

Finance Bill, 2010 – Issues

This Note sets out some of the issues (identified during at the preliminary stage of discussion on 26 and 27 February, 2010) that are likely to arise in application of the amendments proposed by Finance Bill, 2010 relating to Service Tax. Members and especially, Regional Councils, Branches, Study Circles and Chapters may consider these and add any other issues relating to indirect taxes that they identify during course of discussions on the Finance Bill. All are also encouraged to send these to Indirect Taxation Committee on or before 15 March, 2010 so that they can be compiled and considered by the Committee at its meeting scheduled on 17 March, 2010.

The Committee is also considering developing FAQs in due course and welcomes questions as also answers from members in this regard. These would be considered by the Committee and are proposed to be hosted on the website.

Please send your comments, suggestions, questions and answers to the Committee at itdc@icai.org

1. Section 65(19a) - Definition of “business entity”

The definition is an inclusive one and excludes an “individual”. The issue that arises is whether an individual includes “proprietary concern”?

2. Port and Airport Service

The definition of “port service” and “airport service” and the taxable service in that regard is modified to cover any service rendered within a port/airport and a proviso is added to the effect that provisions of S 65A (classification) will not apply to any service when the same is rendered wholly within the port and airport. Majority of the other categories of services which when rendered within the port/airport that would get covered under this category like “storage and warehousing”, “management, maintenance and repair”, “cargo handling” as also “port service” and “airport service” would fall under performance based service group for the purpose of determination of import and export of service. Some part of the “ship management service” may also get covered under “port service” which is covered under recipient based service group for the purpose of determination of export and import of service.

Is there a need to place “port” and “airport” service under the recipient based service group for the purpose of determination of export and import service?

3. Commercial Training or coaching service

An Explanation is added to Section 65(105)(zzc) explaining the meaning of the expression “commercial training or coaching center” with retrospective effect from

1.7.2003. There are Tribunal judgments holding otherwise. The issues that therefore, arise are:

- (i) What happens in the case where an assessee has not paid tax based on such Tribunal judgments?
- (ii) Would such an assessee now have to pay tax for past period and would such tax have to be with interest?
- (iii) Can the demand for the past period be raised on the basis of this Explanation? If so, can it be within normal period of limitation (1 year) or can it be for extended period? What about penalty?
- (iv) What about the nature of coaching – is it required to be “commercial” and would exclude say, “spiritual” coaching or training?

4. Commercial or industrial and residential complex construction

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

- (i) Whether a mere deeming fiction added through an Explanation can deem such an activity to be “service” – would it be valid constitutionally?
- (ii) In cases where a prospective buyer pays advance and books flat/apartment which does not result in transferring the property by the builder to the prospective buyer and, consequently, the question of builder providing service to the buyer does not arise as was explained by the Board in the Circular of January 29, 2009 - can mere addition of Explanation change the legal position?
- (ii) The amendment places persons buying premises but, making payment at different times and otherwise placed equally, in unequal tax position and therefore, can it be justified from Constitution perspective ?
- (iii) When a prospective buyer makes an advance payment to the builder against booking of specified unit in a building, that part also includes a price towards the land on which the building is being constructed and treating the entire amount being paid by the prospective buyer to the builder would amount to imposing a tax on transfer of land which a State subject – can it be upheld ?

- (iv) The explanation uses the expression “intended for sale” – Therefore, it means that if the building is intended for “renting” without sale, this Explanation would not apply ?
- (v) It is quite likely that on the basis of this amendment the States also seeks to tax such transaction as liable to VAT – would it lead to substantial double taxation and increase in the cost of properties? Should a mechanism to ensure that full credit of taxes paid at earlier stages is made available be developed?
- (vi) Entering into an agreement to sell as also acquiring premises after construction attracts stamp duty at the State-level. Would this lead to double taxation on that count also and appropriate mechanism needs to be developed to relieve double taxation?
- (vii) Issuance of completion certificate often takes very long and possession is given before that and in some cases, buyers occupy the premises also. In such cases, though the premises are purchased as immovable property, yet it would be liable to Service tax? Is this in excess of Center’s powers?
- (viii) There would be many ongoing constructions/agreements and buyers would have paid part amounts, the Section does not set out the manner in which these transaction would need to be dealt with – Is there need for grandfathering those cases ?

5. Aircraft operation

It needs to be clarified as to whether it would apply to the journeys undertaken on or after the date on which the notification is issued. How would the user be able to take input tax credit especially, where the tickets are purchased from the agents? Are the agents, those of the airline or of the buyer and how would Valuation Rules apply in such cases ? What about the situation where there are multiple agents?

6. Renting of immovable property

The definition has been modified with retrospective effect from 1st June, 2007. The issues that arise are:

- (i) What happens to the cases where a landlord did not charge/ pay tax on rent on the basis of Delhi High Court judgement? No time has been provided for making payment without or with interest in the validation Section 76 of the Finance Bill,2010.
- (ii) Can new show cause notices be issued for the past period for recovery of tax not paid from June, 2007? If so, would it be for normal limitation period of one year or for extended period of five years?

(iii) What amounts are to be included/excluded for computing taxable amount of service?

7. Copyrights

The new entry, Section 65(105)(zzzzt), seeks to impose Service tax on temporary transfer or permitting use or enjoyment of copyright relating to sound recording and cinematographic film. Some of the States impose VAT on transfer or use or enjoyment of such copyrights treating the same as “deemed sale”. Further, the output service of the users of these copyrights may be subjected to entertainment tax at state level which would lead to significant cascading too. What provision needs to be brought in to avoid such double taxation?