

EXPORT OF SERVICES *vis-a-vis* IMPORT OF CONFUSIONS

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Indian Revenue Laws are always drafted in conjunction with the famous Murphy's Laws (If anything can go wrong, it will) and the present Export of Services Rules, 2005, is no exception. The Board has notified the new Export of Service Rules w.e.f 15.03.2005. Consequently, the exemption from payment of service tax, if the consideration is received in foreign exchange, is also being withdrawn with effect from 15.03.2005.

When the draft Export of Service Rules were made public, we have strongly opposed the same and also highlighted the potential problems in interpreting/implementing the same (Ref: Our title "Reverse Gear"). Rather, we have advocated for the continuance of the present scheme of exempting service tax, whenever the consideration is received in foreign exchange, as it is backed with sound reasoning and purpose.

But, as usual, the suggestions have been ignored and the draft has now become final thus making the draft publication a mock ritual.

Now, on to the provisions.

Category I:

In respect of the following services, the service shall be considered as an export of service, if it is in relation to an immovable property, situated outside India.

- (d) General insurance.
- (p) Architect.
- (q) Interior Decorator.
- (v) Real Estate Agent.
- (zzq) Construction service.

Category II.

In respect of the following services, the service shall be considered as an export of service, if it is performed outside India, either wholly or partly.

- (a) Stock broker.
- (f) Courier.
- (h) Custom House Agent.
- (i) Steamer Agent.
- (j) Clearing & Forward Agent.
- (l) Air Travel Agent.
- Mandap Keeper.
- (m) Tour Operator.
- (n) Rent a cab operator.
- (s) Chartered Accountant.
- (t) Cost Accountant.
- (u) Company Secretary.
- (w) Security Agency.
- (x) Credit Rating Agency.
- (y) Market Research Agency.
- (z) Underwriter.

- (zb) Photography.
- (zc) Convention services.
- (zi) Video Production.
- (zj) Sound recording.
- (zn) Port service.
- (zo) Authorised Service Station.
- (zq) Beauty Parlour.
- (zr) Cargo Handling Agency.
- (zt) Dry cleaning.
- (zu) Event management.
- (zv) Fashion Designer.
- (zw) Health Club and fitness Center.
- (zza) Storage and warehousing.
- (zzc) Commercial Training and Coaching Center.
- (zzd) Erection, Commissioning and Installation.
- (zzf) Internet café.
- (zzg) Maintenance and Repair.
- (zzh) Technical testing and analysis.
- (zzi) Technical Inspection and Certification.
- (zzj) Authorised Service Station – LMVs. (exempted in the Finance Bill 2005).
- (zzl) Services rendered by Minor Ports.
- (zzm) Airport Authority services.
- (zzn) Transport of Goods by Air.
- (zzo) Business Exhibition service.
- (zzp) Goods Transport Agency.
- (zzs) Opinion Poll Agency.
- (zzt) Outdoor caterer
- (zzv) Survey and Exploration of minerals.
- (zzw) Pandal and Shamina.
- (zzx) Travel Agent.
- (zzy) Forward Contract.

Category III

In respect of the following services, the service shall be considered to have been exported if,

- (i) if such services are provided and used in or in relation to commerce or industry and the service recipient is located outside India (if such service recipient does not have any commercial or industrial establishment or any office in India). If such recipient has a commercial or industrial establishment or any office in India, the service shall be treated as export, only if

- the order for such service is made by the recipient from any of his commercial or industrial establishment of office, located outside India;
- service so ordered is delivered outside India and used in business outside India; and
- payment for such service is received by the service provider in convertible foreign exchange.

- (ii) if such services are provided and used other than in relation to commerce or industry, the service shall be considered as export of service only if the recipient is located outside India, when such services are received.

- (b) Telephone.
- (c) Pager.
- (d) General Insurance (other than in relation to immovable property)
- (e) Advertising agency.
- (g) Consulting Engineering.
- (k) Manpower Recruitment Agency.
- (r) Management consultant.
- (za) Scientific or Technical consultancy.
- (zd) Leased Circuit.
- (ze) Telegraph.
- (zf) Telex.
- (zg) Facsimile (Fax).
- (zh) Online information and database retrieval.
- (zk) Broadcasting.
- (zl) Insurance Auxiliary Service.
- (zm) Banking and financial services.
- (zs) Cable Operator.
- (zx) Life insurance services.
- (zy) Insurance auxiliary services in relation to life insurance.
- (zz) Rail Travel Agent.
- (zzb) Business Auxiliary Service.
- (zze) Franchisee.
- (zzk) Foreign Exchange brokers.
- (zzr) Intellectual Property services.
- (zzu) TV and Radio program.

It may be observed from the above, in respect of the services falling under category II, the service shall be deemed to be export of service, **if it is performed outside India, either wholly or partly**. Though we have burnt gallons of midnight oil in understanding and visualizing as to what is the intention of the Revenue by deeming the said services as export of services under the said category, we have miserably failed. By this present proposition, for example, if a Chartered Accountant audits the accounts of the Indian operations of a multi national company and also partake in the audit of the company's foreign branch office, his entire provision of service (to the Indian office) would be deemed as an "export of service" because "part" of the service is rendered outside India. This funny proposition would shatter the fundamental principle and defeat the intended purpose of the levy. The term "wholly or partly" defined under the category II is so hairsplitting that, we along with TIOL announce a title "*Interpreter le magna*", to whoever explains the term. Further in such "partly" cases, whether the levy will be on *pro rata* basis or shall be completely exempt is also a nagging bug.

Before parting...

It may also be noted that an Explanation is proposed to be inserted in Section 65 (105) of the Finance Act, 1994, which reads as under:

Explanation: For the removal of doubts (For the generation of doubts!!!), it is hereby declared that, where any service provider or to be provided by a person, who has established a business or has a fixed establishment from which the service is provided or to be provided, or has his permanent address or usual place of residence, in a country other

than India and such service is received or to be received by a person who has his place of business, fixed establishment, permanent address or, as the case may be, usual place of residence, in India, such service shall be deemed to be taxable service for the purpose of this clause.

A reading of the above Explanation would lead one to believe that a service shall be taxable, even if rendered outside India, if the recipient is situated in India (maybe based on the baseline "Service tax is a destination based consumption tax"). For example, if a machine is sent outside India for some repairs to be done by a foreign company, then such repairs done by the foreign company shall become taxable service, by virtue of the above Explanation. It is common sense that, like the levy of Excise duty is on manufacture of goods, the taxable event for levy of Service tax is provision of service. It may also be observed that, the Finance Act, 1994 has got jurisdiction only over the territory of India. But by way of this Explanation, the tax has been proposed to be demanded in respect of the services, which are rendered outside India, merely on the ground that the recipient is situated in India. It's writing on the wall, that, in days to come, this Explanation is in for a judicial whipping. To our common sense and knowledge, the levy of Service tax would be attracted, if and only if , the service is **rendered in India, irrespective of the fact whether the recipient is in India or not.** But with this present Explanation, the department, in all likelihood, would proceed to demand service tax, even when the services are rendered outside India, citing the reason that it is rendered for an Indian recipient, forgetting even the basic question of the jurisdiction of the levy. In such cases, the service provider would be the foreign company and it shall be argued that such services are "export of services" for the foreign company as they are rendered "wholly or partly" outside India!!!!

Now tell us, is it all required!!!!