

Service Tax – Law of Perennial Perplexity

Sent to Tiol/RLT.

(By Swamy Associates)

Section 67 of the Finance Act, 1994 defines value of taxable service, for the purpose of payment of service tax. As per clauses (vi) and (vii) thereof, the following are not includible in the value of taxable service.

(vi) the cost of parts or other material, if any, sold to the customer during the course of providing maintenance or repair service;

(vii) the cost of parts or other material, if any, sold to the customer during the course of providing erection, commissioning or installation service.

Now, the moot question is, as to whether credit of the duties of excise paid on such goods (parts or other materials) which are required for the purpose of maintenance or repair service or erection, commissioning or installation service, can be availed by such service providers are not.

In the above case, as the value of parts and materials sold during the course of service is excluded from the value of taxable service and such value is not subject to any service tax. As such, the very purpose of allowing credit of duties to be set off against one's duty liabilities i.e. off setting the cascading effect of duty incidence, is not at all present in the case. But fortunately for the service providers and unfortunately for the Government, the above provision of Section 67 does not put any embargo on availment of credit.

Often various parts have to be replaced while rendering the service of maintenance and repair, in respect of any goods. Similarly, for the purpose of rendering the service of erection, commissioning and installation, many goods would be required to be procured. The goods and materials thus purchased by the above service providers satisfies the definition of "input" as they are used for providing the output service. The definition of the term "input" does not envisages that the value of such inputs shall form part of the value of excisable goods manufactured or value taxable service, as the case may be. (Earlier there was such a requirement in respect of packaging materials). In as much as the said goods qualify to be considered as inputs, availment of credit of duties paid thereon cannot be questioned legally.

The department may proceed to deny the credit availed on the inputs stating that the inputs, once billed separately, are deemed to have been cleared "as such". The activity of billing the sale of such goods and materials separately and paying service tax only on the labour charges portion cannot be, by any stretch of imagination, equated to a case of inputs being removed as such, warranting reversal of credit. In the instant case, the inputs in question are not at all removed "as such", but are used during the course of rendering maintenance or repair service or erection, commissioning or installation service, as the case may be.

Notification 12 / 2003 provides for a general exemption whereby the value of any goods or materials, sold by the service provider to the customer is exempted from payment of service tax. As per the amendment carried out to this notification vide Notification 12/2004, the benefit of such exemption shall not be available, if credit of

duties paid on such goods and materials are availed. This notification is applicable for all services.

But, service providers under the categories of maintenance or repair and erection, commissioning or installation can always claim that while excluding the value of goods and materials sold during the course of service, they are only going by the provisions of Section 67 of the Act and are not claiming the benefit of Notification 12/2003, as the former is without any strings attached.

Another unintended fall out of loose legislation!

Upon extending the benefit of cross sectoral credit and issue of Notification 12/2003, the provisions of Section 67 of the Act, should have been revisited by the Government. But, the Government has the omnipotent weapon of "retrospective legislation", which can be wielded at any point of time. Till such time, those service providers under the category of maintenance or repair and erection, commissioning and installation, who have more regard to law than logic, can avail credit of excise duties paid on all their inputs and adjust it against their service tax liability, with immunity. The quantum of credit thus earned would be multifold than their service tax liability, especially in case of erection, commissioning and installation service, which would prompt the Government to look back.

Let us hope that even if the Government choose to retrospectively amend the law, let the service providers be spared from interest and penalty, as the hapless service providers should not be punished for a faulty legislation.