# Central Excise

## Manufacture

**CBEC Clarification on manufacture**

Certain units are undertaking the process of pickling and oiling in addition to process of de-coiling, cutting and slitting. The issue involved is whether the process of pickling and oiling amounts to manufacture.

Previously it has been clarified by CBEC[1] that processes de-coiling, cutting and slitting of HR / CR Coils do not amount to manufacture.

CBEC[2] has now clarified that - Pickling is removing surface oxides from metals by chemical or electro chemical reaction and pickle means the chemical removal of surface oxides (scale) and other contaminants such as dirt from metal by immersion in an aqueous acid solution. The process of pickling is only a chemical cleaning process to remove scales and dirt from the metal by immersion in chemical solution and does not result in emergence of any new commercially different commodity.

Therefore mere undertaking the process of oiling and pickling as preparatory steps do not amount to manufacture since no new product emerges as a result of the process of pickling.

## Classification

**CBEC[3] clarifications on Classification - Tea fortified with vitamins (Classification of Chapter 21)**

Preparation of tea and preparation with the basis of tea are classifiable under the chapter heading 2101 20. Preparation of tea as well as preparation with a basis of tea is a product containing tea as one of the major component and has other added ingredients to it. Flavoured tea contains tea along with at least one flavouring agent and is a preparation of tea, though not classifiable under this chapter by virtue of Chapter Note 1(c) to the Chapter 21. However all other preparations of tea not specifically excluded by virtue of any Section/Chapter Note will get classified in this chapter only.

The tea fortified with vitamins is nothing but a preparation of tea having added ingredients like stabilizers and vitamins in addition to tea. Since no Section/Chapter Note excludes this preparation from the purview of Chapter 21, it is clarified that such preparations of tea namely tea fortified with vitamins will be classified under Chapter 21.

[1] Circular No 811/08/2005-CX dated 02.03.2005
[2] Circular No. 927/17/2010-CX dt 24 June 2010
[3] Circular No. 931/21/2010-CX., dated 15-7-2010

### *Rule 8 - Manner of payment of duty*

(i) The duty on the goods removed from the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case. However, in case of goods removed during the month of March, the duty shall be paid by the 31st day of March.

(ii) In case of a SSI[4], the duty on goods cleared during a quarter of the financial year shall be paid by the 6th day of the month following that quarter, if the duty is paid electronically through internet banking and in any other case, by the 5th day of the month following that quarter. However, in case of goods removed during the last quarter, starting from the 1st day of January and ending on the 31st day of March, for which the duty shall be paid by the 31st day of March[5].

The manner of payment as specified above shall be available to the assessee for the whole of the financial year.

The scheme of quarterly payment will be applicable even if an eligible unit opts not to avail of the SSI exemption[6].

(iii) In case of an assessee, who has paid total duty of Rs. 10 lakh or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, shall deposit the duty electronically through internet banking.

### *Rule 12 - Filing of return*

(i) Every assessee being a manufacturer shall submit to the Superintendent a monthly return, of production and removal of goods and other relevant particulars, within ten days after the close of the month to which the return relates.

(a) If an assessee is a SSI[7] he shall file a quarterly return in the form specified, of production and removal of goods and other relevant particulars within 10 days after the close of the quarter to which the return relates. The filing of returns as specified above shall be available to the assessee for the whole of the financial year.

(ii) Every assessee shall submit to the Superintendent, an Annual Installed Capacity Statement in Form ER–7 declaring the annual production capacity of the factory for the financial year to which the statement relates. Such statement shall be filed by 30th day of April of the succeeding financial year[8].

If an assessee has paid total duty of Rs. 10 lakhs or more, including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall file the Annual Financial Information Statement electronically[9].

[4] An assessee shall be eligible, if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed Rs. 400 lakhs.
[5] Notification No.6/2010-Central Excise(N.T.) dt 27.2.2010
[6] Memorandum to the Finance Act 2010.
[7] An assessee shall be eligible, if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed Rs. 400 lakhs
[8] Inserted as Rule 12(2A) vide Notification No.38/2008- CE (NT) dt 29th September, 2008
[9] Notification No. 20 / 2010 - Central Excise (N.T.) dt 18 May 2010

### *Rule 17 - Removal of goods by a 100% EOU for DTA*

(iv) The unit shall submit a monthly return in form ER-2 to the Superintendent, within ten days from the close of the month to which the return relates, in respect of the goods removed to DTA.

If an assessee has paid total duty of Rs. 10 lakhs or more, including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall submit the said monthly return electronically[10].

### *Rule 18 - Export of goods under Rebate of duty*

CBEC has clarified[11] that rebate is admissible for supplies made from DTA to SEZ.

### *Rule 19 - Export of goods under Bond*

(iv) [12]Export of excisable goods which are chargeable to nil rate of duty or are wholly exempted from payment of duty, other than goods cleared by a 100%EOU shall not be allowed under this notification[13];

# Valuation

Clarification by CBEC

(iii) If manufacturer/transporter charges cost of transportation both for outward journey up to the point of delivery and return there from, whether the cost of transportation for the return journey of the empty truck/vehicle should also be allowed as deduction.

Cost of return fare of vehicles is not required to be added for determining value[14].

~~As per Rule 5 of the Valuation Rules the actual cost of transportation from the place of removal up to the place of delivery is only to be excluded. If the assessee is recovering an amount from the buyer towards the cost of return fare of the empty vehicle from the place of delivery, this amount will not be available as a deduction. Therefore, unless it is specifically mentioned in the invoice that the transportation charges indicated therein do not include cost of transportation for the return journey of the empty truck/vehicle, the deduction of the said transportation charges will not be admissible~~[15].

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[10] Notification No. 20 / 2010 - Central Excise (N.T.) dt 18 May 2010

[11] Circular No. 06 /2010 – CUS dt 19.3.2010

[12] Inserted by Notification No 24 /2010-Central Excise (N.T.) dt 26 May 2010

[13] Rational of such change : Some of the manufacturers of exempted goods were exporting such goods under bond. Subsequently, they claimed refund of accumulated input credit under Rule 5 of the CENVAT Credit Rules, 2004. The department had objected to this procedure on the ground that if the goods are exempted from payment of excise duty, in that case the goods cannot be exported under bond for the reason that bond is executed only when goods are liable for payment of excise duty and if there is no excise duty, there is no question of exporting under bond. However, in some cases, the judicial pronouncements on the issue was against the department whereby the Courts had permitted the refund.

As the policy of the govt. is not to tax the exports and there are various ways to make it tax free. If the goods were exempted, then the department had prescribed a detailed procedure for refund of input taxes through Notification No. 21/2004-CE (NT), wherein a detailed procedure requiring verification of details like manufacturing process, input-output ratio, wastages etc., by the departmental officer is prescribed. The reason for the same is that in case of exempted goods, the department does not exercise control. The exporters exported the exempted goods under bond to avoid detailed verification and scrutiny by the department for claiming of refund of input taxes. Accordingly, it was felt necessary to correct the anamoly – circular 928/18/2010 dt 28 June 2010.

[14] Circular No. 923/13/2010 – CX dt 19 May 2010, this Circular withdraws Circular 827/4/2006-CX dated 12.4.2006.

In case of Haldia Petrochemicals Limited v CCE [2009 (233) E.L.T. 344 (Tri. - Kolkata), held that in case where the transaction value of the goods being cleared is available at the factory gate value will be determined in accordance with Section 4(1)(a) without any reference to Rule 5 of Valuation Rules. The appeal filed by the department against this order of the tribunal has been dismissed by the Supreme Court.

[15] As amended by Circular no. 827/4/2006-CX dated 12.4.2006

# Cenvat Credit Rules

1.1 Rule 2(a) – Definition of Capital Goods

- Dumpers or tippers, falling under Chapter 87 of the First Schedule to the CETA, registered in the name of provider of output service for providing the following taxable services
  - Services in relation to site formation and clearance, excavation and earthmoving and demolition and such other similar activities under clause (zzza);
  - Services in relation to mining of mineral, oil or gas under clause (zzzy)[16].

CBEC Instruction[17]

Credit on capital goods is available only on items, which are excisable goods covered under the definition of ‘ capital goods’ under CENVAT Credit Rules and used in the factory of the manufacturer.

Inputs have to be covered under the definition of ‘input’ and used in or integrally connected with the process of actual manufacture of the final product for admissibility of Cenvat credit. The credit on inputs used in the manufacture of capital goods, which are further used in the factory of the manufacturer is also available, except for items like cement, angles, channels, CTD or TMT bars and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. Further, credit shall also not be admissible on inputs used for repair and maintenance of capital goods.

1.2 Rule 3

(vii) The CENVAT credit of any duty specified in point (ii) shall not be utilized for payment of the Clean Energy Cess leviable under section 83 of the Finance Act, 2010[18].

(viii) When inputs or capital goods, on which CENVAT credit has been taken, are removed as such from the factory, or premises of the provider of output services, the manufacturer of the final products or provider of output service, shall pay an amount equal to the credit availed in respect of such inputs or capital goods.

Held[19] when demand in respect of reprocessed goods was set aside due to the reason that reprocessing did not amount to manufacture, Cenvat credit in respect of same goods was not deniable to sister unit. Cenvat credit was sought to be denied on the ground that re-processed inputs were cleared without payment of duty by the manufacturing unit though duty was paid when they were cleared originally and credit availed at the first instance was reversed when such goods were returned as defective. It would be treated as removal of goods as such.

If the capital goods, on which CENVAT Credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely:

(a) for computers and computer peripherals:

| Period | (@) Rate |
|---|---|
| for each quarter in the first year | 10% |

[16] Inserted by Notification No. 25 / 2010 - Central Excise (N.T.) dt 22 June 2010
[17] Instruction F.No. 267/11/2010-CX8 dt. 8-7-2010
[18] Inserted by Notification No. 26/ 2010-Central Excise (N.T.) dt 29 June 2010
[19] Commissioner v. Ranbaxy Laboratory Ltd. - 2010 (257) E.L.T. A50 (P & H)

| | |
|---|---|
| for each quarter in the second year | 8% |
| for each quarter in the third year | 5% |
| for each quarter in the fourth and fifth year | 1% |

(b) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter[20].

1.3 Rule 4

(ii) The CENVAT credit in respect of input service shall be allowed, on or after the day for which payment is made of the value of input service and the service tax paid or payable as is indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

CBEC has clarified that if the service charges as well as the service tax have been paid in any prescribed manner which is entitled to be called 'gross amount charged' then credit should be allowed. Thus, in the case of "Associate Enterprises", credit of service tax can be availed of when the payment has been made to the service provider in terms of book entries and the service tax has been paid to the Government Account.

CBEC has also clarified[21] that in the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly.

(iii) The CENVAT credit in respect of capital goods received in a factory or in the premises of the provider of output service at any point of time in a given financial year shall be taken only for 50% of the duty on such capital goods in the same financial year, with the following exceptions:

- In case of a SSI[22], the CENVAT credit in respect of capital goods received by such assessee shall be allowed for the whole amount of the duty paid on such capital goods in the same financial year23.

The scheme of full CC on Capital Goods for SSI units will be applicable even if an eligible unit opts not to avail of the SSI exemption[24].

(vi) The CENVAT credit shall be allowed even if any inputs or capital goods as such or after being partially processed are sent to a job worker for further processing, testing, repair, re-conditioning, or for the manufacture of intermediate goods necessary for the manufacture of final products or any other purpose. However it should be established from the records, challans or memos or any other document produced by the manufacturer or provider of output service taking the CENVAT credit that the goods are received back in the factory within 180 days of their being sent to a job worker.

[20] The amendment has been made provide accelerated depreciation in the case of computers and computer peripherals cleared after use at the same rates as applicable for similar capital goods of EOU/EHTP/STP units under Notification No. 52/2003-Customs – Memorandum to the Finance Act 2010.

[21] Circular No. 122/03/2010 – ST dt 30 April 2010

[22] An assessee shall be eligible, if his aggregate value of clearances of all excisable goods for home consumption in the preceding financial year, computed in the manner specified in the said notification, did not exceed Rs. 400 lakhs.

[23] Notification No.6/2010-Central Excise(N.T.) dt 27.2.2010

[24] Memorandum to the Finance Act 2010.

If the inputs or the capital goods are not received back within 180 days, the manufacturer or provider of output service shall pay an amount equivalent to the CENVAT credit attributable to the inputs or capital goods by debiting the CENVAT credit or otherwise, but the manufacturer or provider of output service can take the CENVAT credit again when the inputs or capital goods are received back in his factory or in the premises of the provider of output service.

The CENVAT credit shall also be allowed in respect of jigs, fixtures, moulds and dies sent by a manufacturer of final products to:

(a) another manufacturer for the production of goods, according to his specifications; or

(b) a job worker for the production of goods on his behalf, according to his specifications[25].

1.4 Rule 5 - Refund of CENVAT credit

(iv) Notification[26] issued by Central Government for refund under this Rule with the safeguards, conditions and limitations, subject to which the refund shall be granted, are as follows:

(a) The final product or the output service is exported in accordance with the procedure laid down in the Central Excise Rules or the Export of Services Rules as the case may be.

(b) The claims for such refund are submitted not more than once for any quarter in a calendar year.

However, where,-

A. The average export clearances of final products or the output services in value terms is 50% or more of the total clearances of final products or output services, as the case may be, in the preceding quarter; or

B. the claim is filed by 100% EOU,

the claim for such refund may be submitted for each calendar month.

(c) The manufacturer or provider of output service, as the case may be, submits an application in the prescribed Form to the DC/AC, in whose jurisdiction:

A. the factory from which the final products are exported is situated, along with the Shipping Bill or Bill of Export, duly certified by the officer of customs or a photocopy thereof duly attested by him to the effect that goods have in fact been exported; or

B. the registered premises of the service provider from which output services are exported is situated, along with a copy of the invoice and a certificate from the bank certifying realization of export proceeds.

(d) The refund is allowed only in those circumstances where a manufacturer or provider of output service is not in a position to utilize the input credit or input service credit allowed under rule 3 of the said rules against goods exported during the quarter or month to which the claim relates.

(e) The refund of unutilised input service credit will be restricted to the extent of the ratio of export turnover to the total turnover for the given period to which the claim relates.

[25] Amended by Finance Act 2010 notification.

[26] Notification No. 05/2006 14th March 2006 as amended by Finance Act 2010 notification, retrospectively.

Maximum refund = Total CENVAT credit taken on input services during the given period × export turnover ÷ Total turnover

Export turnover shall mean the sum total of the value of final products and output services exported during the given period in respect of which the exporter claims the facility of refund under this rule.

Total turnover means the sum total of the value of,-

(a) All output services and exempted services provided, including value of services exported;

(b) All excisable and non excisable goods cleared, including the value of goods exported;

(c) The value of bought out goods sold, during the given period.

(f) The application in the prescribed form along with the prescribed enclosures are filed with DC/AC, before the expiry of the period specified in section 11B.

(g) The refund of excise duty or service tax is allowed by the DC/AC.

Further, a declaration is to be given with certification by the person authorized by the directors/ partner / proprietor in case the amount of refund is less than Rs. 5 lakh and by the Chartered Accountant who does the audit of their records under the Companies Act, or Income Tax Act if the amount of refund is more than Rs 5 lakh .

Example: X is a manufacturer of paints which are exported under Rule 19 of Central Excise Rules, 2002. The credit accumulated could be set off against duty on the paints or other finished goods that are sold locally within India or used to apply duty on exports. Then such duty paid can be obtained as a refund in the form of rebate.

1.5 Rule 6

(ix) The provisions of clause (i) to (iv) shall not be applicable in case the excisable goods removed without payment of duty are either:

(a) cleared to a unit in a SEZ or to a developer of SEZ for their authorized operation / 100% EOU/EHTP/STP; or

(b) supplied to the United Nations or an international organization for their official use or supplied to projects funded by them, on which exemption of duty is available under notification; or

(c) cleared for export under bond; or

(d) gold or silver falling, arising in the course of manufacture of copper or zinc by smelting;or

(e) supplied[27] for the use of foreign diplomatic missions or consular missions or career consular offices or diplomatic agents[28]; or

(f) All goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act (BCD) and the additional duty leviable under section 3(1) of the said Customs Tariff Act (CVD) when imported into India and are supplied:

(A) against International Competitive Bidding; or

(B) to a power project from which power supply has been tied up through tariff based competitive bidding; or

[27] in terms of the provisions of notification No. 6/2006- Central Excise dated the 1st March, 2006, number G.S.R.96(E), dated the 1st March, 2006.

[28] Inserted by Notification No. 27 / 2010-Central Excise (N.T.) dt 1 July 2010

(C) to a power project awarded to a developer through tariff based competitive bidding.

1.6 Rule 9A – Information relating to principal inputs

(i) A manufacturer of final products shall furnish to the Superintendent, annually by 30th April of each Financial Year, a declaration in Form ER 5, in respect of each of the excisable goods manufactured or to be manufactured by him, the principal inputs[29] and the quantity of such principal inputs required for use in the manufacture of unit quantity of such final products.

A manufacturer of final products has paid total duty of Rs. 10 lakhs or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall file such declaration electronically[30].

(ii) If a manufacturer of final products intends to make any alteration in the information so furnished, he shall furnish information to the Superintendent together with the reasons for such alteration before the proposed change or within 15 days of such change in Form ER-5.

(iii) A manufacturer of final products shall submit, within 10 days from the close of each month, to the Superintendent, a monthly return in Form ER 6, in respect of information regarding the receipt and consumption of each principal inputs with reference to the quantity of final products manufactured by him.

A manufacturer of final products has paid total duty of Rs. 10 lakhs or more including the amount of duty paid by utilization of CENVAT credit in the preceding financial year, he shall file such declaration electronically[31]

(iv) The Central Government has notified that assessees, who have paid excise duty less than Rs. 100 lakhs during the preceding financial year, shall not be required to furnish declaration or monthly return.

1.7 Rule 15 - Confiscation and penalty

(i) If any person, takes or utilises CENVAT credit in respect of input or capital goods or input services, wrongly or in contravention of any of the provisions of these rules, then, all such goods shall be liable to confiscation.

Also such person, shall be liable to a penalty of the undermentioned amount(s), whichever is greater:

(a) An amount the not exceeding the duty or service tax on such goods or services;

(b) Rs. 2,000.

(ii) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act, or of the rules made thereunder with intent to evade payment of duty, then, the manufacturer shall[32] also be liable to pay penalty in terms of the provisions of section 11AC of the Excise Act.

(iii) In a case, where the CENVAT credit in respect of input or capital goods or input services has been taken or utilised wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of these rules or of the Finance Act or of the rules made thereunder with intent to evade payment of

[29] Principal inputs, means any input which is used in the manufacture of final products where the cost of such input constitutes not less than 10% of the total cost of raw-materials for the manufacture of unit quantity of a given final products.

[30] Notification No. 21 / 2010-Central Excise (N.T.) dt 18 May 2010

[31] Notification No. 21 / 2010-Central Excise (N.T.) dt 18 May 2010

[32] The Bombay High Court noted that language used is “shall”. Hence undoubtedly, the language is mandatory and there is no discretion vested in the authorities in the matter of imposition of penalty or the quantum therof. Tthe penalty has to be equal to the amount of duty which is payable and not less than that - CCus & Ex., Raigad v. Fibre Foils Ltd. 2009 (241) E.L.T. 201 (Bom.)

service tax, then, the provider of output service shall also be liable to pay penalty in terms of the provisions of section 78 of the Finance Act.

(iv) Any order shall be issued by the Central Excise Officer following the principles of natural justice.

# Demand and Adjudication

1.1 Section 33 - Power of adjudication

(i) In terms of Act / Rules made thereunder anything is liable to confiscation or any person is liable to a penalty, such confiscation or penalty may be adjudged by the following officers (as notified by CBEC) in relation to the amount involved:

| Designation | Amount of duty involved |
|---|---|
| Superintendents | Upto Rs. 1 Lakh (excluding cases involving determination of rate of duty or valuation and cases involving extended period of limitation)[33] |
| DC/AC | Upto Rs. 5 lakhs (except the cases where Superintendents are empowered to adjudicate). |
| JT Comm | Above Rs. 5 lakhs but upto Rs. 20 lakhs |
| Add Comm | Above Rs. 20 lakhs but upto Rs. 50 lakhs |
| Comm | Without limit |

(ii) Limitations / Restriction on the power of adjudication by the Superintendents[34]

(a) They would be eligible to decide cases involving duty and/or CENVAT credit upto Rs. 1 Lakh in individual SCNs.

(b) They would not be eligible to decide cases which involve excisability of a product, classification, eligibility of exemption, valuation and cases involving suppression of facts, fraud etc..

(c) They would be eligible to decide cases involving wrong availment of CENVAT credit upto a monetary limit of upto Rs. 1 Lakh.

(d) They would be eligible to decide Show Cause Notice proposing only imposition of penalty under Rule 26 and 27 of the Central Excise Rules, 2002 or Rule 15 and 15A of the CENVAT Credit Rules, 2004.

(iii) It is also clarified that notwithstanding this revision, in all cases, where the personal hearing has already been completed, orders will be passed by the officer before whom the hearing has been held.

(iv) CBEC has clarified[35] that the jurisdiction over the EOU/EHTP/STP even in the port cities should be with the Central Excise formations. This will facilitate uniform and better administration/control of such EOUs.

1.2 Section 11A

(i) The person chargeable with the duty may pay the amount of duty on the basis of his own ascertainment of such duty or on the basis of duty ascertained by the CEO, before service of aforesaid notice on him and inform the CEO

[33] Amended by Circular No. 922/12/ 2010-CX dt 18 May 2010
[34] CBEC in the circular No. 922/12/ 2010-CX dt 18 May 2010 regarding the power of adjudication of cases given to Superintendents, has clarified these.
[35] Circular No. 932/22/2010-CX., dated 4-8-2010

of such payment. The CEO on receipt of such information shall not serve any notice on the person. However, this benefit shall not be available where original short payment was willful or fraud, with an intent to evade payment of duty. [Section 11A(2B)].

However, Finance Act 2010 has inserted Explanation 3 to section 11A(2B) to provide by way of clarification that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of duty under 11A(2B) and interest thereon.

# Settlement Commission

1.1. When application to Settlement Commission shall be made:

(iv) An application for settlement shall be accepted only if the following conditions are satisfied:

- the applicant has filed returns showing production, clearance and central excise duty paid in the prescribed manner;
- a show cause notice for recovery of duty issued by the CEO has been received by the applicant;
- the additional amount of duty accepted by the applicant in his application exceeds Rs. 3 lakhs; and
- the applicant has paid the additional amount of excise duty accepted by him along with interest due under section 11AB;

Prior to the amendment by Finance Act 2010, an application to Settlement Commission could not be made, where the assessee had admitted short levy of Excise Duty for goods which were not recorded in the Daily Stock Account (in case of Customs goods not recorded in the Bill of Entry). This condition has been removed by Finance Act 2010, whereby now an application for settlement could be made even where there was a short levy due to goods manufactured / imported not recorded in the books of account / Bill of Entry as the case may be.

1.2 Time Limit for passing of an order

(vi) An order should be passed within 9 months from the last day of the month in which the application was made. However the Settlement Commission may extend the period but not more than 3 months, after recording the reasons for doing so[36].

1.3 Section 320 - Bar on subsequent application for settlement in certain cases

In the following cases a person cannot apply for settlement in relation to any other matter :

(i) Where an order of settlement passed provides for imposition of a penalty on the person who has made the application for settlement, on the ground of concealment of particulars of his duty liability; or

(ii) Where after the passing of an order of settlement in relation to a case, such person is convicted of any offence under this Act in relation to that case; or

(iii) the case of such person is sent back to the adjudicating / proper officer by the Settlement Commission[37].

The amendment removes the restriction of one time application.

[36] Amended by Finance Act 2010

[37] Amended by Finance Act 2010. Subsection (2) deleted. The restriction that an assessee may seek only one-time settlement is relaxed.

# Customs

1.1 Additional Customs Duty (CVD)

(iv) In case of an article imported into India in relation to which it is required, under the provisions of the SWM Act[38], to declare on the package thereof the RSP of such article; and

where the like article produced or manufactured in India, or in case where such like article is not so produced or manufactured, then, the class or description of articles to which the imported article belongs, is:

*(a)* the goods specified by notification under section 4A(*1*) of the CEA, the value of the imported article shall be deemed to be the RSP declared on the imported article less such amount of abatement, allowed; or

*(b)* the goods specified by notification under section 3[39], the value of the imported article shall be deemed to be the RSP declared on the imported article less such amount of abatement, allowed in respect of such like article under clause (2) of the said *Explanation.*

If on any imported article more than one retail sale price is declared, the maximum of such retail sale price shall be deemed to be the retail sale price for the purposes of this section[40].

However, outright exemption have been granted to some products by Finance Act 2010, for CVD-VAT namely:

- Goods imported in pre-packaged form and intended for retail sale and certain specified goods namely, ready-made garments, mobile phones and watches.
- Exemption from this duty is also being provided to Carbon Black Feedstock, waste paper and paper scrap.

1.2 Valuation

(i) For the purposes of the CTA, or any other law for the time being in force, the value of the imported goods and export goods shall be the transaction value of such goods. The price actually paid or payable for the goods when sold for export to India for delivery at the time and place of importation, or as the case may be, for export from India for delivery at the time and place of exportation, where the buyer and seller of the goods are not related and price is the sole consideration for the sale subject to other conditions as may be specified in the valuation rules.

CBEC has clarified[41] that sale of imported goods after they are warehoused on Indian territory, the value at which such sale transaction to buyer took place will not qualify as the transaction value, as per Section 14. As this would not be the value at which the goods were sold for export to India. The question of adding any amount on notional basis in the case of goods already warehoused in India and sold subsequently does not arise. This clarification assumes significance when imported goods after having been warehoused are sold while in the warehouse.

1.3 Section 11 – Power to prohibit importation or exportation of goods

[38] Standards of Weights and Measures Act,1976 or the rules made thereunder or under any other law for the time being in force.
[39] read with clause (1) of Explanation III of the Schedule to the Medicinal and Toilet Preparations (Excise Duties) Act, 1955
[40] Amended by Finance Act 2010
[41] Circular no. 11 dt 3 June 2010

Central Government[42] under the powers of section 11 for the purposes of specified in section 11(2) clauses (n) and (u), hereby prohibits the import of the following goods intended for sale or use in India, subject to following conditions and procedures as specified in the Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, namely:

(i) goods having applied thereto a false trade mark as specified in section 102 of the Trade Marks Act;

(ii) goods having applied there to a false trade description within the meaning of section 2(1)(i) of the Trade Marks Act, otherwise than in relation to any of the matters specified in section 2(1)(za)(ii) and (iii);

(iii) goods made or produced beyond the limits of India and having applied thereto a design in which copyright exists under the Designs Act, 2000, in respect of the class to which the goods belong or any fraudulent or obvious imitation of such design except when the application of such design has been made with the licence or written consent of the registered proprietor of the design or where such importation or use is allowed under the Designs Act;

(iv) the product made or produced beyond the limits of India for which a patent is in force under the Patents Act, except in cases where the consent from the patentee in India has been obtained provided that such prohibition is not applicable to the cases where such importation is allowed under the Patents Act;

(v) the product obtained directly by the process made or produced beyond the limits of India where patent for such process is in force under the Patents Act, except in cases where the consent from the patentee in India has been obtained provided that such prohibition is not applicable to the case where such importation is allowed under the Patents Act;

(vi) goods having applied thereto a false Geographical Indication within the meaning of section 38 of the Geographical Indications of Goods (Registration and Protection) Act;

(vii) goods which are prohibited to be imported by issuance of an order issued by the Registrar of Copyrights under section 53 of the Copyright Act.

1.4 Project import status granted by Finance Act 2010

(i) Initial setting up or substantial expansion of, a cold storage, cold room (including farm pre-coolers) for preservation or storage or an industrial unit for processing of agricultural, horticultural, dairy, poultry, aquatic & marine produce and meat. These projects would attract concessional rate of basic customs duty of 5%.

(ii) Project imports status is being granted to installation of Mechanized Handling Systems & Pallet Racking Systems, in mandis or warehouses for food grains and sugar, with concessional rate of basic customs duty of 5%. Such systems are also being exempted from additional duty of customs (CVD) and special additional duty of customs.

(iii) Mono Rail Projects for urban transport are being granted project imports status under Heading No. 98 01 and would accordingly attract concessional rate of 5% basic customs duty (Capital Goods category).

[42] Notification No. 51/2010 - Customs (N.T.) dt 30 June 2010

1.5 Duty Drawback – Section 74

(i) In terms of the Rules for drawback the manner of filing drawback claim is enumerated here under:

(a) In the cases of exports other than by post, a formal drawback claim, in the prescribed form, should be filed with the proper officer of customs, within three months of the date of let export order ( under section 51). Tthe AC/DC may extend the period by 3 months and the CCCE may further extend the period by a period of 6 months. After making such enquiry as they think fit, they may grant extension or refuse to grant extension after recording in writing the reasons for such refusal.

(b) An application fee equivalent to 1% of the FOB value of exports or Rs. 1,000/- whichever is less, shall be payable for applying for grant of extension by AC/DC and an application fee of 2% of the FOB value or Rs. 2,000/- whichever is less, for applying to the CCCE[43].

1.6 Section 75

(iii) Where any drawback has been allowed on any goods and the sale proceeds in respect of such goods are not received by or on behalf of the exporter in India, within time allowed under FEMA, such drawback shall be deemed never to have been allowed and would be recovered. The AC/Dc of CC shall pass an order and the importer shall pay the amount within 30 days from the date of receipt of the order.

Rule 16A of the DDBR where a part of the sale proceeds has been realised, the amount of drawback to be recovered shall be the amount equal to that portion of the amount of drawback paid which bears the same proportion as the portion of the sale proceeds not realised bears to the total amount of sale proceeds.

CBEC has clarified[44] that 'Drawback' would not be payable in cases where export proceeds have not been realised in accordance with the provisions of the Foreign Exchange Management Act, 1999 even if the claim has been settled by ECGC or realisation waived by RBI.

Rule 16A(4) provides that where the sale proceeds are realised by the exporter after the amount of drawback has been recovered from him and the exporter produces evidence about such realisation within a period of 3 months from the date of realisation of sale proceeds, the amount of drawback so recovered shall be repaid by the AC/DC to the claimant, provided the sale proceeds have been realised within the period permitted by the RBI.

The CCCE may extend the by 9 months provided the sale proceeds have been realised within the period permitted by the RBI. An application fee equivalent to 1% of the FOB value of exports or Rs. 1,000/- whichever is less, shall be payable for applying for grant of extension[45].

[43] Amended by Notification No. 48/2010 - Customs (N.T.) dt 17 June 2010
[44] Circular No. 7/2010-Cus dt 23.3.2010
[45] Amended by Notification No. 49/2010 - Customs (N.T.) dt 17 June 2010

(vi) Rule 15 : Supplementary claim

Where any exporter finds that the amount of drawback paid to him is less than what he is entitled to on the basis of the amount or rate of drawback determined, he may make a supplementary claims can be made in prescribed Form within 3 months from

(a) Date of publication of such rate in case of revised rate granted

(b) Date of communication of the said rate in case of brand rate (rule 6 & 7)

(c) Date of payment of original drawback in other cases.

The AC/DC of C & CE as the case may be, may extend the period by 9 months and the CC or CCCE, as the case may be, may further extend the period by a period of 6 months. However, after making such enquiry as they thinks fit, they may grant extension or refuse to grant extension after recording in writing the reasons for such refusal.

An application fee equivalent to 1% of the FOB value of exports or Rs. 1,000 whichever is less, shall be payable for applying for grant of extension by the AC/DC of C &CE, and an application fee of 2% of the FOB value or Rs. 2,000 whichever is less, shall be payable for applying for grant of extension by the CCCE[46].

**Brand rate** : It is possible to fix All Industry Rate only for some standard products. It cannot be fixed for special types of product.

Rule 6 of the DDBR[47] - Cases where amount or rate of drawback has not been determined

(a) Where no amount or rate of drawback has been determined in respect of any goods, any manufacturer or exporter of such goods may, within 3 months from the date relevant for the applicability of the amount or rate of drawback in terms of Rule 5(3), apply in writing to the CCE or the CCCE, having jurisdiction over the manufacturing unit, of the manufacturer exporter or, of the supporting manufacturer, as the case may be, for determination of the amount or rate of drawback thereof stating all the relevant facts including:

A. the proportion in which the materials or components; or

B. inputs services are used in the production; or

C. manufacture of goods and the duties paid on such materials or components; or

D. the tax paid on input services.

(b) The AC/DC of CE or AC/DC of CC&CE as the case may be, may extend the period by 3 months and the CCE or CCCE, as the case may be, may further extend the period by a period of 6 months;

(c) An application fee equivalent to 1% of the FOB value of exports or Rs. 1,000 whichever is less, shall be payable for applying for grant of extension by the AC/DC of CE or AC/DC of CC&CE, as the case may be and an application fee of 2% of the FOB value or Rs. 2,000 whichever is less, shall be payable for applying for grant of extension by the CCE or CCCE, as the case may be.

(d) On receipt of an application under clause the CCE or CCCE, as the case may be, shall, after making or causing to be made such inquiry as it deems fit, determine the amount or rate of drawback in respect of such goods.

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[46] Amended by Notification No. 49/2010 - Customs (N.T.) dt 17 June 2010

[47] Amended by Notification No. 49/2010 - Customs (N.T.) dt 17 June 2010

(e) If a manufacturer or an exporter desires provisional drawback, he may, while making an application, apply in writing to the CCE / CCCE that a provisional amount be granted to him towards drawback on the export of such goods pending determination of the amount or rate of drawback.

(f) The CCE /CCCE may allow provisionally payment of an amount not exceeding the amount claimed by the manufacturer or exporter in respect of such export. However, he may require the applicant to enter into a general bond for such amount, and subject to such conditions, as he may direct; or to enter into a bond for an amount not exceeding the full amount claimed as drawback in respect of a particular consignment and binding himself, -

A. to refund the amount so allowed provisionally, if for any reason, it is found the duty drawback was not admissible; or

B. to refund the excess, if any, paid to such [manufacturer] or exporter provisionally if it is found that a lower amount was payable as duty drawback :

(g) If the Central Government considers it necessary so to do, it may:

A. revoke the rate of drawback or amount of drawback, determined; or

B. direct the CCE / CCCE to withdraw the rate of drawback or amount of drawback determined.

# Service tax

## *1.1 Basic Exemptions*

**CBEC[48] Clarifications on New services introduced by Finance Act 2010**

Service taxpayers have raised doubts in determining the Export/Import of the new services introduced *vide* the Finance Act, 2010, as they have not been notified under the respective categories of services enlisted under the Export / Import of Services Rules.

All the new services notified through the Finance Act, 2010 falls in category (*iii*) of clause (*3*) of services listed in the Export of Services Rules, 2005 and Taxation of Services (Provided from Outside India and Received in India) Rules, 2006, (residual category), no notification regarding individual classification was issued.

**CBEC[49] clarification on services provided by State Governments under Centrally Sponsored Schemes (CSS**)

In the recent past, instances have come to the notice of the Board, where field formations have demanded service tax from State Governments or their departments/agencies, for providing certain services under the Centrally Sponsored Schemes (CSS). To cite an illustration, in the case of the Centrally sponsored National Bio-gas and Manure Management Programme operating under Ministry of New and Renewable Energy, State Government agencies were involved in setting up of bio-gas plants in villages. Certain expenses incurred by the State Governments or their departments/agencies during the course of setting up of such bio-gas plants were reimbursed by the Central Government by way of a grant under the CSS. Jurisdictional service tax authorities demanded service tax from the State Government department/agency, saying that the reimbursements received by the concerned State Government department/agency (as service provider) are nothing but consideration for installation and commissioning service received from the Central Government (service receiver).

Implicit in this service tax demand is an assumption that the relationship between Central Government and the State Government is an equivalent of a relationship between principal and the agent. This assumption is questionable as under administrative arrangement, State Governments are bound to implement the centrally sponsored schemes on receipt of a grant. The fact that State Governments are implementing agencies for the Central Government within the framework of CSS does not make them service providers. Consequently, Central Government cannot be taken as service receiver. Grant released by the Central Government under a centrally sponsored scheme cannot be presumed as consideration for providing a taxable service.

Levy and collection of service tax on State Government agencies/departments implementing CSS under a central grant, is not legally tenable and therefore in such cases service tax should not be demanded.

**CBEC has issued clarifications[50] on applicability of service tax on certain activities** such as shifting of overhead cables to underground on account of renovation/widening of roads; laying of electrical cables under or alongside roads/railway tracks; between grids/sub-stations/transformers the distribution points of residential or commercial complexes and such activities as electrification of railways, installation of street-lights, traffic lights, flood-lights.

Scope of certain taxable services in brief :

(*i*) ‘Commercial or industrial construction services’, in brief, cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits.

[48] Circular No. 129/11/2010-ST, dated 21-9-2010
[49] Circular No. 125/7/2010-ST, dated 30-7-2010
[50] Circular No.123/5/2010-TRU dt 24 May 2010

Therefore, only such electrical works that are parts of (or which result in emergence of a fixture of) buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under this taxable service.

(*ii*) Under ‘Erection, commissioning or installation services’, the activities relevant to the instant issue are (*a*) the erection, commissioning and installation of plant, machinery, equipment or structures; and (*b*) the installation of electrical and electronic devices, including wiring or fitting therefor. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (*i.e.* a machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.

(*iii*) ‘Works contract’ incorporates the inclusions and exclusions of the aforementioned two taxable services (amongst others) and it is the nature of the contract (*i.e.* a contract wherein the transfer of property in goods involved is leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services. Thus, even in the case of ‘works contract’ if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.

(*iv*) ‘Site formation and clearance, excavation, earth-moving and demolition services’ are attracted only if the service providers provide these services independently and not as part of a complete work such as laying of cables under the road.

| **Activity** | **Status** |
|---|---|
| Shifting of overhead cables/wires for any reasons such as widening/renovation of roads | Not a taxable service under any clause. |
| Laying of cables under or alongside roads | Not a taxable service under any clause. |
| Laying of electric cables between grids/sub-stations/transformer stations en route | Not a taxable service under any clause. |
| Installation of transformer/ sub-stations undertaken independently | Taxable service, namely Erection, commissioning or installation services (zzd) |
| Laying of electric cables up to distribution point of residential or commercial localities/complexes | Not a taxable service under |
| Laying of electric cables beyond the distribution point of residential or commercial localities/complexes. | Taxable service, namely commercial or industrial construction’ or ‘construction of complex’ service - Clause (zzq)/(zzzh), as the case may be. |
| Installation of street lights, traffic lights flood lights, or other electrical and electronic appliances/devices or providing electric connections to them | Taxable service, namely Erection, commissioning or installation services (zzd) |
| Railway electrification, electrification along the railway track | Not a taxable service under any clause. |

### *2.1 Clause (zzb) – To a client in relation to business auxiliary service*

Scope of Business Auxiliary Service has been amended for clause – "Promotion or marketing of services provided by the client".

Previously services in relation to promotion of games of chance like soliciting business for the client for games like Bingo, Playwin etc, were covered by the above clause.

However Finance Act 2010, has now included a new category of service "Games of Chance Service", whereby soliciting of business for the client for games like Bingo, Playwin etc., would now be covered by this category. Hence the clause of Business Auxiliary service has been appropriately amended to exclude the same from Business Auxiliary service.

(xiii) CBEC has clarified[51] that detention charges' for retaining marine container beyond the pre-holding period is neither a service provided on behalf of the client (Business Auxiliary Service) nor is it an infrastructural support in the business of either the shipping lines or the customer (Business Support Service). Such charges can at best be called as 'penal rent' for retaining the containers beyond the pre-determined period. Therefore, the amount collected as 'detention charges' is not chargeable to service tax.

(xiv) CBEC clarification[52] on re-insurance payments

In terms of the Insurance Act every insurer dealing in insurance business is required to re-insure a specified percentage of sum assured with another insurance company.

The insurance company pays premium to the reinsuring company for this service. However, a part of such premium is deducted and kept by the insurance company for meeting the administrative expenditure. In other words, the insurance company and the re-insurance company jointly bear the expenses for running the insurance/reinsurance business. This shared expense is commonly known as 'commission' though strictly it is not in the nature of a commission.

The issue involved is whether the amounts deducted by the insurance company (in other words paid by the reinsurance company) is consideration to former providing business auxiliary service to the re-insuring company.

Clarification - The arrangement between the insurance company and the reinsurer is only sharing of expenses and there is no service provided by the insurance company to the re-insurer for a consideration. Since the policy holder may not even be aware of the operations of the re-insurer, it cannot be said that the payment made by the re-insurer to the insurance company is for its business promotion or a service on behalf of the re-insuring company ( i.e. Business Auxiliary Service). In fact, it is the reinsurer which provides insurance service to the insurance company. As both the insurance company and reinsurer pay service tax on the entire amount of premium charged by them, the question of charging service tax under any other taxable service does not arise.

(xv) Central Government[53] has exempted fully the taxable service provided to any person, by a distribution licencee, a distribution franchisee, or any other person by whatever name called, authorized to distribute power under the Electricity Act, 2003, for distribution of electricity.

Note : Business auxiliary services/Business support services - Exemption to licencee/franchisee or any other person authorized to distribute power under the Electricity Act, 2003

[51] Circular No. 121/3/2010-ST dt 26 April 2010
[52] Circular No. 120(a)/2/2010-ST dt 16 April 2010
[53] Notification No. 32/2010-ST, dated 22-6-2010

### 3.1 Clause (zzq) - To any person being construction

The word service has been omitted from Industrial or Commercial construction clause. Finance Act 2010, has inserted the following explanation for deemed service:

(iii) The construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction shall be deemed to be service provided by the builder to the buyer. However, in cases where no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the competent authority[54] shall not be deemed to service provided by the builder to the buyer[55].

(v) CBEC has notified[56] that taxable service provided in relation to commercial or industrial construction service shall be exempt from so much of the service tax leviable on such service, as in excess of the amount of service tax calculated on 25% of the gross amount charged from any person by such commercial concern. However, the exemption shall be available only if the following conditions are met:

- the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the commercial or industrial construction service for such service;
- the gross amount charged shall include the cost of land. In other words where the cost of land has been separately recovered from the buyer by the builder or his representative, the exemption shall not be available.
- no credit of duty paid on inputs or capital goods or credit of service tax on inputs services has been taken under the provisions of the Cenvat Credit Rules; and
- such commercial concern has not availed exemption for value of goods supplied under other exemption notification.

### 4.1 Clause (zzzh) - To any person in relation to construction of complex

The word service has been omitted from Industrial or Commercial construction clause. Finance Act 2010, has inserted the following explanation for deemed service:

(ii) The construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction shall be deemed to be service provided by the builder to the buyer. However, in cases where no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the competent authority shall not be deemed to service provided by the builder to the buyer[57].

(vi) Central Government[58], has exempted fully the service of construction of complex when provided to Jawaharlal Nehru National Urban Renewal Mission and Rajiv Awaas Yojana.

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[54] Authority competent includes, besides any Government authority:
architect registered with the Council of Architecture; or
chartered engineer registered with the Institution of Engineers (India); or
licensed surveyor of the respective local body of the city or town or village or development or planning authority;
who is authorised under any law for the time being in force, to issue a completion certificate in respect of residential or commercial or industrial complex, as a precondition for its occupation. Service Tax (Removal of Difficulty) Order, 2010 - M.F.(D.R.) ORDER NO. 1/2010 dt 22 June 2010.

[55] Explanation inserted by Finance Act 2010.

[56] Notification no 29 dt 22 June 2010

[57] Explanation inserted by Finance Act 2010.

[58] Notification No. 28/2010 - Service Tax dt 22 June 2010

(vii) CBEC has notified[59] that taxable service provided in relation to construction of complex shall be exempt from so much of the service tax leviable on such service, as in excess of the amount of service tax calculated on 25% of the gross amount charged from any person by such commercial concern. However, the exemption shall be available only if the following conditions are met:

- the gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the commercial or industrial construction service for such service;
- the gross amount charged shall include the cost of land. In other words where the cost of land has been separately recovered, the exemption shall not be available.
- no credit of duty paid on inputs or capital goods or credit of service tax on inputs services has been taken under the provisions of the Cenvat Credit Rules; and
- such commercial concern has not availed exemption for value of goods supplied under other notification.
- the services provided are not only completion and finishing services in relation to building or civil structure.

### *5.1 Clause (zzzp) – To any person in relation to transport of goods by rail*

(i) Services to any person, by any other person, in relation to transport of goods by rail, in any manner.

(ii) Central Government has notified[60] that taxable service provided to any person by any other person, in relation to transport of goods by rail shall be exempt from so much of the service tax leviable on such service, as in excess of the amount of service tax calculated on 30% of the gross amount charged from any person by the service provider. However, the exemption shall be available only if the following conditions are met:

(a) no credit of duty paid on inputs or capital goods or credit of service tax on inputs services has been taken under the provisions of the Cenvat Credit Rules; and

(b) service provider has not availed exemption for value of goods supplied under other exemption notification.

(iii) Central Government has fully exempted[61] service provided or to be provided by **government railway** to any person in relation to transport of goods by rail.

This notification (providing exemption will be applicable upto 31.12.2010) - Notification No. 07/2010-ST dt 27.2.2010 further amended by Notification No. 20/2010 dt 30.3.2010 as further amended by Notification No. 33/2010-Service Tax dt 22 June 2010.

It has been clarified in the notification that nothing contained in this notification shall apply to any service provided or to be provided, by any person other than Government railway, in relation to transport of goods in containers by rail.

[59] Notification no 29 dt 22 June 2010

[60] Notification 20/2006 dt 25 April 2006 as amended by Notification No. 20/2006-S.T. dated 25-04-2006, Notification No. 29/2009-S.T., dated 31-8-2009, Notification No. 09/2010-ST dt 27.2.2010 and Notification No 22/2010 - Service Tax, dated 30-03-2010.

[61] Notification No. 33/2009 - Service Tax dt 1st September, 2009

(iv) Central government has fully exempted[62] service provided to any person in relation to transport of goods (as described in the table) **by rail** w.e.f. 1 January 2011.

| Sl No | Description of Goods |
|---|---|
| 1 | Defence/ military equipments |
| 2 | Railway equipments/ materials |
| 3 | Postal mail bags |
| 4 | Relief materials meant for victims of natural or manmade disasters, calamities, accidents and mishap |
| 5 | Luggage of train passengers, whether carried as personal luggage in the train compartments or booked separately in the luggage van/Household effects |
| 6 | Parcels [including newspaper/magazines registered with Registrar of Newspapers] booked in the luggage vans, where the goods/commodity heads fall below train load class 130 as per the Indian Railway Conference Association(IRCA) Goods Tariff |
| 7 | The following goods which are classified in the IRCA Goods Tariff, as below train load class 130 and wagon load class 130 ( Formula: Train Load Class 120+10) including 'Low Rate' goods viz., LR1, LR2, LR3, LR4:<br>Food grains, flours and pulses, Chemical Manure, Gunnies, Oil cakes and seeds, Soap, Starch, Salt for industrial use, Sugar, Salt, De-oiled cakes, Machinery and machine tools, Hides and Skins, Leather, Rubber and plastic, Electrical appliances and fittings, Empty drums, jerry cans and barrels, Jaggry, Jute, Milk and Milk products, Organic Manure, Paints and polishes, Timber, Vegetable oil pitches, Water, Fireworks, Boiler components, Charcoal, Paper Bamboos, Brooms, Coffee and Tea, Cotton and other textiles, Fodder and Husk, Fruits and vegetables and other perishables like fishery and marine produce, Groceries, Live stock, Motor vehicles, Sugar cane and Bagasse, Fire clay. |
| 8 | Kerosene oil meant for supply through public distribution system; Petroleum products including LPG Cylinders (filled and empty) booked by public sector Oil Marketing Companies transported by Indian Railways. |

### *6.1 Clause (zzzq) - To any person in relation to support services of business or commerce*

(iii) CBEC has clarified[63] that detention charges' for retaining marine container beyond the pre-holding period is neither a service provided on behalf of the client (Business Auxiliary Service) nor is it an infrastructural support in the business of either the shipping lines or the customer (Business Support Service). Such charges can at best be called as 'penal rent' for retaining the containers beyond the pre-determined period. Therefore, the amount collected as 'detention charges' is not chargeable to service tax.

[62] Notification No. 08/2010-ST dt 27.2.2010 as amended by Notification No. 21/2010 - Service Tax, dated 30-03-2010, further amended by Notification No.34 /2010-Service Tax dt 22 June 2010

[63] Circular No. 121/3/2010-ST dt 26 April 2010

## 7.1 *Clause (e) – Advertising Services*

Services to any person by any person, in relation to advertisement, in any manner.

(i) Advertisement[64] includes any notice, circular, label, wrapper, document, hoarding or any other audio or visual representation made by means of light, sound, smoke or gas.

(ii) Advertising agency means any person engaged in providing any service connected with the making, preparation, display or exhibition of advertisement and includes an advertising consultant;

(iii) In cases where some amount is directly charged by the Foreign channels to clients in foreign currency, such amount are not includible as these are not charged by the advertising agency from the clients.

(iv) It is clarified[65] that Directorate of Audio and Visual Publicity not being a commercial concern is not liable to service tax. This clarification is no longer valid.

(v) In the case of persons who are printing and publishing telephone directories, yellow pages or business directories, their activity is essentially of printing readymade advertisements from the advertisers and publishing the same in the directory. Therefore this activity shall not attract service tax. However, if these persons also undertake any activity relating to making or preparation of an advertisement, such as designing, visualizing etc., then they will be liable to pay service tax on the charges made thereon[66].

It is to be noted that visualizing / conceptualizing are pre-requisites for advertisement. Designing should succeed visualizing / conceptualizing.

(vi) Space Selling / Canvassing : Canvassing which is limited to space selling is not a taxable service.

A person or an agency may be engaged in canvassing for advertisements for which he may get commission from the publishers. The term canvassing may merely involve contacting potential advertisers and persuading them to give advertisements to a particular newspaper /periodical / magazine. The making and preparation of the advertisements namely, drafting of text, preparation of layout, is either left to the advertiser or to the media. Such a service is known as space selling. Such service is not taxable under this category but is now taxable under "Sale of Space or time for Advertisements" category.

If canvassing is involving receiving the text of advertisement, estimating the space that such advertisement would occupy in the newspaper/periodical/magazine, negotiating the price, forming the general layout of the advertisement that would finally appear in the newspaper then such activity may fall within the phrase "any service …..provided in any manner connected to making, preparing ….." may be liable to service tax under the category of Advertising Agency Services. However, the Government in its Master Circular[67] has further clarified that "Merely canvassing advertisements for publishing on commission basis, is not classifiable under this category. Such services are liable to service tax under Business Auxiliary Service.

[64] Advertisement is a public announcement, which can be made by way of display of any hoarding or otherwise. Advertisement is used to awaken, enlighten and activate the public at large concerning matters that affect the society generally.
[65] Circular No 341/43/96-TRU dt 31.10.1996.
[66] Trade Notice No 99/GL-90/CE/PRO/Cal-II/99 dt 16.9.99, Comm of CE, Kolkata & MoF F n. 345/4/97 dated 16.8.1999
[67] Master circular No 96/7/2007 dt 23.8.2007 para 004.01.

(vii) Held in the case of Adwise Advertising (P) Ltd. v UOI[68], that selection of a particular print media or a particular electronic media for the display of advertisement will also be a part of the services rendered to the client by an advertising agency, because the advertising agency will be expected to advise its clients as regards the media through which the advertisement is to be flashed. Locating or selecting a particular media will be a service by the advertising agency in relation to the advertisement.

Accordingly, any commission earned by the agency even from the advertising media, if it forms a part of the gross amount charged by such agency from the clients in relation to that advertisement, could be included in the value of the taxable service.

(viii) Held in the case of Star Neon Sign v CCE[69], that the activity of making neon light sign boards as per customer's requirements is not covered under advertising agency as only writing or preparing the sign board was made at the behest of customer and no advertising services was involved.

(ix) Television serial producers allow episodes to be telecasted by the channels in the lieu of procurement of Free Commercial Time (FCT), which is sold by them to advertising agencies for showing advertisements. FCT, selling the time allotted to a producer does not fall within the purview of advertisement service since this activity is not connected to making, preparation, display or exhibition of advertisement. This is akin to providing space in a newspaper or magazine for publishing an advertisement and has nothing to do with actual presentation of the advertisement. Therefore no tax is leviable on the producers for selling the FCT. The Circular[70] clarifying this has been withdrawn, since such service is not taxable under this category but is now taxable under "Sale of Space or time for Advertisements" category.

(x) CBEC[71] has clarified that while services rendered in relation to a circular, label, documents, hoardings or any other audio visual representation of a product or service falls under Advertisement Service, the services relating to actual exhibition or display of the product or service would fall under Business Exhibition services. Nevertheless now classification of services would be governed by the provisions of section 65A.

(xi) CBEC[72] has clarified that the Cinema theatres cannot be treated as advertisement agencies as they project advertisements only on behest of advertising agencies.

Madras High Court in the case of Advertising Club[73] has held that, where a person gets his advertisement flashed in the press media or electronic media, it could certainly not be said to be a service provided by the media. There is nothing done except flashing a prepared advertisement. The decision as to how and in what format the advertisement should be, how it should be projected, at what point of time it should be flashed, the manner in which it has to be drafted has got nothing to do with the press or electronic media.

(xii) The CBEC[74] has clarified that in some cases the advertising agency gets a documentary or film prepared by an independent film producer on behalf of clients and the advertising agency charges the client for the amount paid to the film producer. In such cases the film producer is not liable to service tax but the advertising agency wil include the aforesaid in the value of taxable services.

[68] 2001 (131) ELT 529 (Mad)
[69] 2002 (49) RLT 551 (Delhi)
[70] Circular No 78/08/2004-ST dt 23 March 2004
[71] Circular No 80/10/2004 dt 17.9.2004
[72] CBEC answer to Q no 6.1 on Frequently asked questions issued in October 2003
[73] 2001 (131) ELT 35 (Mad)
[74] Circular No 341/43/96-TRU dt 31.10.1996

### *8.1 Clause (n) - To any person by a tour operator*

(i) Services provided by any person to any person by a tour operator in relation to a tour[75].

(ii) Tour operator means any person engaged in the business of planning, scheduling, organising or arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes

- any person engaged in the business of operating tours in a tourist vehicle[76] or
- a contract carriage[77] by whatever name called,

covered by a permit, other than a stage carriage permit[78], granted under the Motor Vehicles Act.

(iii) Service tax on the services rendered by the tour operators is only on services rendered in India (except Jammu Kashmir) in respect of a tour within the Indian territory. Services rendered by tour operators in respect of out bound tourism, i.e. for tours abroad, do not attract service tax.

(iv) Abatements

| **Description of taxable service** | **Conditions** | **Percentage** |
|---|---|---|
| (*i*) Services provided or to be provided to any person, by a tour operator in relation to a package tour[79]. | The bill issued for this purpose indicates that it is inclusive of charges for package tour. | 75% (Exemption is in excess of 25%) |
| (*ii*) Services provided or to be provided to any person, by a tour operator in relation to a tour, if the tour operator is providing services solely of arranging or booking accommodation for any person in relation to a tour. | (*a*) The invoice, bill or challan issued indicates that it is towards charges for such accommodation, and<br>(*b*) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation. | 90% (Exemption is in excess of 10%) |
| | | |

[75] Tour means a journey from one place to another irrespective of the distance between such places. However, tour does not include a journey organised or arranged for use by an educational body, other than a commercial training or coaching centre, imparting skill or knowledge or lessons on any subject or field.

[76] Tourist Vehicle means a contract carriage constructed or adapted and equipped and maintained in accordance with such specifications as may be prescribed in this behalf.

[77] Contract carriage means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorized by him in this behalf on a fixed or an agreed rate of sum-

(a) on a time basis, whether or not with reference to any route or distance;

(b) from one point to another, and in either case, without stopping to pick up or set down passengers not included in the contract anywhere during the journey and includes, motor cab (≤6 passengers other than driver) and maxicab (>6 but ≤12 passengers other than driver)

[78] Stage carriage means a motor vehicle constructed or adapted to carry more then 6 passengers excluding driver for hire or reward at separate fares paid by or for individual passengers, either for the whole journey or for stages of the journey.

[79] Package tour means a tour wherein transportation, accommodation for stay, food, tourist guide, entry to monuments and other similar services in relation to tour are provided by the tour operator as part of the package tour to the person undertaking the tour.

| | | |
|---|---|---|
| (*iii*) Services, other than services specified in (*i*) and (*ii*) above, provided or to be provided to any person, by a tour operator in relation to a tour. | The bill issued indicates that the amount charged in the bill is the gross amount charged for such a tour. | 60% (Exemption is in excess of 40%) |

However, the exemption shall be available only if the following conditions are met:

- no credit of duty paid on inputs or capital goods or credit of service tax on inputs services has been taken under the provisions of the Cenvat Credit Rules; and
- such tour operator has not availed exemption for value of goods supplied under other exemption notification.

(v) Central Government, has exempted[80] fully the service, provided or to be provided to any person, by a tour operator having a contract carriage or tourist vehicle with a permit for inter-state or intra-state transportation of passengers, excluding tourism, conducted tours, charter or hire service.

Government[81] has clarified that

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.

Service tax is not leviable under tour operator service only if the tour is conducted in a vehicle having stage carriage permit.

(vi) CBEC[82] has clarified that even public sector undertaking operating tours, such as Indian Tourism Development Corporation, Delhi Development Tourism Corporation are also covered by service tax under this category.

(vii) CBEC[83] has clarified that

The amount charged to the pilgrims in India undertaking Haj and Umrah pilgrimage, is for services provided by the Government of Saudi Arabia and the tour takes place outside India.

As per the Export of Services Rules, the service in respect of tour operator is export if such service is performed outside India. It is also provided therein that where such taxable service is partly performed outside India, it shall be treated as performed outside India.

Therefore, it is clarified that service tax is not chargeable on the services provided in respect of tour undertaken for carrying out Haj and Umrah Pilgrimage in Saudi Arabia by Indian pilgrims considering these as export of service, provided they fulfil the other conditions of export as provided in Export of Services Rules.

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[80] Notification No. 20/2009-S.T., dated 7-7-2009
[81] Ministry's circular letter D.O.F. No. 334/13/2009-TRU, dated 6-7-2009
[82] Circular F No B 43/10/97-TRU dt 22.8.1997.
[83] Circular No. 117/11/2009-ST, Dated 30-10-2009

(viii) CBEC[84] clarified that

Schools running transport services for their students are not liable to pay service tax under the category of tour operator[85].

Further clarified that the activity of schools to transport children from and back to the school on the cabs owned and run by them does not constitute renting a cab and schools do not fall in the category of rent-a-cab operator. As regards hiring a cab by school from outside, the same has specifically been excluded from the scope of taxable service. Hence, activity of transportation of school children on cabs owned by school or hired by school does not attract service tax.

(ix) Government[86] has clarified that

Services provided in relation to a journey from one place to another in a tourist vehicle having contract carriage permit is leviable to service tax under tour operator service. Tour in a vehicle covered by the following categories of permits granted under the Motor Vehicles Act and rules made thereunder are clearly leviable to service tax under tour operator service:

(a) Contract Carriage permit granted under section 74 of the MVA, 1988 and authorisation certificate issued under Motor Vehicles (All India Permit for Tourist Transport Operators) Rules, 1993; and

(b) Permit granted under section 88(9) in accordance with the provisions of section 74 of the MVA, 1988 in respect of tourist vehicles, for the purpose of promoting tourism.

Since the permits under the above two categories are granted only for tourist vehicle, service tax is leviable if the tour is provided in the above categories of vehicles. Hence Service tax is chargeable from vehicles having the above two types of permits.

It may be noted that services provided in relation to a journey from one place to another conducted in a tourist vehicle having contract carriage permit for use by educational bodies shall be excluded from the scope of the taxable service. Educational bodies do not include commercial training or coaching centres.

### *9.1 Clause (zn)/ (zzl) – Port Services*

(i) Services to any person, by any other person, in relation to port services in a port[87] or in other port[88], in any manner.

The provisions of section 65A dealing with classification shall not apply to any service when the same is rendered wholly within the port or other port[89]. Port service means any service rendered within a port or other port, in any manner[90].

(ii) Some of the specific charges for the services rendered in respect of port services are as follows:

(a) Port and dock Charges consisting of berthing and mooring charges, port dues, pilotage and towage, water supply charges, salvage and diver charges, anchorage fees;

[84] Board's letter F.No.137/70/2007-CX.4(Pt), dated 15-12-2008 (Issued from file C.No.IV/16/06/2009-STU)/Trade Notice No. 17/2009, dated 13-3-2009/Madural Commissionerate
[85] Board's letter F.No.137/70/2007-CX.4, dated 26-4-2008
[86] Ministry's Circular/Letter D.O.F. No. 334/1/2008-TRU, dated 29-2-2008
[87] Port means any major port to which this Act applies within such limits as may, from time to time, be defined by Central Government, for the purposes of this Act by notification.
[88] Other Port means – Port as defined in 3(4) of Indian Ports Act. Port includes also any part of a river or channel in which this Act is for the time being in force.
[89] Amended by Finance Act 2010.
[90] Amended by Finance Act 2010

(b) Cargo haulage and storage charges consisting of wharfage for general cargo, warehousing charges, cranage charges, ore handling charges, wharfage on petroleum products, weighment charges for lorries, traffic appliance charges, weighment charges for goods;

(c) Railway haulage charges for rail borne goods, local haulage and storage;

(d) Container handling charges consisting of import, export and transhsipment wharfage on containers, equipment charges for handling containers, container storage charges;

(e) Labour charges.

(iii) The Government in its Master Circular has clarified that Management Committee of Paradeep Port providing services within the Port are liable to service tax. Similarly Dock Labour Board[91] is liable to service tax on the labour charges recovered from them.

Vide the same circular it is clarified that Demurrage Charges are recovered by port authority as a rental for storage of goods. They are as well liable to service tax.

(iv) Ship repairs during the dry docking and repairs otherwise including minor repairs provided by ship chandlers as duly authorised by port authorities, shall be treated as taxable service. The services may involve removal and replacement of damaged parts, repairing the outside bottom area by supplying MS plates etc.

(v) CBEC has clarified that[92] services rendered by ship chandlers like supply of ship stores – vegetables, fruits, deck stores etc, minor repair works to clear technical snag through local workshop etc. are taxable. As these services are rendered under authorization from port authorities, they fall under port services.

(vi) Pursuant to this amendment Central Government has amended the abatement notification[93] which extended abatement to the various services as stated hereunder to extend the abatement when such services have been provided in the Port or other Port:

| Clause | Description of Service | %age of abatement |
|---|---|---|
| (o) | Tour operator | 60% (i.e. in excess of 40%) |
| (zzd) | Erection, commissioning or installation | 67% (i.e. in excess of 33%) |
| (zzp) | Goods Transport Agency[94] | 75% (i.e. in excess of 25%) |
| (zzq) | Commercial or industrial construction service (without the cost of land) | 67% (i.e. in excess of 33%) |
| (zzq) | Commercial or industrial construction service (with the cost of land) | 75% (i.e. in excess of 25%) |
| (zzzh) | Construction of complex. | 67% (i.e. in excess of 33%) |
| (zzzh) | Commercial or industrial construction service (with the cost of land) | 75% (i.e. in excess of 25%) |
| (zzzp) | Transport of goods in containers by rail | 70% (i.e. in excess of 30%) |

[91] Circular F No. B 11/1/2001-TRU dt 9.7.2001
[92] Circular no. 67/16/2003 – ST dt 10/11/03
[93] Notification No 1/2006 dt 1 March 2006 amended vide notification no 40 dt 28 June 2010
[94] Notification No. 43/2010-Service Tax dt 30 June 2010

(v) Central Government[95] has exempted fully the following services when provided wholly within the port or other port:

(a) by a cargo handling agency in relation to, agricultural produce or goods intended to be stored in a cold storage;

(b) by storage or warehouse keeper in relation to storage and warehousing of agricultural produce or any service provided for storage of or any service provided by a cold storage;

(c) to transport of export goods in an aircraft by an aircraft operator;

(d) of site formation and clearance, excavation and earthmoving and demolition and such other similar activities.

(vi) Central Government[96], has exempted fully the following services when provided within a port or other port:

(a) repair of ships or boats or vessels belonging to the Government of India including Navy or Coast Guard or Customs but does not include Government owned Public Sector Undertakings;

(b) repair of ships or boats or vessels where such process of repair amounts to 'manufacture' and under section 2(f) of the Central Excise Act;

(c) supply of water;

(d) supply of electricity;

(e) treatment of persons by a dispensary, hospital, nursing home or multi-specialty clinic (except cosmetic or plastic surgery service);

(f) services provided by a school or centre to provide formal education other than those services provided by commercial coaching or training centre;

(g) services provided by fire service agencies.

(h) pollution control services.

(ix) Central Government[97] has exempted fully service of commercial or industrial construction referred to in clause (zzq) when provided wholly within the port or other port, for construction, repair, alteration and renovation of wharves, quays, docks, stages, jetties, piers and railways.

(x) (viii) The Central Government, has exempted[98] commercial or industrial construction service, provided to any person by any other person in relation to construction of port or other port, from the whole of the service tax.

The Central Government, has exempted[99], services provided in relation to the execution of works contract, provided to any person by any other person in relation to construction of port or other port, from the whole of the service tax.

CBEC[100] has clarified even after introduction of the above exemption notification, services such as completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port shall be outside the scope of this exemption and hence, leviable to service tax.

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[95] Notification No. 41/2010-Service Tax dt 28 June 2010
[96] Notification No. 31/2010 - Service Tax dt 22 June 2010
[97] Notification No. 38/2010-Service Tax dt 28 June 2010
[98] Notification No. 25/2007 – Service Tax dated 22 May 2007
[99] Notification No. 25/2007 – Service Tax dated 22 May 2007

### *10.1 Clause (zzg) – Management, maintenance or repair services*

Services to any person, by any person in relation to management, maintenance or repair[101].

(i) Management, maintenance or repair means any service provided by:

- any person under a contract or an agreement; or
- a manufacturer or any person authorised by him; In relation to:

    (a) management of properties, whether immovable or not;

    (b) maintenance or repair of properties, whether immovable or not; or

    (c) maintenance or repair including reconditioning or restoration, or servicing of any goods (includes computer software), excluding a motor vehicle[102].

(ii) CBEC has clarified[103] that such services would be taxable when provided under a contract or an agreement by any person or by a manufacturer or any person authorized by a manufacturer. To attract service tax under this category, the contract or agreement need not necessarily be a maintenance contract / agreement.

(iii) Services provided during the warranty period by the dealer or any other authorized person, service tax would also be leviable on any amount received by such dealer or such other authorized person from manufacturer of such goods.

(iv) CBEC has clarified[104] that maintenance or repair means any service provided by (i) any person under a maintenance contract or agreement or (ii) a manufacturer or any person authorised by him in relation to maintenance or repair or servicing of any goods or equipment. In case of software repair is not of tangible goods but that of intangible program/software, which is in installed condition and thus the maintenance and repair of software, is not maintenance and repair of goods. Therefore the maintenance of software is not chargeable to tax.

(v) Central Government has fully exempted[105], the services provided to any person by any other person in relation to management, maintenance or repair of roads, bridges, tunnels, dams, airports, railways and transport terminals.

(vi) CBEC[106] has clarified that activity undertaken by SISSO is limited to keep the public toilets (which are owned by municipal bodies) in clean and hygienic conditions for the users who pay nominal charges for the same. Such activities cannot be considered to be 'management, maintenance or repair of an immovable property' Also, in the instant case, while the contract is executed between SISSO and the municipal bodies, the actual beneficiary is the user who makes payment for using such toilet.

Cleaning activities of SISSO relating to 'pay and use toilets', owned by municipal bodies does not attract Service tax under the law for time being in force.

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[100] Para 8.4 of Letter F. No. B1/16/2007-TRU, dated 22-5-2007

[101] Maintenance is to keep a machine, building etc. in a good condition by periodically checking and servicing or repairing. While repair is a one time activity, maintenance is a continuous process of which repairing may be incidental or ancillary.

[102] Goods includes computer software Properties includes information technology software.

[103] Departmental letter F.No.B1/ 6 /2005-TRU dt. 27 July, 2005

[104] Circular No. 70/19/2003-ST dated Dec 17, 2003

[105] Notification No. 24/2009-S.T., dated 27-7-2009 as amended by notification no. 54/2010-ST, dated 21-12-2010

[106] Letter No. 356/45/2006-TRU, dated 23-10-2006

### 11.1 *Clause (zzm) - To any person, by airports authority or any person authorised by it, in an airport or a civil enclave*

(i) Services to any person, by airports authority or by any other person, in any airport[107] or a civil enclave[108].

However, the provisions of section 65A (classification of services) shall not apply to any service when the same is rendered wholly within the airport or civil enclave [109]. Hence all services rendered wholly within the airport or civil enclave would be classifiable under airport services only.

Airports authority means the airports authority of India and also includes any person having the charge of management of an airport or a civil enclave.

(ii) Pursuant to this amendment Central Government has amended the abatement notification[110] which extended abatement to the various services as stated hereunder to extend the abatement when such services have been provided in the Airport:

| Clause | Description of Service | %age of abatement |
|---|---|---|
| (o) | Tour operator | 60% (i.e. in excess of 40%) |
| (zzd) | Erection, commissioning or installation, under a contract for supplying a plant, machinery or equipment and erection, commissioning or installation of such plant, machinery or equipment. | 67% (i.e. in excess of 33%) |
| (zzp) | Goods Transport Agency[111] | 75% (i.e. in excess of 25%) |
| (zzq) | Commercial or industrial construction service (without the cost of land) | 67% (i.e. in excess of 33%) |
| (zzq) | Commercial or industrial construction service (with the cost of land) | 75% (i.e. in excess of 25%) |
| (zzzh) | Construction of complex. | 67% (i.e. in excess of 33%) |
| (zzzh) | Commercial or industrial construction service (with the cost of land) | 75% (i.e. in excess of 25%) |
| (zzzp) | Transport of goods in containers by rail | 70% (i.e. in excess of 30%) |

(iii) CBEC has clarified[112] that services provided under this category includes variety of services provided to airlines, as well as for cargo and passenger handling such as security, transit facilities, landing charges, terminal navigation charges, parking and housing charges and route navigation facility charges. It would be on the gross amount chargeable by AAI or other such authorized person. Thus, charges such as royalty, license fees etc. collected by AAI from other service providers at the airport such as ground handling, security, common user terminal services etc. are chargeable to service tax. However, in case a part of airport/ civil enclave premises is rented / leased out, the rental/lease charges would not be subjected to service tax, as the activity of letting out premises is not rendering a service.

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[107] Airport means a landing and taking off area for aircrafts usually with runways and aircraft maintainance and passenger facilities and includes aerodrome – Section 2(b) of the Airports authority of India Act.

[108] Civil Enclave means the area if any, allotted at an airport belonging to any armed force of the Union, for use by persons availing of any air transport services from such airport or for the handling of baggage or cargo by such service and includes any land comprising of any building and structure on such area.

[109] Substituted by Finance Act 2010

[110] Notification No 1/2006 dt 1 March 2006 amended vide notification no 40 dt 28 June 2010

[111] Notification No. 43/2010-Service Tax dt 30 June 2010

[112] Circular no. 80/2004 dated 17th September 2004

(iv) Central Government[113] has exempted fully the following service when provided wholly within airport,

(a) by a cargo handling agency in relation to, agricultural produce or goods intended to be stored in a cold storage;

(b) by storage or warehouse keeper in relation to storage and warehousing of agricultural produce or any service provided for storage of or any service provided by a cold storage;

(c) to transport of export goods in an aircraft by an aircraft operator;

(d) of site formation and clearance, excavation and earthmoving and demolition and such other similar activities.

(v) Central Government[114], has exempted fully the following services when provided within a airport :

(a) repair of ships or boats or vessels belonging to the Government of India including Navy or Coast Guard or Customs but does not include Government owned Public Sector Undertakings;

(b) repair of ships or boats or vessels where such process of repair amounts to 'manufacture' under section 2(f) of the Central Excise Act;

(c) supply of water;

(d) supply of electricity;

(e) treatment of persons by a dispensary, hospital, nursing home or multi-specialty clinic (except cosmetic or plastic surgery service);

(f) services provided by a school or centre to provide formal education other than those services provided by commercial coaching or training centre;

(g) services provided by fire service agencies.

(h) pollution control services.

(vi) Central Government[115] has exempted fully service of commercial or industrial construction referred to in clause (zzq), when provided wholly within the airport.

(vii) In the case of Cochin International Airport Ltd.[116] the Supreme Court impliedly affirmed the High Court's judgement. The High Court ruled that Rs. 500 collected from each outgoing passenger towards User Fee was collected only towards the enhancement of the airport and not for any other service rendered to the outgoing passenger. Since user fee is not for any specific service rendered by them but is a flat rate charged, it cannot be treated as a service charge so as to attract service charge. Therefore no service tax was payable on this amount.

### *12.1 Clause (zzzo) To any passenger, by an aircraft operator for Air Travel*

(i) Services 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[117].

(ii) [118]Passenger means any person boarding an aircraft in India for performing domestic journey or international journey[119].

[113] Notification No. 41/2010-Service Tax dt 28 June 2010
[114] Notification No. 31/2010 - Service Tax dt 22 June 2010
[115] Notification No. 42/2010-Service Tax dt 28 June 2010
[116] 2009 (17) STR J79 (SC)
[117] Amended by Finance Act 2010.

(iii) International journey in relation to a passenger, means his journey from any customs airport on boarding of any aircraft to a place outside India

(iv) Central Government[120], has exempted fully the service, in respect of persons specified below:

(a) a person who has arrived at a customs airport from a place outside India and is in transit through India. He should not pass through immigration and does not leave customs area and continues his journey to a place outside India; and

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

(v) Central Government[121], has exempted the services from so much of service tax as is in excess of[122]:

(a) Domestic Travel - 10% of the gross value[123] of the ticket or Rs. 100 per journey, whichever is less, for passengers travelling in any class, within India;

(b) International Travel - 10% of the gross value of the ticket or Rs. 500 per journey, whichever is less, for passengers embarking in India for an international journey in economy class[124].

However, the exemption shall be available subject to the condition that the CENVAT credit of duty paid on inputs used for providing such taxable service has not been taken.

CBEC has clarified that[125] - in case a ticket covers more than one domestic journey/flight/sector (say Mumbai-Delhi-Mumbai), whether Rs. 100 would be charged for each journey/flight/sector (i.e. in the aforementioned example one for Delhi-Mumbai flight and one for Mumbai-Delhi flight) or would it be charged once for the entire ticket. In this regard, it is clarified that since the taxable activity relates to 'embarkation in India for domestic journey….', each time such embarkation in India takes place the tax is chargeable. In other words tax would be separately chargeable for each journey/flight/sector. Similarly, in round trip tickets involving multiple journies/flights/sectors with one of the sector involving embarkation or disembarkation at North-Eastern States /Bagdogra, the journey/flight/sector that involves embarkation or disembarkation at North-Eastern States /Bagdogra would alone be covered under aforesaid exemption.

(vi) Central Government[126], has exempted fully the service for passengers embarking on a journey originating or terminating in an airport located in the state of Arunachal Pradesh or Assam or Manipur or Meghalaya or Mizoram or Nagaland or Sikkim or Tripura or at Baghdogra located in West Bengal.

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[118] Passenger means any person boarding, at any customs airport, an aircraft for performing an international journey, but does not include:

(a) 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

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

[119] Amended by Finance Act 2010 w.e.f. 1.7.2010

[120] Notification No. 25/2010 - Service Tax dt 22 June 2010

[121] Notification No. 26/2010 - Service Tax dt 22 June 2010

[122] Rational for the abatement - The taxes on transport of passengers travelling by air were in operation in the past. These were not in the nature of service tax but operated through separate legislations. Inland Air Travel Tax [@ 15%] was levied on domestic travel in 1989. Foreign Travel Tax [@ Rs. 500 per trip, except to neighbouring countries for which the rate was Rs. 150 per trip] was levied on international travel in 1979. These taxes were withdrawn in the interim Budget 2004. In 2006, tax was imposed on international air travel by a passenger embarking in India and travelling in higher [other than economy] classes. This tax continues.
The taxable service is being suitably amended to extend this levy to cover all domestic and international air passengers embarking in India.

[123] CBEC vide Circular no Letter dt 1 July 2010 F.No.334/03/2010-TRU has clarified that all charges except statutory levies (levied under a law for time being in force), if any mentioned in a ticket is to be taken as 'gross value of the ticket' for this purposes.

[124] Economy class in an aircraft means

(i) where there is more than one class of travel, the class attracting the lowest standard fare; or

(ii) where there is only one class of travel, that class.

[125] CBEC vide Circular no Letter dt 1 July 2010 F.No.334/03/2010-TRU

[126] Notification No. 27/2010 - Service Tax dt 22 June 2010

(vii) CBEC[127] has clarified that

| Issue | Clarification |
|---|---|
| In the case of international journey commencing from an Indian airport involving stopover/ transfer at intermediate airports outside India before reaching the destination (say Mumbai-Dubai-London-New York), whether service tax would be leviable on the value indicated in the ticket or on the value attributable to the first sector (Mumbai-Dubai)? | International journey is from Mumbai to New York. Stopover / transfer at intermediate airports is incidental or part of the main journey. Stop over / transfer at intermediate airports outside India is of no relevance or consequence for levy of service tax under section 65(105)(zzzo) read with section 66 of the Finance Act,1994. Service tax is leviable on the total value of the ticket representing the consideration of a single composite service. |
| In case the international journey also includes travel in a domestic sector as part of the international journey (say Delhi-Mumbai-London), whether service tax is leviable excluding the value attributable to the domestic sector or on the total value of the ticket treating the domestic sector as integral part of international journey? | Service tax is leviable on the total value of the ticket. |
| In the case of round trip/return ticket, whether service tax is leviable on the total value of the ticket or only half the value of the ticket? | Service tax is leviable on the total value of the ticket. |
| In the case of journey commencing from an airport outside India and completed at an airport outside India but including a sector wherein the passenger disembarks and subsequently embarks at an Indian airport as part of international journey (say Sydney-Mumbai-Dubai-Singapore-Sydney), whether service tax is leviable for Mumbai-Dubai sector only or on the total value of the ticket? | Service tax is not leviable in such cases. |
| Whether ticket issued outside India for an international journey commencing from India (say Delhi–London) is leviable to service tax? | Yes. Service tax is payable by the service provider for the taxable service provided. Place of purchase/ issue of ticket is of no relevance or consequence to determine the levy of service tax. Service tax is leviable as long as the passenger embarks in India. |

[127] Circular no. 96/7/2007-st, dated 23-8-2007, as amended by circular no. 98/1/2008-st, dated 4-1-2008

### *13.1 Clause (zzzx) - To any person, by the telegraph authority in relation to telecommunication service*

(i) Services to any person, by the telegraph authority[128] in relation to telecommunication service[129].

Telecommunication service means service of any description provided by means of any transmission, emission or reception of signs, signals, writing, images and sounds or intelligence or information of any nature, by wire, radio, optical, visual or other electro-magnetic means or systems, including the related transfer or assignment of the right to use capacity for such transmission, emission or reception by a person who has been granted a licence and includes:

(a) voice mail, data services, audio text services, video text services, radio paging;

(b) fixed telephone services including provision of access to and use of the public switched telephone network for the transmission and switching of voice, data and video, inbound and outbound telephone service to and from national and international destinations;

(c) cellular[130] mobile telephone services including provision of access to and use of switched or non-switched networks for the transmission of voice, data and video, inbound and outbound roaming service to and from national and international destinations;

CBEC clarifications on International in-bound roaming liable to Service tax under Telephone Service[131]

Roaming service provided to an international in-bound roamer, i.e., subscriber of a foreign telecom network, when in India, by an Indian telecom service provider. The telecom operators are of the view that in-bound roamer is not a subscriber as no telephone connection is provided to him and such roamer does not undergo the processes of registering as subscriber like entering into contract with the visiting network, furnishing of identity, etc.

During the period of roaming, the Indian telecom service provider provides telephone service to an international in-bound roamer. This service to in-bound roamers is delivered and consumed in India and, therefore, it is not an export of service. International practice treats the telephone service provided to an in-bound roamer by the visited network, for purposes of taxation, in the same manner as a telephone service provided to any home subscriber.

Accordingly, the domestic telecom operators providing roaming service to international in-bound roamers are liable to pay service tax on the amount received through the home network on account of service provided to such international roaming subscriber.

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[128] (a) The DG of P & T or any other officer so delegated by him;
(b) The Chairman cum MD, MTNL;
(c) Any other person who has been granted a License by the Central Government

[129] Public Mobile Radio Trunking Services (PMRTS), as these services do not use telephone line or telephone instrument, are not covered as telephone service.

[130] A cellular phone includes fixed wireless terminals or fixed wireless telephones working on the cellular technology – M.F. (D.R.) Circular No 15/2006 dt 20.4.2006

[131] Circular No. 90/1/2007-S.T., dated 3-1-2007 F.No. 149/4/2005-CX.4

To enable an in-bound roamer to hook on to the visited network and avail of telephone service, a temporary internal number is assigned by such network. Any call made to/from a roaming mobile is routed through the visited network like any other call. The details of usage of service by such a subscriber are captured and billing account is transferred to the home network for receiving the payments. The home operator then bills these calls to his subscribers. Roaming fees are traditionally charged on a per minute basis, and they are typically determined by the service provider's pricing plan.

During international roaming, the visiting network provides service to a person treating him as a subscriber on a temporary basis for the period during which service is availed of by such person from the visited network. The only difference is that the payment is not directly received from the subscriber, but the same is routed through the home network. However, this does not alter the essential characteristics of the service, which is of a telephone connection. As regards the argument that no telephone connection is provided to an in-bound roamer, a telephone connection does not necessarily mean providing a telephone instrument or providing a SIM card. Even if this number is allocated temporarily and internally, it remains a service of telephone connection. Further, the issues of entering into a contract or verification of the subscriber are not relevant to the levy of service tax.

(d) carrier services including provision of wired or wireless facilities to originate, terminate or transit calls, charging for interconnection, settlement or termination of domestic or international calls, charging for jointly used facilities including pole attachments, charging for the exclusive use of circuits, a leased circuit or a dedicated link including a speech circuit, data circuit or a telegraph circuit;

(e) provision of call management services[132] for a fee including call waiting, call forwarding, caller identification, three-way calling, call display, call return, call screen, call blocking, automatic callback, call answer, voice mail, voice menus and video conferencing;

(f) private network services including provision of wired or wireless telecommunication link between specified points for the exclusive use of the client;

(g) data transmission services including provision of access to wired or wireless facilities and services specifically designed for efficient transmission of data; and

(h) communication through facsimile, pager, telegraph and telex.

Government[133] has clarified that at present the telegraph authorities are providing it in two ways. One is "bureau fax" where the charges are based on a flat rate per page depending upon paper size and the other is "ordinary fax" where charges are equivalent to the number of calls consumed in faxing the paper. In case of "bureau fax", this is provided by the Deptt. of Telecom through post and telegraph offices. In the second type of facsimile service, the service charges are equal to the telephone calls consumed and it is already covered in the ambit of service tax under the category of telephone connections. Therefore, service tax will not be payable in respect of those facsimile services where service charges are based on the number of telephone calls consumed. Private fax operators are providing the second kind of facsimile service and therefore, they are not liable to service tax again.

Telecommunication service shall not include service provided by:

(a) any person in relation to on-line information and database access or retrieval or both, as this service is already covered by clause (zh);

(b) a broadcasting agency or organisation in relation to broadcasting, as this service is already covered by clause (zk); and

(c) any person in relation to internet telecommunication service, as this service is already covered by clause (zzzu).

(ii) Held in case of BPL Mobile Cellullar Ltd[134] held that there is no sale of goods involved in the case of a SIM card and recharge coupon and it is part of the taxable service rendered by the service provider. VAT cannot be charged. Similar judgement in the case of Escotal Mobile Communications Ltd.[135]

(iii) The license fee if any, charged by the telegraph authority from the subscriber will also form part of the taxable value, as the gross amount is chargeable. However, if the license fee is charged by the Government in granting license under the Telegraph Act, to provide telecommunication services, it will not constitute part of taxable services.

[132] Would include the rentals and all other charges like STD, Shifting Charges etc.
[133] Ministry's Letter F. No. B.II/I/2000-TRU, dated 9-7-2001 -
[134] V State of Kerala 2009 TIOL 555 KERALA-VAT
[135] V UOI 2004 (177) ELT 99 (Ker)

(iv) CBEC[136] has clarified that an amount collected for delayed payment of telephone bills is not to be treated as consideration charged for provision of telecom service and therefore does not form part of taxable value.

(v) Central Government[137] has exempted fully the following services:

(a) Departmentally run public telephones for local calls;

(b) Guaranteed public telephone operating only for local calls;

(c) Free telephone at airports and hospitals only for local calls.

### *14.1 Clause (zzzy) - To any person, by any other person in relation to mining of mineral, oil or gas*

(i) Service to any person, by any other person in relation to mining of mineral, oil or gas.

(ii) The Government in its letter[138] on Budgetary changes has clarified that geological, geophysical or other prospecting, surface or sub-surface surveying or map-making services relating to location or exploration of deposits of mineral, oil or gas are leviable to service tax under “survey and exploration of mineral service [section 65(105)(zzv)]. Services such as -

(a) site formation and clearance, and excavation and earth moving, drilling wells for production/exploitation of hydrocarbons (development drilling);

(b) well testing and analysis services;

(c) sub-contracted services such as deploying workers and machinery for extraction/breaking of rocks into stones, sieving, grading, etc.;

(d) outsourced services;

### *15.1 Clause (zzzz) - To any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce*

(i) [139]Services to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce.

An immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce [Explanation 2 to Clause (zzzz)].

(ii) Immovable property includes:

(a) building and part of a building, and the land appurtenant thereto;

(b) land incidental to the use of such building or part of a building;

(c) the common or shared areas and facilities relating thereto; and

(d) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate;

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[136] Master Circular No 96/7/2007 dt 23.8.2007 in para 002.01
[137] Notification 3/94-ST dt 30.6.1994
[138] D.O.F. No. 334/1/2007-TRU dt 28.2.2007
[139] Amended by Finance at 2010 w.r.e.f. 1.6.2007

(e) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce[140],

but 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.

(iii) Renting[141] of immovable property includes renting, letting, leasing, licensing or other similar arrangements of immovable property <u>for use in the course or furtherance of business or commerce</u> but does not include:

(a) renting of immovable property by a religious body or to a religious body; or

(b) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre[142].

CBEC[143] has clarified that use of immovable property is allowed for placing vending/dispensing machines in malls and other commercial premises and erection of communication towers on buildings. In such cases, there may or may not be transfer of right of possession or control of the immovable property in favour of the person using such property.

Renting of immovable property service includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the immovable property. Therefore service tax is leviable in these cases.

(iv) It is clarified vide Explanation 1 that for the purposes of this clause, <u>“for use in the course or furtherance of business or commerce”</u> includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings.

(v) The Central Government has exempted[144] the property tax **<u>levied and collected</u>** by local bodies from service tax. However, any amount such as interest, penalty paid to the local authority by the service provider on account of delayed payment of property tax or any other reasons shall not be treated as property tax for the purposes of deduction from the gross amount charged:

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[140] Inserted by Finance Act 2010

[141] Renting of immovable property includes allowing or permitting the use of space in an immovable property, irrespective of the transfer of possession or control of the said immovable property.

[142] Commercial training or coaching centre means any institute or establishment providing commercial training or coaching for imparting skill or knowledge or lessons any subject or field other than sports and includes coaching or tutorial classes. The training provided may be with or without issuance of a certificate. It shall not include preschool coaching or training centre or any institute or establishment, which issues any certificate or diploma, or degree or any educational qualification recognised by law for the time being in force.

Commercial training or coaching centre shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive - Explanation inserted by Finance Act 2010.

[143] Para 5 of Circular/Letter D.O.F. No. 334/1/2008-ST, dated 29-2-2008

[144] Notification No. 24/2007 – Service Tax dated 22 May 2007

Wherever the period for which **property tax paid** is different from the period for which service tax is paid, property tax proportionate to the period for which service tax is paid shall be calculated and the amount so calculated shall be excluded from the gross amount charged for renting of the immovable property for the said period, for the purposes of levy of service tax.

| | | |
|---|---|---|
| Property tax paid for April to September | = | Rs. 12,000/- |
| Rent received for April | = | Rs. 1,00,000/- |
| Service tax payable for April | = | Rs. 98,000/- (1,00,000–2,000) * rate of service tax |

Also refer Rule 6(4C)[145] of the Service tax Rules, for payment of Service tax.

CBEC[146] has clarified that the above notification exempts taxable service provided by any person in relation to renting of immovable property from service tax equivalent to service tax payable on the amount of property tax, actually paid by the service provider to the local authority. In other words, service tax is payable on the rental amount received less the **<u>actual amount of property tax paid</u>**.

(vi) CBEC has clarified[147] that the activity of screening of film supplied by a film distributor cannot fall under 'Business Support Service'. This is for the reason that in order for a service to fall under Business Support the principal activity is to be undertaken by the client while assistance or support is provided by the taxable service provider. In the instant case the theatre owner screens/exhibits a movie that has been provided by the distributor. Such an exhibition is not a support or assistance activity but is an activity on its own accord.

Therefore screening of a movie is not a taxable service except where the distributor leases out the theater and the theater owner get a fixed rent. In such case, the service provided by the theater owner would be categorized as 'Renting of immovable property for furtherance of business or commerce' and the theater owner would be liable to pay tax on the rent received from the distributor.

Further where as regards screening of films, it was observed by the CBEC[148] that generally a film distributor supplies a print of film to the owners of movie theaters who run the same using their manpower and infrastructure. The distributor has no control over the screening of films. He gets either the share of the total collections or a fixed sum. Hence there is renting involved to be taxed under this category.

(vii) CBEC in its master circular[149] has clarified that services used for construction of an immovable property are input service to the immovable property. Immovable property is not subject to excise duty or service tax and such immovable property is neither service nor goods. Hence service tax so paid cannot be set off against service tax payable on renting of an immovable property.

[145] If any person liable to pay service tax in respect of services provided or to be provided in relation to renting of immovable property, has paid to the credit of Central Government any amount in excess of the amount required to be paid towards service tax liability for a month or quarter, as the case may be, on account of non-availment of deduction of property tax, from the gross amount charged for renting of the immovable property for the said period at the time of payment of service tax, the assessee may adjust such excess amount paid by him against his service tax liability. The adjustment shall be made within one year from the date of payment of such property tax. The details of such adjustment shall be intimated to the Superintendent of Central Excise having jurisdiction over the service provider within a period of fifteen days from the date of such adjustment.

[146] Para 8 of Letter F. No. B1/16/2007-TRU, dated 22-5-2007

[147] Circular No. 109/03/2009 dt 23 February 2009

[148] F No 137/186/2007-CX-4 dt 23.8.2007 Para 2 of the Instructions.

[149] Master Circular 96/7/2007-ST dt 23.8.2007

(viii) Renting of immovable property used for furtherance of business is liable to service tax. It does not matter whether the Government of private parties rent it. However, the Government[150] has clarified that Central Excise office does not fall under furtherance of business and commerce as it is an activity of performing statutory functions by a public authority and not an activity of business or commerce. Therefore it is not liable to pay service tax under this category.

(ix) State Warehousing Corporation had merely rented out its godowns and did not provide any service as storage or warehousing keeper, they had provided the service of renting as defined under 'renting of immovable property'. The storage or warehousing service provider is required to make arrangements for space to keep the goods, loading and un-loading and stacking of goods in storage areas, keeping inventory of goods, making security arrangements, providing insurance cover etc. Now letting out storage premises on rent without providing any other service as defined under the storage and warehousing service attracts service tax under this category.

Income/payment received from any person on account of rent is chargeable to service tax under the category 'renting of immovable property', irrespective of the fact whether the space so rented is used for agricultural produce or otherwise as there is no such exemption[151].

### *16.1 Clause (zzzza) - To any person in relation to the execution of a works contract*

Services to any person, by any other person in relation to the execution of a works contract[152], excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

CBEC has clarified[153] that if the nature of activity carried out is commercial or industrial construction service or erection, commissioning or installation service and they are excluded from the levy of service tax under these two services, then even in the case of works contract, they would generally remain excluded from the levy of service tax. It is the nature of contract rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services.

Works contract means a contract wherein:

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out:

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

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[150] Instruction No 137/280/2007-CX4 dt 17.12.2007

[151] Letter F. No.137/26/2007-CX-4, dated 5-12-2008

[152] 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 - Para 9 of Letter B1/16/2007-TRU, dated 22-5-2007

[153] Circular No 123/5/2010-TRU dt 24.5.2010

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

(iii) The Central Government, has exempted[154], services provided in relation to the execution of works contract, provided to any person by any other person in relation to commercial or industrial construction service of port or other port, from the whole of the service tax.

However, commercial or industrial construction service or services provided in relation to the execution of works contract in relation to construction of port or other port shall not include services of completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port.

In other words services such as completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port shall be outside the scope of this exemption and hence, leviable to service tax.

(iv) Central Government has exempted[155] fully the taxable service, in relation to execution of a works contract in respect of canals, other than those primarily used for the purposes of commerce or industry.

CBEC[156] has clarified that as the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such construction should be charged to service tax.

The second issue is about Government taking up construction activity of dams, buildings or infrastructure construction etc. through EPC (Engineering Procurement & Construction) mode. The said service is covered under section 65(*105*)(*zzzza*) of Finance Act, 1994. The said section itself excludes works contract in respect of dams, roads, airports, railways, transport terminals, bridges and tunnels executed through EPC mode. Hence works contract in respect of above works even if done through EPC mode are exempt from payment of service tax.

(v) CBEC[157] clarification on valuation of Works Contract

Works contract is a composite contract for supply of goods and services. A composite works contract is vivisected and,—

(a) VAT/sales tax is leviable on transfer of property in goods involved in the execution of works contract [Art. 366(29A)(b) of the Constitution of India], and

(b) service tax will be leviable on services provided in relation to the execution of works contract.

In the case of works contract, the taxable value of services is to be determined by vivisecting the composite works contract. Rule 2A of Valuation Rules, provides that value of works contract service shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract. Thus, wherever the service provider maintains records, the value of services shall be the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the works contract.

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[154] Notification No. 25/2007 – Service Tax dated 22 May 2007
[155] Notification No 41/2009 - Service Tax, dated 23-10-2009
[156] Circular No. 116/10/2009-S.T., Dated 15-9-2009

[157] Para 9 of Letter B1/16/2007-TRU, dated 22-5-2007

Wherever VAT/sales tax on transfer of property in goods involved in the execution of works contract is paid on actual value, the same value is also taken for the purpose of determining the value of works contract service. In other cases, value of works contract service shall be determined based on the actuals. It has also been explained that value of works contract service shall include:

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract, the property in which is not transferred in the course of execution of a works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

If the gross amount charged for the works contract is inclusive of VAT or sales tax, the value for the purposes of service tax shall be computed as follows:

[Gross amount charged - (Value of transfer of property in goods involved in the execution of works contract and VAT or sales tax paid, if any, on the said transfer of property in goods involved in the execution of works contract)].

(vi) Rule 2A – Determination of value of services involved in the execution of a works contract

Subject to the provisions of section 67, the value of taxable service in relation to services involved in the execution of a works contract shall be determined by the service provider in the following manner:

(I) Value of works contract service determined shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

(a) gross amount charged for the works contract shall not include[158]:

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

B. the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire.

(b) value of works contract service shall include:

A. 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

B. the value of all the services that are required to be provided for the execution of the works contract[159].

[158] These exclusions shall not 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.

(II) If VAT or sales tax, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or sales tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under clause (i).

(vii) The Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007[160] provides:

This rule overrides Rule 2A of the valuation rules. The person liable to pay service tax in relation to works contract service shall have the option to pay 4% of the gross amount charged for the works contract instead of the prescribed rate.

This option shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract[161].

The gross amount charged for the works contract shall not include VAT or sales tax, paid on transfer of property in goods involved in the execution of the said works contract. However, the following conditions have to be satisfied

(a) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract;

CBEC[162] has clarified that there is no restriction to take CENVAT credit of duty paid on capital goods and service tax paid on input services.

(b) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

(viii) CBEC[163] clarification on Classification of taxable services - Service tax on on-going works contracts entered into prior to 1-6-2007

It has been brought to the notice of the Board that the following confusions/ disputes prevail with respect to long term works contracts which were entered into prior to 1-6-2007 (when the taxable service, namely, works contract came into effect) and were continued beyond that date:

(*i*) While prior to the said date services like Construction; Erection, Commissioning or Installation; Repair services were classifiable under respective taxable services even if they were in the nature of works contract, whether the classification of these activities would undergo a change?

(*ii*) Whether in such cases of continuing contracts, the Works Contract (Composition Scheme for Payment of Service Tax) Rules would be applicable?

[159] Notification No. 23/2009-S.T., dated 7-7-2009
[160] Notification No. 32/2007-Service Tax dated 22 May 2007
[161] Notification No. 23/2009-S.T., dated 7-7-2009
[162] circular no. 96/7/2007-st, dated 23-8-2007, as amended by circular no. 98/1/2008-st, dated 4-1-2008
[163] Circular No. 128/10/2010-ST, dated 24-8-2010

As regards the classification, with effect from 1-6-2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long-term contracts even though part of the service was classified under the respective taxable service prior to 1-6-2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A, it would be the appropriate classification for the part of the service provided after that date.

As regards applicability of composition scheme, the material fact would be whether such a contract satisfies rule 3(3) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules. This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract. Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service commenced prior to 1-6-2007 and any payment of service tax was made under the respective taxable service before 1-6-2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 1-6-2007 but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 1-6-2007, such contracts would be eligible for opting of the composition scheme.

### *17.1 Clause (zzzzc) - To any person in relation to asset management including portfolio management and all forms of fund management*

Services to any person, by any other person, in relation to asset management including portfolio management and all forms of fund management.

Similar services provided by a banking company or a financial institution including a non-banking financial company or any other body corporate or commercial concern which are already covered by clause (zm) would not be covered by this clause.

### *18.1 Clause (zzzzl) - To any person in relation to transport of goods through waterways*

(i) Services to any person, by any other person, in relation to transport of:

(a) coastal goods[164];

(b) goods through national waterway[165]; or

(c) goods through inland water[166].

[164] Coastal goods has the meaning assigned to it in section 2(7) of the Customs Act – Coastal goods means goods, other than imported goods, transported in a vessel from one port in India to another.

[165] National Waterways means the Inland Waterway declared by Section 2 of the National Waterways Act to be a National Waterway. If the Parliament declared by law any other waterway to be a national waterway, then such waterway shall also be deemed to be a national waterway.

[166] Inland water means any canal, river, lake or other navigable water – Section 2(b) of the Inland Vessels Act.

(ii) Central Government has fully exempted[167] the following provided to any person in relation to the transport of goods, through national waterway, inland water and coastal shipping:

| Sl No. | Description of Goods |
|---|---|
| 1 | Foodstuffs including edible oil seeds and edible oils; food grains (cereals and pulses) and flours; fruits, vegetables and flowers; agricultural, fishery, marine produce; meat and poultry; water; tea and coffee; salt, sugar, sugarcane; grocery; milk and milk products; livestock and cattle fodder; dhoties , sarees and voils; long cloth, sheeting Fertilizer whether inorganic, organic or mixed |
| 2 | Petroleum and petroleum products |
| 3 | Hank yarn made wholly from cotton |
| 4 | Hank yarn made wholly from cotton |
| 5 | Raw jute and jute textile |
| 6 | Seeds of food crops and seeds of fruits and vegetables; seeds of cattle fodder and jute seeds |
| 7 | Medicine/pharmaceutical products |
| 8 | Relief materials meant for victims of natural or manmade disasters, calamities, accidents and mishap |
| 9 | Defence/ military equipments |
| 10 | Luggage of passengers, whether carried as personal luggage in the ship or booked separately as consignment/ postal mail / mail bags/Household effects |
| 11 | Newspaper/magazines registered with Registrar of Newspapers |

### *19.1 Clause (zzzzo) – Health services undertaken by Hospitals or Medical Establishments*

(i) Services by any hospital, nursing home or multi-specialty clinic:

(a) to an employee of any business entity[168], 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

(b) 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.

(ii) As this service is made operative from 1 July 2010, Central Government[169] has exempted service tax on any amount received by way of advance before 1 July 2010.

[167] Notification No. 31/2009 - Service Tax dt 31st August, 2009
[168] Business Entity includes an AOP, BOI, Company or Firm but does include an Individual - Section 65(19b).
[169] Notification No. 36/2010 - Service Tax dt 22 June 2010

### *20.1 Clause (zzzzq) – Services of Promotion of Brand of Goods / Services etc.*

(i) Services to any person, by any other person, through a business entity[170] or otherwise, under a contract

- for promotion or marketing of a brand[171] of goods, service, event; or
- endorsement of name, including a trade name, logo or house mark of a business entity by appearing in advertisement and promotional event; or
- carrying out any promotional activity for such goods, service or event.

(ii) As this service is made operative from 1 July 2010, Central Government[172] has exempted service tax on any amount received by way of advance before 1 July 2010.

### *21.1 Clause (zzzzt) – Copyright services*

(i) Services to any person, by any other person[173], for:

- transferring temporarily; or
- permitting the use or enjoyment of,
- any copyright defined in Section 13(1)[174] of the Copyright Act. However, copyright on original literary, dramatic, musical and artistic work falling under section 13(1)(a) would continue to remain outside the scope of service tax.

(ii) As this service is made operative from 1 July 2010, Central Government[175] has exempted service tax on any amount received by way of advance before 1 July 2010.

### *22.1 Clause (zzzzu) – Services of Preferential allotment provided by Builder*

(i) Services provided to

- a buyer, by a builder (of a residential complex176 / a commercial complex) or
- any other person authorised by such builder,

for providing preferential location[177] or development of such complex.

(ii) Services which are not covered under this category:

- Charges for providing parking space;
- Services which are covered under Clause (zzg) - Management, Maintenance or Repair Services, Clause (zzq) – Commercial or Industrial Construction Services, Clause (zzzh) - Construction of Residential Complex Services.

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[170] Business Entity includes an AOP, BOI, Company or Firm but does include an Individual - Section 65(19b).
[171] Brand includes symbol, monogram, label, signature or invented words which indicate connection with the said goods, service, event or business entity.
[172] Notification No. 36/2010 - Service Tax dt 22 June 2010
[173] The Government through TRU-II Letter D.O.F. No 334/1/2010-TRU dt 26.2.2010 has clarified that, companies distributing music, owners of copyright of cinematographic films etc., would be the taxpayers
[174] Section 13(1) of the Copyright Act defines Copyright to include the following work:
(a) Original literary, dramatic, musical and artistic work;
(b) Recording of cinematograph films;
(c) Sound Recordings.
[175] Notification No. 36/2010 - Service Tax dt 22 June 2010
[176] Would mean the same as defined in Clause (zzzh)
[177] Preferential location means any location having extra advantage which attracts extra payment over and above the basic sale price.

- Development charges, to the extent they are paid to the State Government or Local Bodies would be excluded from the taxable value.
- Any service provided by Resident Welfare Association or Cooperative Group housing Society consisting of residents / owners as their members.

(iii) As this service is made operative from 1 July 2010, Central Government[178] has exempted service tax on any amount received by way of advance before 1 July 2010.

### *23.1* *Section 67 – Valuation of taxable services*

(i) CBEC has clarified that if the service charges as well as the service tax have been paid in any prescribed manner which is entitled to be called 'gross amount charged' then credit should be allowed. Thus, in the case of "Associate Enterprises", credit of service tax can be availed of when the payment has been made to the service provider in terms of book entries and the service tax has been paid to the Government Account.

(ii) CBEC has also clarified[179] that in the cases where the receiver of service reduces the amount mentioned in the invoice/bill/challan and makes discounted payment, then it should be taken as final payment towards the provision of service. The mere fact that finally settled amount is less than the amount shown in the invoice does not alter the fact that service charges have been paid and thus the service receiver is entitled to take credit provided he has also paid the amount of service tax, (whether proportionately reduced or the original amount) to the service provider. The invoice would in fact stand amended to that extent. The credit taken would be equivalent to the amount that is paid as service tax. However, in case of subsequent refund or extra payment of service tax, the credit would also be altered accordingly.

### *24.1* *Documents and accounts*

In case the provider of taxable service is aircraft operator providing the service of air transport of passenger, an invoice, a bill or as the case may be, challan shall include ticket in any form by whatever name called and whether or not containing registration number of the service provider, classification of the service received and address of the service receiver but containing other information in such documents as required[180].

[178] Notification No. 36/2010 - Service Tax dt 22 June 2010
[179] Circular No. 122/03/2010 – ST dt 30 April 2010
[180] Notification No. 39/2010 – ST dt 28 June 2010