

REVERSE GEAR

(By S.Jaikumar and G.Natarajan, Advocates, Swamy Associates, Chennai)

Kudos to the TRU for throwing up the draft proposals for public debate at the stage of incubation. Before getting into the proposals, our opinion on treatment of export of services are as under. Exports, be it goods or services, are privileged because of their contribution in building forex reserves, which is oxygen to any developing economy. As such, both the direct taxation and the indirect taxation provisions accord a special status to exports. It is the law of the land that goods and services can be exported but not the incidence of any domestic duty. Kind reference is drawn to the Boards Circular No. 641/32/2002 CX dt 26.6.2002, wherein it has been stated that, "Further, it is the policy to grant relief from element of domestic taxes on goods, which are exported". Going by the same logic and analogy, the same shall be made applicable to export of services also. Further, going by the macro meaning, exports are not only terrain based but also currency based.

The Hon'ble Union Minister of Law & Justice and Commerce and Industry, in his distinguished speech while unveiling the EXIM Policy, while giving greater mention to the Export of services, has recognised the necessity to facilitate and promote Export of services. Para 3.8 of the EXIM Policy deals with "Service Exports", the Policy describes "Service Exports" as services where payment is received in free foreign exchange. Hence, in our considered opinion, export of services shall mean any service rendered by any person, wherein the consideration is received in forex. There is no rhyme or reason to deviate from the same and need to define it any further. Despite our whole hearted support to the retention of Notification 21/2003, we proceed to deal with the draft proposals.

With regard to the proposal as in Para 1 (A), the said proposal is quite confusing and may lead to a probable chaos. In the said proposa,l certain category of services has been deemed to have been exported, if such services are physically carried out of India either **"Partly or Wholly"**. It strikes immediately as to what is the meaning and scope of the term 'Partly and Wholly" in the above said expression. To put it elaborately, Service tax is a levy which extends and confines to the whole of Union of India, except Jammu and Kashmir. Hence, in cases of services which are rendered

wholly outside India, there cannot be a levy at all, for lack of jurisdiction. Hence, the term '**wholly**' used in the proposal is infructuous.

The term 'Partly' used in the said expression is the real Mr. Confusious. Does it mean that service tax is proposed to be levied on pro rata basis? Does this proposal aim at chasing the service from its origin to destination? In our understanding, the term 'Partly' is aimed at services which has a voyage from India to outside India. If it is so, how to segregate the service and what is the measure? Such an attempt would only further complicate the existing complexities. Hence in our view, the suggestion as to deal with 'Partly' rendered services is of no avail.

Notwithstanding the above observations, we are not able to visualise and comprehend as to the reasoning behind the classification of the selected services under this proposal, either partly or wholly.

In respect of the proposal at 1 (B), at the outset, we prefer to lodge our dissent, as in our opinion the proposal is nothing but absurd. It has been proposed in respect of the four services viz., 1) Real estate consultancy, 2) Architect, 3) Interior decorators and 4) Mandap keepers, that the services shall be deemed to have been exported, if the immovable property is located outside India. Even if a consultant/ architect/ interior decorator sits in India and do the service of consultancy/ designing/ decoration to a client for his property located outside India, then by the above said proposal, such services as Exports. The above services are in the nature of species of an Intellectual property and can be rendered from any place. An architect can design a White House for Washington DC sitting at Karol Bagh. The above proposal would defeat the fundamentals of the levy and collection of Service Tax. Further, in the case of Mandap Keepers, if the Mandap is at a place outside India, then going by the logic spelt out in our earlier paragraph, the same is out of the jurisdiction of the levy.

In respect of the proposal at 1 (C), the idea behind the proposal seems to gel with our fundamental thumb rule principle, that the export of service means services where consideration is received in forex. By considering the recipient to be situated outside India, the intention seems to be that, the receipt of consideration shall be in

forex. Even though not explicitly spelt, the explanation appended to the said proposal also fortifies the above said intention.

It is a welcome proposal to have decided to provide for refund of the tax paid on the input services utilised for the export of services. Such a benevolent proposal of input relief is heartening. The basic ideology of parting with the tax paid on input services is nothing but to encourage forex inflow as done in the case of exports of goods. That being the case, why to deviate from the direction. To sum up, instead of beating around the bush, the Notification 21/2003 may be retained, maintaining the status quo. Any attempt to rescind the notification and define export of services would only justify the title of this article.