please see para 7.1

5. Exemptions:

5.1 Private bus operators, who operate buses on specific inter-state or intra-state routes, are required to pay service tax as they ply their buses having 'contract carriage permits' and thus fall within the definition of tour operators. On the other hand the State Undertakings run buses, which run on the same route carrying passengers, are not subjected to service tax as these buses bear 'stage carriage permit'. In order to bring parity between the two, 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. 20/209-ST dated 07.07.09 refers).

5.2 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. 1/2009-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

5.3 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 refers)

5.4 All the exemptions mentioned above would come into force immediately.

6. Changes in territorial jurisdiction:

6.1 Vide notification No. 1/2002-ST dated 01.03.2002, the provisions of chapter V of the Finance Act, 1994 (which governs the levy and collection of service tax were extended to the designated areas in the Continental Shelf of India (CSI) and the Exclusive Economic Zone (EEZ) of India, as declared by Ministry of External Affairs Notification Nos. S.O. 429(E) dated 18.07.1986 and S.O. 643 (E) dated 09.09.1996. Notification No. 1/2002-ST has been amended to extend the provisions of Chapter V of the Finance Act, 1994 to installations, structures and vessels in the entire CSI and EEZ of India. Thus, services provided to or from CSI and EEZ of India would be covered within the ambit of the provisions relating to service tax w.e.f. 07.07.2009 (Notification No. 21/2009-ST dated 07.07.09 refers). Consequential changes have also been made in the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 (Notification No. 22/2009-ST dated 07.07.09 refers).

7. Changes in the scheme for refund of service tax to the exporters of goods:

7.1 Notification No. 41/2007-ST dated 06.10.2007 provides for a scheme of refund of service tax paid on taxable services, received and used in connection with export of goods by the merchant/manufacturer-exporter. This notification has been amended several times in order to include a number of taxable services within the scheme and also to facilitate speedier disposal of the refund claims. The Board has also issued a number of circulars. Despite these efforts, representations have been received from trade and industry that there are inordinate delays in grant of refund claims and in many cases the refund is denied or notices are issued to the exporters. On the other hand, the field formations have expressed difficulties in implementing the conditions and following the procedures laid down in the said notification and the circulars issued from time to time. In order to ensure that exporters get refunds speedily, the entire scheme has been revamped. The new scheme would consist of two parts.

7.2 Exemption to taxable services.

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 refers).

7.3 Modified Refund Scheme

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.

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