POST-BUDGET MEMORANDUM 2010

Indirect Taxes

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA, NEW DELHI

POST-BUDGET MEMORANDUM - 2010

INDIRECT TAXES

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NEW DELHI

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THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

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INTRODUCTION

1.0 The Council of the Institute of Chartered Accountants of India considers it a privilege to submit this Post-Budget Memorandum to the Government.

2.1 This Memorandum is divided in two Parts. Part - I covers issues arising out of the Budget proposals and Part–II contains other matters which were included in our Pre-Budget Memorandum 2010 which we believe are important and addressing the same would make tax laws simple, fair and transparent and avoid litigation.

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

POST BUDGET MEMORANDUM – 2010

EXECUTIVE SUMMARY

SERVICE TAX

PART – I	
1. Definition of "business entity" [Proposed clause (19b) to section 65(105)]	➢ *Clarification may be issued to provide that the term does not cover proprietary concerns.* ➢ *Since, the definition uses the term "business" with the term "entity", appropriate clarification may be provided as to whether non-business entities are excluded from the scope of the definition.* ➢ *Also, it may be clarified that the "individuals" as also "proprietary concerns" are excluded from the scope of the term "business entity" even if they are engaged in business activities.*
2. Definition of "passenger" [Section 65(105)(77c)]	➢ *May be amended to cover domestic traveler.*

3. Port, Other Port and Airport services [clause (zn), clause (zzl) and clause (zzm)]	➢ *Instead of inserting the provisos in clauses (zn) (zzl) and (zzm) of sub-section (105) of section 65, the exceptions to classification relating to port and airport services may be provided in section 65A itself.* ➢ *A clarification may be issued to provide that non-taxable services like that of hospitals, doctors etc. provided within the port, airport will not be liable to service tax.* ➢ *Also, clarification may be issued in respect of handling of export cargo which is specifically excluded from the definition of cargo handling service as provided under section 65(105)(23).*
4. Commercial training or coaching service [Section 65(105)(zzzc)]	➢ *Amendment may be made prospective.* ➢ *Clarifications may be provided in respect of the cases where organizations have not charged, collected or paid the tax in the past on the basis of Tribunal judgments wherein the word "commercial" in*

	relation to commercial training or coaching centre has been interpreted as the institutes with non profit motive.
5. Commercial or industrial and residential complex construction [Section 65(105)(zzq) and Section 65(105)(zzzh)]	➢ *In place of completion certificate, architects certificate, proof of electricity connection or water connection may be considered.* ➢ *The value of land based on municipal valuation may be excluded as the intention is not to tax the value of land.* ➢ *The clarity on ongoing contracts may be provided considering the numerous permutations and combinations. Ideally, the Explanation should apply in case of contracts entered into after the date of notification.* ➢ *The use of the work "intended for sale" in the Explanation may be clarified as not covering those which are intended for renting.* ➢ *It may be clarified that the Explanation will not apply in case of*

	advance received before the date of when this amendment becomes effective.
6. Renting of immovable property [Section 65(105)(zzzz)]	➢ ***Appropriate amendment be made in the relevant clause so as to tax only that vacant land on which commercial, industrial construction is to be carried out. Further, vacant land to be used for construction of residential buildings etc. may be specifically exempted though part thereof may be used for purposes like camp offices.*** ➢ ***It may be clarified that service tax and CENVAT paid for services like setting up, modernization, renovation, repairs of premises of a service provider are available as credit. Further, rebate may be provided in respect of rental service.*** ➢ ***Alternatively, deemed credit towards service tax and CENVAT actually paid or at a specified percentage be allowed by way of***

		CENVAT credit against rental service. ➢ *Further, it is suggested that the amendment may be given prospective effect as the retrospective amendments tend to unsettle the past positions.*
7.	Copy rights on cinematographic films and sound recording [Proposed clause (zzzzt) of section 65(105)]	➢ *In the light of the decision in Imagic Creative Private Ltd. v. Commissioner of Commercial Taxes 2008 (9) STR 337 (ST and VAT mutually exclusive) as well as BSNL (on value of sale no service tax and vice versa) the same maybe re-looked.*
8.	Health care services [Proposed clause (zzzzo) of section 65(105)]	➢ *The presumption that the insurance companies are eligible for credit and therefore the proposal is revenue neutral may be re-looked after confirmation from insurance providers on whether the credits could be utilised or not. If not, then the coverage for individuals may be avoided as health care is in its infancy in India.*

	➢ *A clarification may be issued on what is covered under "preventive care".* ➢ *Suitable abatement for the cost of medicines etc. from the bill raised on a patient may be provided.*
9. Exemption provided to erection, commissioning and installation of specific machinery vide *Notification 12/2010 ST dated 27.02.2010*	➢ *The exemption may be extended to cover the services rendered under section 65(105)(zzzza) also.* ➢ *A clarification may be issued to provide the meaning and coverage of the term "substantial expansion".*
10. Exemption in respect of license value of software	➢ *Exemption from service tax may be extended to all types of software and condition for payment of CVD may be restricted to CIF value of software imported.*
11. Export of Service Rules, 2005	➢ *Deletion of condition for service to be provided from India and used outside India may be given retrospective effect.*
12. CENVAT Credit Rules, 2004	➢ *Since the excise rate has been increased to 10%, which is also the rate of service tax, the rates for*

	payment of amount under rule 6(3)(i) of the CENVAT Credit Rules, 2004 may be re-aligned.
PART – II	
1. CENVAT CREDIT RULES, 2004 (CCR 04) **(i) Coverage of capital goods for availing credit**	➢ ***The list of "capital goods" and "inputs" eligible for service tax may be redefined to include all the goods used for the purpose of business other than specified items on which CENVAT credit is not desired to be allowed.*** ➢ ***There is a need to clarify that items like dumpers, motor vehicles, etc. which are used for the purpose of business ought to be eligible for CENVAT credit especially, for those providing works contract or construction of commercial and residential properties.***
(ii) CENVAT credit of 4% additional duty levied u/s 3(5) of the Customs Tariff Act, 1985 (CTA)	➢ ***CENVAT credit in respect of 4% additional duty levied u/s 3(5) of the CTA may be extended to service providers as well.***

(iii) Rule 6(5) of the CCR 04	➢ ***"Works Contract Service" may be included in the list of services specified under rule 6(5) of the CCR 04.***
2. Adjustment of excess payment of service tax	➢ ***Adjustment of excess or short payment of service tax may be permitted within the same financial year.***
3. Revision of returns	➢ ***The time limit for revision of returns may be extended to 7 months from the end of the financial year.***

POST BUDGET MEMORANDUM - 2010

INDIRECT TAXES

PART - I

SERVICE TAX

1. Definition of "business entity" [Proposed clause (19b) to section 65(105)]

Amendment

Finance Bill, 2010 proposes to insert a new clause (19b) in sub-section (105) of section 65 to define the meaning of "business entity". Clause (19b) provides that business entity includes an association of persons, body of individuals, company or firm but does not include an individual. The definition is an inclusive one and excludes an "individual". The issue that arises is whether an individual includes "proprietary concern". It is our understanding that the term "individual" includes proprietary concern as well.

Suggestions

With a view to provide clarity, it may be clarified appropriately that individuals also include proprietary concerns.

Further, the definition uses the term "business" with the term "entity". This raises an issue as to whether a non-business entity say, a charitable organisation is excluded from the scope of the term. The intention may be appropriately clarified so as to avoid disputes like the ones arising in the context of

"commercial coaching or training service" if the idea is to cover every entity irrespective of the nature of activities being undertaken by it.

Also, it may be clarified that the "individuals" as also "proprietary concerns" are excluded from the scope of the term "business entity" even if they are engaged in business activities.

2. Definition of "passenger" [Section 65(105)(77c)]

Amendment

The scope of air transport passenger service is proposed to be widened by substituting clause (zzzzo) with a new clause. The new clause defines that air transport passenger service means "*any service provided or to be provided to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for domestic journey or international journey*". Thus, now all journeys (domestic or international) taken in any class would be liable to service tax.

However, as per section 65(77c), which defines the term "passenger", a person performing an international journey *inter alia* is a passenger.

Section 65(77c) reads as under:

"*Passenger means any person boarding, at any customs airport, an aircraft for performing an international journey, but does not include—*

(i) *a person who has arrived at such customs airport from a place outside India and is in transit through India, provided that he does not pass through immigration and does not leave customs area and continues his journey to a place outside India; and*

(ii) *a person employed or engaged by the aircraft operator in any capacity on board the aircraft."*

In view of the amendment proposed in the definition of air transport of passenger service, the current definition of passenger does not hold good".

Suggestion

The definition of "passenger" be amended suitably to bring it in line with the proposed amendment in the definition of air transport of passenger service.

3. Port, Other Port and Airport services [clause (zn), clause (zzl) and clause (zzm)]

Amendment

Finance Bill seeks to amend the definitions of 'Port services' [clause (zn)], 'Other port services' [clause (zzl)] and 'Airport Services' [clause (zzm)] to provide that all services provided entirely within the port/airport premises would be classified under these services. This has been done by adding a proviso to the definitions.

Majority of services like "storage and warehousing", "management, maintenance and repair", "cargo handling" when rendered entirely within the port/airport would now be covered under the port/airport service on account of such an amendment. All these services as also "port service" and "airport service" fall under performance based service group for the purpose of determination of import and export of service. Some part of the "ship management service" may also get covered under "port service" which is covered under recipient based service group for the purpose of determination of export and import of service.

Some services rendered within port area (e.g. hospitals) are not covered under service tax net at present. In view of the proposed amendment, they would also be liable to service tax which does not seem to be the intention of the legislature.

Suggestions

On account of the proposed amendment, it is suggested that "port, "other port" and "airport" service may be placed under the recipient based service group for the purpose of determination of export and import service.

It may be provided either vide a clarification or by amending the definition of taxable port/airport service that non-taxable services like that of hospitals, doctors etc. provided entirely within the port, airport and 'excluded' services like handling of export cargo (which is specifically excluded from the

definition of cargo handling service) will not be liable to service tax.

Further, in order to keep the principles of interpretation simple and avoid any confusions, the exceptions to classification relating to port and airport services may be provided in section 65 itself and not individually by inserting provisos in clauses (zn) (zzl) and (zzm) of sub-section (105) of section 65. Also, the two categories of 'port service' and 'other port services' may now be merged for more clarity and administrative convenience.

4. Commercial training or coaching service [Section 65(105)(zzzc)]

Amendment

An Explanation is proposed to be added to section 65(105)(zzc) explaining the meaning of the expression "commercial training or coaching center" with retrospective effect from 1.7.2003. The Explanation clarifies that the term 'commercial' in the context of this service would mean any training or coaching, which is provided for a consideration, whether or not for profit.

Suggestions

It is suggested that the Explanation may be given prospective effect as the retrospective amendments go against the best practice of "anteriority" which ought to be built into our tax laws. Moreover, in an emerging scenario, emphasis should be

more on stability in tax laws and resorting to retrospective legislation ought to be avoided which has the tendency to unsettle the past positions.

Further, appropriate clarification may be provided in cases where organizations have not charged, collected or paid the tax in the past on the basis of Tribunal judgments wherein the word "commercial" in relation to commercial training or coaching centre has been interpreted as the institutes with non profit motive.

5. Commercial or industrial and residential complex construction [section 65(105)(zzq) and section 65(105)(zzzh)]

Amendment

The Finance Bill, 2010 proposes to add an Explanation to section 65(105)(zzq) and (zzzh) which deems construction of a new building and complex intended for sale, wholly or partly, by a builder to a person before, during or after grant of completion certificate by the competent authority to be services provided by the builder to the buyer/prospective buyer except in situations where entire amount is paid by the buyer only after the receipt of the completion certificate. This amendment takes a position contrary to the one taken by the Tribunals and also in the *Circular No.108/02/2009-ST dated January 29, 2009* issued by the Board. The points to be considered in this context are:

(i) As explained in *Letter no. D.O.F. No.334/1/2010-TRU New Delhi dated 26/02/10*, intention behind inserting the above

Explanation is to tax transaction in which consideration is passed from the customer to the builder during construction phase. It is admittedly an accepted fact that builder remains the owner of the premise till the sale deed is executed. Now, the fact remains that builder can not provide service to himself.

If one can takes a stand that it provides the service to prospective customer then it can also be said that prospective buyer is taking service on his personal account which is excluded from the scope of taxable service vide section 65(91a). Amount received by the builder can be said at the most advance amount received against sale. Thus, transaction remains transaction of sale only. Changing the timing of payment does not alter the substance of the transaction.

(ii) Generally, the completion certificate is granted only on completion of the project as a whole and not flat or for that matter building wise. The condition of grant of completion certificate by the competent authority laid down by the Explanation proposed to be inserted to section 65(105)(zzq) and (zzzh) might lead to service tax being levied on sale of ready-made flats as issuance of completion certificate often takes very long and possession is given before that and in some cases, buyers occupy the premises also.

(iii) When a prospective buyer makes an advance payment to the builder against booking of specified unit in a building, that part also includes a price towards the land on which the building is being constructed and treating the entire amount being paid by the prospective buyer to the builder would amount to imposing a tax on transfer of land which is a State subject. Further, it is essential to ensure that the appreciation in land value is not subjected to Service tax as that is not within the tax jurisdiction.

(iv) The issue becomes complex where TDRs (Transferable Development Rights) are involved.

(v) The Explanation uses the expression “intended for sale”. Therefore, it means that if the building is intended for “renting” without sale, this Explanation would not apply?

(vi) It is quite likely that on the basis of this amendment the States also seeks to tax such transaction as liable to VAT which would lead to substantial double taxation and increase in the cost of properties. Should a mechanism to ensure that full credit of taxes paid at earlier stages is made available be developed?

(vii) There would be many ongoing constructions/agreements and buyers would have paid part amounts, the section does not set out the manner in which these transactions would need to be dealt with.

(viii) The Explanation deems the buyer to be a service recipient on making of advance payment. If buyer has booked premise for self use, the provisions would not apply being outside scope of taxable service?

Suggestions

(i) ***In place of completion certificate, occupation certificate or electricity connection or water connection be considered.***

(ii) ***The value of land based on municipal valuation be excluded from the payments made by the buyer in respect of premises where land is not sold separately as the intention cannot be to tax the value of land or the appreciation in the value of land.***

(iii) ***The clarity on ongoing contracts may be provided considering the numerous permutations and combinations. Ideally, the Explanation should apply in case of contracts entered into after the date of notification notifying the date when the Explanation would come into effect.***

(iv) ***The use of the words "intended for sale" in the Explanation be clarified as not covering those which are intended for renting.***

(v) ***Since, the Explanation takes a position contrary to the one taken by the Tribunals and also in the Circular No.108/02/2009-ST dated January, 29, 2009 issued by the Board, it is suggested that the same may be re-visited.***

6. Renting of immovable property [Section 65(105)(zzzz)]

Amendment

(i) The definition of renting of immovable property is proposed to be modified to levy service tax on rent of vacant land where there is an agreement or contract between the lessor and lessee for undertaking construction of buildings or temporary structures on such land for furtherance of business or commerce during the tenure of the lease.

Para 10.2 of Annexure B to *Letter D.O.F. No.334/1/2010-TRU New Delhi, dated 26th February 2010*, explains that tax will be leviable on the rent of vacant land given on long term leases with explicit understanding that lessee would construct <u>factory or commercial building</u> on that land as the situation is similar to renting of a <u>constructed structure for commercial purposes</u> except that at the time of executing the lease agreement the land is in a vacant state and that later the lessee constructs commercial structure thereon after executing the lease deed.

However, the proposed clause as provided by the Finance Bill, 2010 does not specifically provide that rent of vacant land given on lease to be used for construction thereon of a *commercial building* is to be taxed. Rather, it states that rent of vacant land given on lease for construction of *building or temporary structure* to be used for furtherance of business or commerce is to be taxed.

Here, it is important to note that Explanation (1) to section 65(105)(zzzz) *inter alia* provides that immovable property does not include-

"(a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

(b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;

(c) land used for educational, sports, circus, entertainment and parking purposes; and

(d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities."

Thus, rent for residential buildings, hotels, hostels, boarding houses, holiday accommodation etc. in itself is not taxable under section 65(105)(zzzz) of the Finance Act, 1994. However, after the proposed amendment, rent of vacant land taken on lease by a builder for construction of residential buildings for sale to prospective customers or for construction of hotels, hostels, boarding houses, holiday accommodation etc. thereon will be liable to service tax against the basic intent of law of taxing only those transactions where proposed construction is of commercial buildings only.

Also, when construction of buildings is undertaken by builders, be it commercial or residential, temporary or permanent structures are constructed on the land for using the same as office or camp office. These camp offices are used for marketing the property, showing the property to prospective buyers etc., i.e. they are used in the course or furtherance of business or commerce. Thus, when proposed clause (v) is read with Explanation 2 to section 65(105)(zzzz), the rent of such vacant land (on which camp office or site office has been constructed) becomes chargeable to service tax even though it may be used for construction of residential buildings or hostel, hotel etc. This too is not the intention of law.

(ii) It is proposed to amend the definition of renting of immovable property to provide explicitly that the activity of 'renting' itself is a taxable service with retrospective effect from 01.06.2007.

This amendment would put the landlords who did not charge/ pay tax on rent on the basis of Delhi High Court judgement in an unfavourable position. Further, no time has been provided for making payment without or with interest in the validation section 76 of the Finance Bill, 2010.

Suggestions

(i) *It is suggested that appropriate amendment be made in the relevant clause so as to tax only that vacant land on which commercial, industrial construction is to be carried out. Further, vacant land to be used for construction of residential buildings etc. may be specifically exempted though part thereof may be used for purposes like camp offices.*

(ii) *Definition of input service covers the input services in relation to setting up, modernization, renovation, repairs of premises of a service provider and accordingly, it may be clarified that service tax and CENVAT paid for such services is available as credit. Further, the fact that significant amount of CENVAT and service tax is incurred in constructing a property, rebate may be provided in respect of rental service.*

or

Deemed credit towards service tax and CENVAT *actually paid or at a specified percentage be allowed by way of* CENVAT *credit against rental service.*

(iii) *Further, it is suggested that the amendment may be given prospective effect as the retrospective amendments tend to unsettle the past positions.*

7. Copy rights on cinematographic films and sound recording [Proposed clause (zzzzt) of section 65(105)]

Amendment

The new entry seeks to impose service tax on temporary transfer or permitting use or enjoyment of copyright relating to sound recording and cinematographic film. Some of the States impose VAT on transfer or use or enjoyment of such copyrights treating the same as "deemed sale". Further, the output service of the users of these copyrights may be subjected to entertainment tax at state level which would lead to significant cascading too.

Suggestion

In the light of the decision in Imagic Creative Private Ltd. v. Commissioner of Commercial Taxes 2008 (9) STR 337 (ST and VAT mutually exclusive) as well as BSNL (on value of sale no service tax and vice versa) the same may be re-looked.

8. Health care services [Proposed clause (zzzzo) of section 65(105)]

Amendment

The proposed new entry seeks to bring hospitals, nursing homes and multi-speciality clinics providing specified services under the service tax net.

The taxable service, as proposed in the said sub section (zzzzo) is defined to mean "*services rendered by any hospital, nursing home or multi-speciality clinic,—*

(i) *to an employee of any business entity, in relation to health check-up or preventive care, where the payment for such check-up or preventive care is made by such business entity directly to such hospital, nursing home or multi-specialty clinic; or*

(ii) *to a person covered by health insurance scheme, for any health check-up or* ***treatment****, where the payment for such health check-up or* ***treatment*** *is made by the insurance company directly to such hospital, nursing home or multi-specialty clinic"*

While sub-clause (ii) uses the word 'treatment', no such usage is there in sub-clause (i). It implies that when a business entity pays the amount directly to the hospital for the medical **treatment** of its employees, no service tax is payable whereas if the same payment is made by an insurance company service tax is leviable.

Besides, no abatement has been provided for the cost of medicines and other goods which are also charged to the patient by the hospital, in addition to the amounts charged for services. Service tax ought to be charged only on the value of services and when composite bills are raised, mechanism ought to be provided for bifurcation of consideration into material and service parts. If service tax is charged on entire bill amount, it will lead to double taxation- VAT and service tax.

Suggestions

(i) ***Provision be made for granting abatement for the cost of medicine/goods included in the bill raised on a patient.***

(ii) ***A clarification be issued on what is covered under "preventive care".***

9. Exemption provided to erection, commissioning and installation of specific machinery vide *Notification 12/2010 ST dated 27.02.2010*

Amendment

Notification No.12/2010 ST dated 27.02.2010 has exempted the following services falling under the above category:

"*Erection commissioning and installation of:*

(i) Mechanized food grain handling systems etc.;

(ii) Equipments for setting up or substantial expansion of cold storage; and

(iii) Machinery or equipment for initial setting up or substantial expansion of units for processing agricultural, apiary, horticultural, dairy, poultry, aquatic and marine or meat products."

Most of these services involve use of materials in rendering these services. When use of materials is involved, the TRU vide its

Circular No. F. No. B1/16/2007-TRU dt. 22/05/2007 has clarified as follows:

"9.8 Presently, erection, commissioning or installation service [section 65(105)(zzd)], commercial or industrial construction service [section 65(105)(zzq)] and construction of complex service [section 65(105)(zzzh)] are separate taxable services.

Various trade and industry associations have raised apprehension in respect of classification of a contract either under the newly introduced works contract service or under erection, commissioning or installation and commercial or residential construction services.

Contracts which are treated as works contract for the purpose of levy of VAT / sales tax shall also be treated as works contract for the purpose of levy of service tax. This is clear from the definition under section 65(105)(zzzza)."

Since, all the services which are proposed to be exempt generally involve use of materials, all such contracts are likely to be classified under works contract by virtue of the above Circular. However, the above exemption covers only services falling under section 65(105)(zzd) i.e., only erection commissioning and installation services and not services falling u/s 65(105)(zzzza) – works contract service.

Suggestions

The objective of the above exemption shall be fully achieved only when it is extended to cover the services falling under

section 65 (105)(zzzza) also. Thus, it is suggested that the exemption may be granted to the services rendered under section 65(105)(zzzza) also.

Also, a clarification may be issued to provide the meaning and coverage of the term "substantial expansion".

10. Exemption in respect of license value of software

Amendment

Notification Nos. 2/2010-ST and 17/2010-ST have been issued to provide for exemption from service tax on license value of software, if applicable excise duty and countervailing duty, as the case may be, is paid on the same by the manufacturer or importer on the entire amount received from the buyer. However, the exemption is restricted to shrink wrapped-single user software license and not for multi-user licenses, leaving major part of software out of the scope of exemption.

There appears to be inadvertent error in the drafting as the word "use" is used whereas it ought to be "user" – the software licenses are single user.

Further, the sale of such software is often through a distribution network and therefore the manufacturer when he make the first sale or the importer (when he makes the first sale) would not be aware of the entire amount paid by the ultimate buyer.

Therefore, it may lead to a conclusion that the condition of the exemption notification would be satisfied so long as the manufacturer/importer pays excise duty/customs duty on the first sale/import on the full amount received from the buyer who himself may not be the user but a dealer/distributor.

Suggestion

Exemption from service tax may be extended to all types of software licenses and condition for payment of CVD may be restricted to CIF value of software imported and of the excise duty to the 'value" on which excise duty is payable by the manufacturer. Alternatively, it be clarified that the "entire amount" referred to in the Notification refers to the amount charged to the buyer by the manufacturer/importer i.e. first sale by the manufacturer/importer.

11. Export of Service Rules, 2005

Amendment

The condition prescribed under rule (3)(2)(a) for a service "to be provided from India and used outside India" has been deleted from the recipient based criteria for determination of service export vide *Notification No. 6/2010 ST dated 27.02.2010*. This is a welcome move which would now resolve lot of complexities. The issue of past periods however remains.

The amendment is proposed to be made applicable on prospective basis thereby leaving a large number of refund claims pertaining to the period before 27.02.2010 under unintentional controversies, if such refund is attributable to that part of export services which were rendered abroad by way of onsite services for overseas clients.

Suggestion

The deletion of condition for service to be provided from India and used outside India in rule 3(2)(a) of Export of Service Rules may be made retrospectively applicable from the date from which these rules were first introduced.

12. CENVAT Credit Rules, 2004

Amendment

The standard rate of excise duty on non-petroleum products has been increased from 8% to 10%. Under rule 6(3)(i) of the CENVAT Credit Rules, 2004 when separate accounts are not maintained and exempted goods or services are cleared, an amount equal to 5% of the value of exempted goods or 6% of the value of exempted services, as the case may be, is required to be paid.

Suggestion

It is suggested that since the excise rate has been increased to 10%, which is also the rate of service tax, the rates for payment of amount under rule 6(3)(i) of the CENVAT Credit Rules, 2004 may be re-aligned.

PART – II

SERVICE TAX

1. CENVAT Credit Rules, 2004 (CCR 04)

(i) Coverage of capital goods for availing credit

Provision

The definition of "capital goods" primarily applies to a manufacturer and restricts the benefit of CENVAT credit to the plant, machinery, equipment, etc. used for manufacture or providing service and like as per the specific tariff entries. Capital goods like furniture, computers, etc. are not eligible for CENVAT credit. This leads to cascading of taxes. In fact, in a tax system where the tax is levied on goods and services, CENVAT credit ought to be broad based covering all items used by the assessee for the purpose of business with a specific negative list of items like petrol on which CENVAT credit may not be allowed.

Suggestions

The list of "capital goods" and "inputs" eligible for service tax may be redefined to include all the goods used for the purpose of business other than specified items on which **CENVAT** ***credit is not desired to be allowed.***

There is a need to clarify that items like dumpers, motor vehicles, etc. which are used for the purpose of business ought to be eligible for* CENVAT *credit especially, for those providing works contract or construction of commercial and residential properties.

(ii) CENVAT credit of 4% additional duty levied u/s 3(5) of the Customs Tariff Act, 1985 (CTA)

Provision

In terms of third proviso to rule 3(4) of the CENVAT Credit Rules, 2004, CENVAT credit in respect of 4% additional duty levied under section 3(5) of the Customs Tariff Act can be availed only by a manufacturer of final products. Service providers and traders are not entitled to avail credit. There appears to be no logical reason to deny the benefit of CENVAT credit to service providers.

Suggestion

Service providers may be permitted to avail benefit of CENVAT credit in respect of 4% additional duty levied under section 3(5) of the Customs Tariff Act, 1985.

(iii) Rule 6(5) of the CENVAT Credit Rules, 2004

Provision

Rule 6(5) under the CENVAT Credit Rules, 2004 provides for a list of specific services in respect of which 100% credit is allowed. The list includes 16 categories of services.

Works contract service was subsequently added and has remained to be included in this category although commercial or industrial construction service is included in the list.

Suggestion

"Works Contract Service" may be included in the list of services specified under rule 6(5) of the CCR 04.

2. Adjustment of excess payment of service tax

Provision

Rule 6 of the Service Tax Rules, 1994 provides for adjustment of excess service tax paid. However, few conditions make it practically very difficult to avail of the benefit.

Suggestion

Adjustment of excess or short payment of service tax may be permitted within the same financial year. This is necessary particularly, in view of the fact that service tax is required to be paid within 5 days from the end of the month and often, a service provider, makes payment without having complete information in respect of the payments received at its all locations which can sometimes result in excess or deficit.

3. Revision of Returns

Provision

The time limit for revision of return provided in rule 7B of the Service Tax Rules, 1994 is little short, as often issues come up when the accounts are finalized for the purpose of Companies Act and at the same time the audit is also carried out.

Suggestion

The time limit for revision of returns may be extended to 7 months from the end of the financial year as accounts under the Companies Act are required to be audited and finalized within 6 months from the end of the financial year. Thus, period of additional one month would be available for revision of returns.