

SEC 66A - STATUS QUO ANTE

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"In this world nothing is certain but death and taxes!"

– Benjamin Franklin

We feel, of the two, the inevitable death is a better certainty! Unlike taxes, it happens only once and does not get worse every year! We all were ecstatic when the controversial Explanation to Section 65 (105) of the Finance Act, 1994 was proposed to be scrapped in the Budget proposals. But the euphoria was short lived. Replacing the legally fragile Explanation, an all-new Section 66A was proposed to be included in the Finance Act, 1994. With the presidential assent on 18th April 2006, the said Section 66A has been enacted as a statute. In pursuance thereof, Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 have also been notified vide Notification 11/2006 Dt. 19.04.2006. As such, a new regime of taxing the import of services is in place. It is a sure bet that, like every other taxing provision, this Section will also go through a legal safari, in days to come!

Simply stated, as per Section 66 A, if any taxable service is provided by a person outside India and if the said service is received by a person in India, the service shall be deemed to be a taxable service and the service recipient shall be considered as the service provider (Here we shall pause to appreciate the usage of the appropriate term "reverse charge"). As per the first proviso to this section 66A, if an individual receives the service, for any purpose other than commerce or business, the vice this Section shall not apply. Further as per the second proviso to this section, if the service provider has a business establishment in India as well as outside India, the establishment from where the service is rendered shall be relevant to determine the applicability of this Section. In other words, if an Indian branch of a MNC renders any service to an Indian recipient, only such Indian branch shall be liable for payment of service tax. On the contrary, if the foreign branch of a MNC renders the service to an Indian recipient, even if such MNC has an Indian branch, the Indian service recipient shall be liable for payment of Service tax. Further as per sub section 2 of this section, if an Indian company has a foreign branch, they shall be considered as separate entities. In other words, if the service is provided by a foreign branch of an Indian company A to another Indian company B, then B would be liable for payment of service tax. **Further, if the foreign branch of A renders any taxable service to its Indian counterpart, the same shall be liable to service tax at the hands of A's Indian branch. Further, even if such service is rendered free of cost, as per the new provisions of Section 67 and the Rules made there under, Service tax shall be paid as per the funny propositions described in our earlier article titled as "Cost of Loving!"** In effect, the service rendered by the right hand to the left hand is taxed!

From the above, it may be observed that the said Section 66A is self-contained and clearly portrays the legislative intention. But, the new Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 restricts the scope of the provisions of Section 66 A and according to these Rules, different services would be treated as "provided from outside India and received in India" according to the relevant criterion, as seen below:

Category I.

In case of the following services, the service shall be considered to be received in India, if they are **provided in relation to immovable property situated in India.**

S.No.	Name of the taxable service.
1	General Insurance
2	Architect
3	Interior Decorator
4	Real Estate Agent
5	Commercial or industrial Construction service.
6	Site formation, clearance, excavation, earth moving, demolition and other similar services
7	Dredging
8	Survey and map making
9	Construction of residential complex
10	Auctioneering of immovable property.

Category II.

In case of the following services, the service shall be considered to be received in India, if they **are performed in India, either wholly or partly.**

S.No.	Name of the taxable service.
1	Stock broker
2	Courier agency
3	Custom House Agent
4	Steamer Agent.
5	Clearing and Forwarding Agent.
6	Air Travel Agent
7	Mandap Keeper
8	Tour operator
9	Rent a cab operator
10	Chartered Accountant.
11	Cost Accountant
12	Company Secretary
13	Security Agency.
14	Credit Rating Agency
15	Market Research Agency.
16	Underwriter.
17	Photography.
18	Convention.
19	Video Production Agency.
20	Sound Recording.
21	Port (Major Ports & Other Ports)
22	Authorised Service Station.
23	Beauty Parlour
24	Cargo Handling.
25	Dry cleaning
26	Event management
27	Fashion Designer.

28	Health Club and fitness centre.
29	Storage or Warehouse keeping
30	Commercial training or coaching centre.
31	Erection, Commissioning and Installation.
32	Internet café.
33	Maintenance or repair.
34	Technical testing and analysis
35	Technical inspection and certification
36	Airports authority
37	Transport of goods by aircraft
38	Business Exhibition.
39	Goods Transport Agency.
40	Opinion Poll Agency.
41	Outdoor Caterer.
42	Survey and Exploration of mineral
43	Pandal or Shamiana Contractor
44	Travel Agents.
45	Forward Contract
46	Cleaning Services.
47	Club or Association
48	Packaging
49	Transport of goods by rail.

Category III.

In case of the following services, the service shall be considered to be received in India, **if the recipient is located in India and if the service is used in relation to business or commerce.** (In other words, if the following services are not used in relation to business or commerce, the vice of the provisions will not apply).

S.No.	Name of the taxable service.
1	Telephone.
2	Pager.
3	General Insurance – Other than immovable property
4	Advertising Agency.
5	Consulting Engineering.
6	Manpower recruitment and supply of manpower.
7	Management Consultant.
8	Scientist or Technocrat.
9	Leased Circuit.
10	Telegraph.
11	Telex.
12	Fax.
13	Online information and database access and retrieval.
14	Broadcasting.
15	Insurance auxiliary Services
16	Banking and other financial services.
17	Cable Operator.
18	Life Insurance.

19	Insurance auxiliary services relating to life insurance.
20	Business Auxiliary Service.
21	Franchisee service.
22	Foreign Exchange Broker.
23	Intellectual Property Service.
24	Programme Producer.
25	Transport of goods through pipeline or conduit.
26	Survey and map making – Other than those relating to immovable properties.
27	Mailing list compilation.
28	Registrar to issue.
29	Share transfer Agent.
30	ATM Operations, maintenance or management.
31	Recovery agents.
32	Sale of space / time for advt.
33	Sponsorship.
34	Business Support services.
35	Auctioneering – Other than immovable properties.
36	Public relations services.
37	Ship Management Services.
38	Credit card related services.

Interestingly, the services in relation to ‘International Air Travel’ and ‘Transport by cruise ship’ are not at all subject to the above provisions.

Fine! Let the legislative intention be to tax the import of services. Notwithstanding the legal and constitutional bottlenecks, such as, territorial nexus, jurisdiction etc, there is a grave impact to the exports by this scheme! Mahatma Gandhiji said, “Goods can be exported but not the taxes”. In most of the export of goods or services, the role of a Commission Agent is indispensable. These foreign Commission agents are mostly situated outside India and shall procure the export orders for the Indian manufacturer/service provider. They are squarely covered under the category of Business Auxiliary Services (BAS). The erstwhile controversial Explanation to Section 65 (105), which created a service tax liability on such foreign commission agents made the Indian exporters liable to pay the tax on behalf of such agents, by virtue of Rule 2 (1) (d) (iv) of the Service Tax Rules, 1994. In the absence of any exemption notification to procure the services without payment of taxes, as it is available for the procurement of excisable goods, which are meant to be used in the exports, the exporters are made liable to pay the service tax on such services. (Even though there is a refund mechanism, the entire export fraternity is highly skeptical about forming a queue along the corridors of the department). This created a high-voltage turbulence and the exporters have already challenged this controversial Explanation in various judicial fora, across the nation. The Hon’ble High Court of Madras has also stayed this national sorrow. In this backdrop, this present Section 66A has arrived in place of the erstwhile Explanation! Even though the present Section 66A seems to have inherited some sense, it does not appear to be absolute. As it could be seen from the above, even today, the Commission agents falling under the BAS are categorized under Category III, where they will be subjected to tax, merely because of the fact that the recipient of service is in India. Thus the nightmares of the erstwhile ghostly Explanation is still present in this Section 66A, *status quo ante*!

Before parting....

The Preamble to the above Rules specifies that they are being framed in exercise of the powers conferred under Section 93, 94 and 66 A of the Finance Act, 1994. Section 93 ibid deals with the power to grant exemptions. The present Rules appear to cast a levy and do not grant any exemption. Section 94 ibid does not vest any powers with the Government, to make the above Rules. Section 66 A is also devoid of any provision enabling the Government to make any Rules, whatsoever. In absence of any provision to make any Rules either under Section 66A or under Section 94 to this effect, we are afraid that the present set of Rules, incorporating variety of categories and prescribing situations to be taxed, shall crave for a serious legislative sanction.