


Analysis of Indirect Tax Proposals

Budget 2008-2009

By

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Mumbai ● Delhi ● Ahmedabad

Service Tax

New Entries

Existing Entries : Scope Widened

Key Legislative Changes

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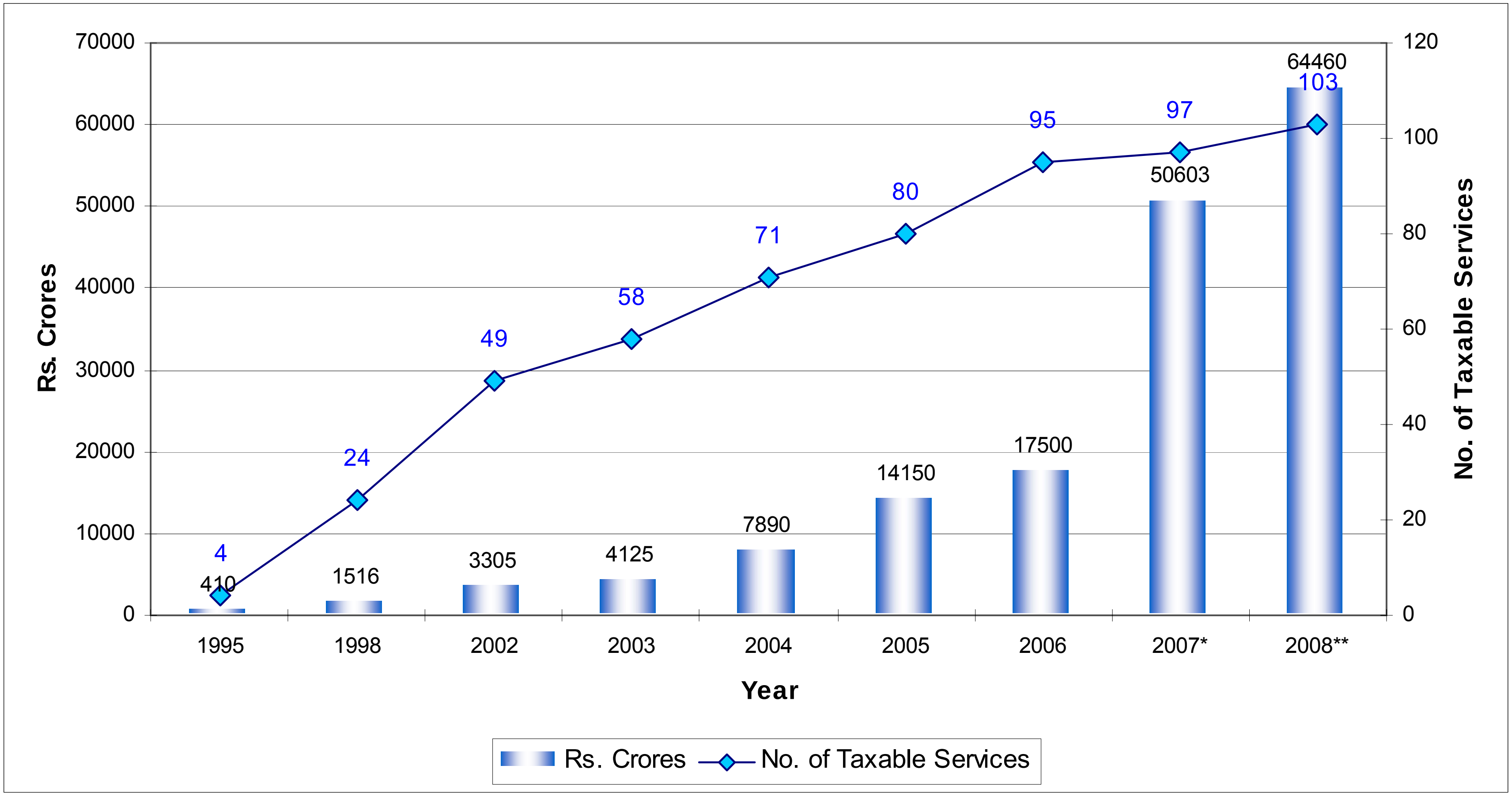
Service tax - Overview



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New Taxing Entries

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Information Technology Software Service…

- Taxable service
  - Information Technology Software (‘IT Software’) defined – Section 65(53a) introduced
    - ““information technology software” means any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.”

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…Information Technology Software Service…

- Taxable service
  - Service provided or to be provided to any person by any other person
  - Services in relation to IT Software for use in the course, or furtherance, of business or commerce, <u>including</u>
    - Development of IT Software
    - Study, analysis, design and programming of IT Software
    - Adaptation, upgradation, enhancement, implementation and other similar services related to IT Software
    - Providing <u>advice, consultancy and assistance</u> on matters related to IT Software including, conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary IT Software

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…Information Technology Software Service…

- Acquiring the right to use IT Software for commercial exploitation including right to reproduce, distribute and sell IT Software and right to use software components for the creation of and inclusion in other IT Software products
- Acquiring the right to use IT Software supplied electronically

- Scope very wide to cover all types of IT Software Services
  - No distinction between ‘packaged software’ and ‘customised software’
- Services involving both hardware and software engineering together will be liable to Service tax under Consulting Engineer’s Services

…Information Technology Software Service…

- TRU Letter - D.O. F. No.334/1/2008-TRU dt. 29.2.2008
  - Para 4.1.3
    - "Packaged software sold off the shelf, being treated as goods, is leviable to excise duty @ 8%. In this budget, it has been increased from 8% to 12% vide notification No. 12/2008-CE dated 01.03.2008."
  - Para 4.1.5
    - "Software and upgrades of software are also supplied electronically, known as digital delivery. **Taxation is to be neutral and should not depend on forms of delivery.** Such supply of IT software electronically shall be covered within the scope of the proposed service."
- FM's Speech
  - Para 151
    - "Similarly, I propose to increase the excise duty on packaged software from 8 per cent to 12 per cent to bring it on par with customised software which will attract a service tax of 12 per cent."

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…Information Technology Software Service…

- FM's Speech - Budget 2006-07
  - Para 138
    - "I propose to impose an 8 per cent excise duty on packaged software sold over the counter. Customized software and software packages downloaded from the internet will be exempt from this levy."
- Geneva Ministerial Declaration on Global Electronic Commerce [May 1998]
  - No levy of any indirect tax on internet downloads of software
  - Affirmed by Tribunal - Not liable to Customs duty
    - Pantex Geebee Fluid Power Ltd. Vs. CC [2003 (160) E.L.T. 514 (Tri. - Bang.)]

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…Information Technology Software Service

Type of Software	Nature of Payment	Mode of Delivery	Tax Implications	
Packaged	License Fees	Electronic	VAT / Customs / Excise	✗
			Service tax *	Uncertain
		Tangible Media	VAT / Customs / Excise	✓
			Service tax *	Uncertain
Customised	License Fees	Electronic	Service tax	✓
		Tangible Media	VAT *	Uncertain
			Customs / Excise	Exempt
			Service tax	✓
	Development Fees		Service tax	✓

* BSNL Vs. UOI [2006 (2) STR 161 (SC)]

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Supply of Tangible Goods for Use Service…

- Taxable service
  - Services provided or to be provided by any person to any other person
  - Services in relation to
    - supply of tangible goods, including
      - machinery, equipment and appliances
      - for use, without transferring right of possession and effective control of such machinery, equipment and appliances
- Aforesaid transactions not liable to Sales tax
  - State of Andhra Pradesh Vs. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114 (SC)
    - Where only a restrictive right is given to the customer and the possession and effective control over the goods lies with Lessor, there is no transfer of right to use the equipment and consequently, there is no liability to Sales tax (Lease tax)

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…Supply of Tangible Goods for Use Service…

- TRU Letter dt. 29.2.2008
  - Para 4.4.3
    - "Proposal is to levy service tax on such services provided in relation to supply of tangible goods, including machinery, equipment and appliances, for use, with no legal right of possession or effective control. Supply of tangible goods for use and leviable to VAT / sales tax as deemed sale of goods, is not covered under the scope of the proposed service…."
  - Para 4.4.2
    - "Excavators, wheel loaders, dump trucks, crawler carriers, compaction equipment, cranes, etc., offshore construction vessels & barges, geo-technical vessels, tug and barge flotillas, rigs and high value machineries are supplied for use, with no legal right of possession and effective control. Transaction of allowing another person to use the goods, without giving legal right of possession and effective control, not being treated as sale of goods, is treated as service."

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…Supply of Tangible Goods for Use Service

- Service tax or VAT?
  - Service tax
    - No transfer of effective control and possession by Lessor
  - VAT
    - Transfer of effective control and possession by Lessor
  - Determination of nature of transaction
    - Essentially a question of fact(s)
    - To be decided based on the terms of the contract and other material facts

Investment Management Service…

- Taxable service
  - Service provided or to be provided by an insurer on life insurance business to a policy holder
  - Services in relation to management of investment, under unit linked insurance business (ULIP scheme)
- Management of segregated fund of unit linked insurance business is deemed to be the service provided by the insurer to the policy holder
- Gross amount charged will be computed as per the illustration:
  - Total premium paid under ULIP policy = Rs.100
  - Risk premium = Rs. 10
  - Amount actually invested = Rs. 85
  - Gross amount charged for service provided = Rs. 5 [100 – (10+85)]

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…Investment Management Service

- Under ULIP, risk premium attributable to insurance risk is covered under the taxing entry of ‘Insurance Services’ whereas management of investment portion will be taxed under the proposed taxable service
  - Proposal brings aforesaid services in line with asset management service provided under Mutual Funds – FM’s Speech
  - T.R.U. Letter dated 29.02.2008
    - *“Insurance companies charge from the policyholder, initially and periodically, various charges, in addition to risk premium, relating to management of the segregated fund under various names, such as, premium allocation charges, fund management fees, fund switching charges, surrender charges, These are consideration for providing services relating to investment management.”*

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Stock Exchange Service

- Taxable service
  - Services provided or to be provided by a recognized stock exchange to any person
  - Services in relation to
    - Assisting, regulating or controlling the business of buying, selling or dealing in securities
    - Also includes services in relation to trading, processing, clearing and settlement of securities
- Taxing entry proposes to cover services provided by entities such as Bombay Stock Exchange, National Stock Exchange, etc. in relation to securities
  - CBEC Letter F. No. 137/57/2006-CX-4 dt. 18.5.2007 no longer relevant
    - Services by such entities not liable under 'Club or Association Service' or 'Business Auxiliary Service'

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Commodity Exchange Service

- Taxable service
  - Services provided or to be provided by a recognized association or a registered association to any person
  - Services in relation to
    - Assisting, regulating or controlling the business of the sale or purchase of any goods or forward contracts, and,
    - Includes services in relation to trading, processing, clearing and settlement of transactions in goods or forward contracts
- Taxing entry proposes to cover services rendered by a commodity exchange
  - CBEC Letter F. No. 137/57/2006-CX-4 dt. 18.5.2007 no longer relevant
    - Services by such entities not liable under ‘Club or Association Service’ or ‘Business Auxiliary Service’

Processing and Clearing Service

- Taxable service
  - Services provided or to be provided by a <u>clearing house</u> to any person
  - Services in relation to
    - Processing, clearing and settlement of transactions in securities, goods or forward contracts
    - Services incidental to or connected with such securities, goods or forward contracts
- Taxing entry proposes to cover services rendered by entities such as
  - National Securities Clearing Corporation Limited, Bank of India Shareholding, Clearing Corporation of India Ltd., etc.
- Services required to complete transactions of securities, goods and forward contracts are proposed to be taxed under this entry

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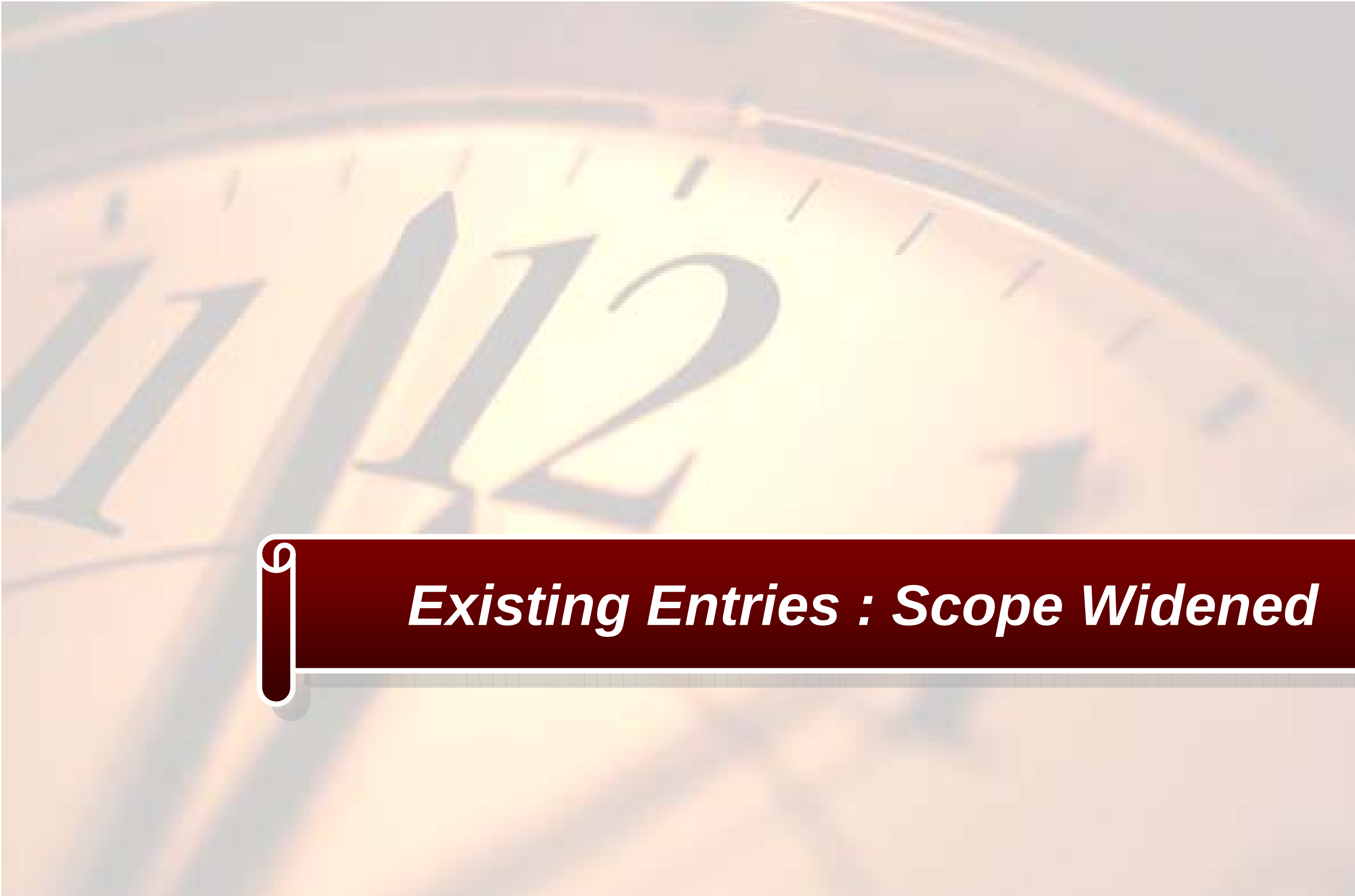

Existing Entries : Scope Widened

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Banking and Other Financial Service…

- Scope enlarged to include purchase or sale of foreign currency including money changing
  - Foreign Exchange Broking Service – Section 65(105)(zzk) also amended to include purchase and sale of foreign currency including money changing
  - Authorised money changers and authorised dealers engaged in purchase or sale of foreign currency now brought under the purview of Service tax
  - Value for the levy of Service tax
    - Commission / brokerage received by foreign exchange brokers explicitly stated
      - However, consideration received by money changers or authorised dealers is not explicitly stated
    - Explanation added to include those instances where consideration received is not explicitly stated

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…Banking and Other Financial Service…

- TRU Letter states that an option available to pay Service tax @ 0.25% of the gross amount of the currency exchanged –
  - Rule 6(7B) to be inserted from the date when revised scope becomes effective

Illustration

- Buying rate : GBP 1 = Rs. 79
  - Purchase of GBP 100 by the service provider

    Gross amount of currency exchanged = Rs. 7900 (Rs. 79 x 100)

    Service tax payable = Rs. 19.75 (0.25% of 7900)

- Selling rate : GBP 1 = Rs. 80
  - Purchase of GBP 100 by the service provider

    Gross amount of currency exchanged = Rs. 8000 (Rs. 80 x 100)

    Service tax payable = Rs. 20 (0.25% of 8000)

…Banking and Other Financial Service

- Circulars no longer relevant
  - Circular No. 92/3/2007-ST dt. 12.3.2007
    - Activity of money changing not liable to Service tax
  - Circular No. 96/7/2007-ST dt. 23.8.2007
    - Buying and selling of foreign exchange where no amount is separately charged as commission / brokerage not liable to Service tax

Renting of Immovable Property

- Explanation inserted
  - Service tax payable irrespective of transfer of possession or control of the immovable property
  - Whether effective prospectively or retrospectively?
    - TRU Letter dt. 29.2.2008 - para 5.5.3
      - “It is proposed **to clarify by way of removal of doubts** that 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. Field formations may ensure that service tax is collected in all such cases.”
    - Effective retrospectively
  - Species of transactions covered
    - Use of immovable property allowed for
      - placing vending / dispensing machines in malls / other commercial premises
      - erection of communication towers on buildings

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Business Auxiliary Service…

- Services in relation to promotion or marketing of games of chance sought to be covered
  - Explanation added to sub-clause (ii) to clarify
    - Services provided by distributors or agents in relation to promotion or marketing of games of chance
      - Games of chance like lottery, bingo, lotto etc. would be covered
      - Games of chance conducted through internet or other electronic networks also covered
  - Decision of the Hon’ble Sikkim High Court sought to be overcome
    - **Martin Lottery Agencies Ltd. Vs. UOI [2007(8) STR 561 (Sikkim)]** – promotion or marketing of lottery tickets not liable under sub-clause (i) as they are not goods

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…Business Auxiliary Service

- Whether lotteries / games of chance are a ‘service’ per se?
  - The Supreme Court in **Sunrise Associates Vs. Govt. of NCT of Delhi [(2006) 5 SCC 603]** has held that lottery is not goods but at best an actionable claim
  - Actionable claim defined in Section 3 of the Transfer of Property Act, 1882 to mean
    - “a claim to any debt, other than a debt secured by mortgage of immoveable property or by hypothecation or pledge of moveable property, or to any beneficial interest in moveable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.”
  - Business Auxiliary Service covers promotion or marketing of ‘goods’ or ‘services’
  - Actionable claims distinct from ‘goods’ and ‘service’
  - May not be covered under Business Auxiliary Service
    - Explanation may need to be challenged

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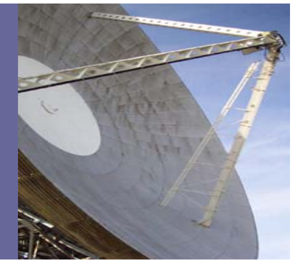
Cargo Handling Service

- Scope expanded to cover packing together with transportation, with or without other services like unpacking, loading, unloading etc.
  - Hitherto ambiguity in classification based on essential character between Transport of Goods by Road Service and Cargo handling Service – now resolved
  - Services of ‘Packers and movers’ would be classifiable under Cargo handling service

Internet Telecommunication Service



- Scope expanded to include
  - Internet backbone services including carrier services of internet traffic by one internet service provider to another internet service provider
  - Internet access services, including provision of a direct connection to the internet and space for the customer’s web page
  - Existing ‘Internet Telephony Service’ shall get subsumed in the proposed taxing entry
  - Services provided for accessing the internet through the computer network hitherto covered under ‘On-line Information and Database Access or Retrieval Service’ shall be covered under proposed entry

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Tour Operator's Service

- Definition of 'Tour Operator' sought to be amended to include 'point to point' tour in <u>any</u> vehicle having contract carriage permit
  - Permit for promotion of tourism under Motor Vehicles Act, 1988 and Authorization certificate under Motor Vehicles (All India Permit for Tourist Transport Operators) Rules, 1993 are granted only to a 'tourist vehicle'
    - Hitherto Service tax was leviable for tour only in tourist vehicles
  - Revised scope shall include those vehicles even if it doesn't qualify as a 'tourist vehicle'
  - Exclusions
    - Tour conducted in a vehicle having stage carriage permit
    - Tourist vehicle having contract carriage permit for use by educational bodies (other than commercial training / coaching centres)

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Other Services

- IT Software related amendments
  - Consulting Engineer’s Services
    - Explanation – Computer software engineering provided together with computer hardware engineering covered
  - Business Auxiliary Service
    - Explanation to exclude ‘Information services’ deleted
  - Technical Testing and Analysis Service
    - Scope expanded to cover services in relation to IT Software
  - Technical Inspection and Certification Service
    - Scope expanded to cover services in relation to IT Software
  - Management, Maintenance or Repair Service
    - ‘Property’ defined to include IT Software
- Scope of 39 specified services expanded
  - ‘any person’ substituted in place of ‘a client’ / ‘a customer’

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Key Legislative Changes

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Key Legislative Changes…

- Section 71 - Service tax return preparers
  - Scheme proposed to assist small tax payers
  - To be similar to Tax Returns Preparers Scheme under Income tax law

…Key Legislative Changes…

- Section 72 - Best judgment assessment
  - When there is a failure to
    - Furnish return under Section 70 of the Act
    - Assess the tax in accordance with the Act and the Rules after having filed the return
  - Then
    - “the Central Excise Officer, may require the person to produce such accounts, documents or other evidence as he may deem necessary and after taking into account all the relevant material which is available or which he has gathered, shall by an order in writing, after giving the person an opportunity of being heard, make the assessment of the value of taxable service to the best of his judgment and determine the sum payable by the assessee or refundable to the assessee on the basis of such assessment.”
  - No time limit prescribed
  - No guidelines issued for carrying out such assessment

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...Key Legislative Changes...

- Section 77 substituted to provide for specific penalties for certain offences
  - Penalty upto Rs. 5000 or Rs. 200 per day for period of failure/period of actual compliance, whichever is higher, for failure to
    - take registration
    - furnish information / produce documents called for
    - appear before the Central Excise Officer when issued with a summons to give evidence/ produce document in an inquiry
  - Penalty which may extend to Rs. 5000 for
    - Failure to keep, maintain or retain books of accounts/ other documents
    - Failure to pay tax electronically
    - Issue of invoice with incorrect and incomplete details or failure to account for an invoice in the books of account
    - For any other contravention under the Act or Rules where no penalty is specifically provided

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…Key Legislative Changes…

- Proviso inserted to Section 78 of the Act
  - Penalty under Section 76 cannot be levied if levied under Section 78 of the Act
    - Beneficial provision to assessee as penalty under both Sections 76 and 78 were being levied when extended period of limitation was invoked
    - No duality of penalty
  - Section 76 and Section 78 are mutually exclusive provisions
    - No scope for imposition of dual penalty
    - Section 76 does not require a guilty mind
    - Section 78 deals with cases of evasion of payment of Service tax with a guilty mind
      - **Opus Media and Entertainment vs. CCE, Jaipur [2007 (8) STR 368] –** (Interim order)

…Key Legislative Changes…

- Section 83 of the Act amended
  - Section 35FF of the Central Excise Act made applicable to Service tax

- Section 95(1E) inserted to empower the Central Government to issue orders for removal of difficulty
  - In respect of implementing, classifying or assessing the value of any taxable service incorporated by the Finance Bill, 2008
  - Upto 1 year from the date of enactment of the Finance Bill, 2008

…Key Legislative Changes…

- Difference in opinion amongst members of the Committee – Sections 86(2) and 86(2A)

Particulars	Sec. 86(2)	Sec. 86(2A)
Order passed by	CCE	CCE (Appeals)
Difference in opinion amongst members of the Committee of	Chief CCE	CCE
Matter to be referred to	CBEC	Chief CCE
Appeal to be filed by	CCE	CE Officer
Appeal to be filed before	Tribunal	Tribunal

…Key Legislative Changes…

- Amendments to Service Tax Rules, 1994
  - Facility to pay Service tax in advance extended to all tax payers
    - Amount paid in advance to be adjusted against liabilities in subsequent period
  - Limit for Self adjustment of Service tax under Rule 6(4)(B)(iii) increased to Rs. 1 lakh
  - Period for filing revised returns to correct a mistake or omission extended from 60 to 90 days
  - Proviso inserted to empower Central Excise Officer to waive penalty for delayed filing for return
    - Where gross amount of Service tax payable is NIL

…Key Legislative Changes…

- Other amendments
  - Threshold limit for Service tax increased from Rs. 8 lakhs to Rs 10 lakhs
    - Annual turnover for registration changed from Rs. 7 lakhs to Rs. 9 lakhs
  - Service tax on GTA to be paid only on 25% of the freight amount under the reverse charge method [Notification 13/2008-S.T]
    - No requirement to obtain declaration from GTA as regards non-availment of credit
  - Rate of Service tax payable under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007, increased from 2% to 4% [Notification 7/2008-S.T]

…Key Legislative Changes…

- Exemption from levy of Service tax [Notification 14/2008-S.T]
  - Services provided by a person located outside India to a hotel located in India
  - In relation to booking of accommodation in the said hotel
  - Booking is for a customer outside India

- Transactions between ‘associated enterprises’
  - Amendment in Rule 6 and Section 67 to clarify that Service tax is leviable on taxable services in a transaction between ‘associated enterprises’
    - Even if the amount is not actually received
    - But the amount is debited or credited in the books of account of the person liable to pay Service tax
      - Term ‘associated enterprise’ to have the same meaning as under the Income Tax Act, 1961
      - Clarification brought in as an anti-tax avoidance measure

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…Key Legislative Changes…

- Amendment to Export of Services Rules, 2005 [Notification 5/2008-S.T]
  - Service provided under the taxing entries of
    - (i) Management, maintenance or repair services (ii) technical testing and analysis services and (iii) technical inspection and certification services
    - When provided in relation to goods, materials or immovable property located outside India
    - Provided remotely through internet or any other electronic network including a computer network or any other means
    - Shall be treated as performed outside India irrespective of whether or not such services are performed outside India
  - Actual location of the tangible goods is material to determine the taxing jurisdiction in respect of the aforementioned three services
- Corresponding amendment in the Import of Service Rules [Notification 6/2008-S.T]

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...Key Legislative Changes

- Service Tax Disputes Resolution Scheme introduced
  - To resolve disputes for arrears as on 1.3.2008
  - Involving amount not exceeding Rs. 25,000
  - Scheme not applicable when longer period of limitation has been invoked

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Summary

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Positives & Negatives

- Positives
  - Affirmation of implementation of GST by 2010
  - Reduction in rate of CST to 2%
  - Reduction in rate of Excise duty to 14%
  - No change in rate of Service tax
  - Proportionate availability of Cenvat credit
  - Reduction in rate of Excise duty for auto sector
- Negatives
  - IT Industry brought under the tax net comprehensively - taxed @ 12%
  - Works Contract Service - Rate of composition increased to 4%
  - Proposals undelivered
    - Definition of ‘service’
    - Export of Services Rules
    - Import of Services Rules

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