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SENSE AND SENSIBILITY

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Sensing, that the controversial Explanation under Section 65 (105) of the Finance Act, 1994, introduced through the last Budget is creating a public uproar and brewing into a legal cyclone across the nation, the Government has sensibly proposed to withdraw the same and has introduced a much refined Section 66 A, which would be enacted once the Finance Bill 06 gets the Presidential assent.

The new Section 66 A of the Finance Act, 1994 coupled with the draft "Taxation of Services (Provided from outside India and received in India) Rules, 2006", manifests the firm intention of the Government to levy service tax on "import of services". Allegations of lack of territorial nexus, legislative competence, etc. have been taken note of and more seasoned attempt is manifested in the new provisions. But whether the "sense" has pervaded wholly or only partially, in the draft rules shall be examined below:

Simply stated, as per the new provisions, if a taxable service is rendered by a person outside India and if the said service is received by a person in India, the person in India shall be deemed to be the provider of such service, for the purposes of payment of service tax {Section 66 A (1)}**.** Services thus received by individuals, not for the purposes of commerce or industry, are not subject to this deeming provision (First proviso thereunder). Even if the Foreign Service provider has a branch in India, the service recipient in India shall continue to be considered as the service provider, if the service is not directly or in anyway concerned with the branch in India (Second proviso thereunder). Services received by the permanent overseas branches of Indian companies are not subjected to these provisions {Section 66 A (2)}.

Now let us move on to the draft Rules. As per Rule 3 (2) (i) of the Draft Taxation of Services (Provided from outside India and received in India) Rules, 2006, in respect of the following services, the services received by an Indian person and rendered by a foreign person, shall be considered as a taxable service for the purposes of payment of service tax, only if the immovable property, in respect of which the service is rendered, is situated in India.

1) Architect.
2) Interior Decorator.
3) Commercial or industrial construction.
4) Site formation, etc.
5) Dredging.
6) Residential construction.

For example, if a foreign architect is engaged by an Indian Company to design a building at Chennai, the Indian company shall be deemed to be service provider under the category of an Architect. In other words, if the same Indian company engages an Architect, to design a building at Singapore, the Indian company cannot be considered as a service provider and hence not liable to pay any service tax.

As per Rule 3 (2) (ii) of the Draft Taxation of Services (Provided from outside India and received in India) Rules, 2006, in respect of the following services, the service recipient in India shall be deemed to be the service provider and hence would be liable to pay service tax, only when the such services are performed inside India, either partly or wholly. The services are,

1) Stock broker.
2) Courier agency.
3) Customs House Agent.
4) Steamer Agent.
5) C & F Agent.
6) Air Travel Agent.
7) Mandap Keeper.
8) Tour operator.
9) Rent a cab operator.
10) Chartered Accoutnant.
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.
20) Sound recording.
21) Port services (all ports).
22) Authorised Service Station.
23) Beauty parlour.
24) Cargo handling agency.
25) Dry cleaner.
26) Event manager.
27) Fashion designer.
28) Health club and fitness center.
29) Storage and warehouse keeping.
30) Commercial training or coaching.
31) Erection, commissioning & Installation.
32) Internet café.
33) Maintenance or repair.
34) Technical testing or analysis.
35) Technical inspection and certification.
36) Airports authority.
37) Transport of goods by air.
38) Business Exhibition.

39) Goods Transport Agency.
40) Opinion Poll agency.
41) Outdoor caterer.
42) Survey and exploration of minerals.
43) Pandal or shamiana contractor.
44) Travel agent.
45) Forward contract.
46) Cleaning services.
47) Clubs and associations.
48) Packaging.

So far so good. But the nightmare of controversy appears to linger under Rule 3 (2) (iii) of the Draft Taxation of Services (supra). As per this rule, in respect of the following services, the service recipient in India shall be considered as the service provider, if such services are received in by a recipient located in India, for use in relation to commerce or industry. The services are,

1) Telephone service. 2) Pager.
3) General insurance.
4) Advertising agency.
5) Consulting engineering.
6) Manpower recruitment / supply agency.
7) Management consultant.
8) Scientific or technical consultancy.
9) Leased circuit.
10) Telegraph.
11) Telex.
12) Facsimile.
13) Broadcasting.
14) Insurance auxiliary service, relating to general insurance.
15) Banking and other financial services.
16) Cable operators.
17) Life insurances.
18) Insurance auxiliary services, relating to life insurance.
19) Rail travel agent.
20) Business Auxiliary Service. 21) Franchisee.
22) Foreign exchange brokers.
23) Intellectual property service.
24) Programme production.
25) Transport through pipeline.
26) Survey and map making.
27) Mailing list compilation.

From the above, it may be observed that in respect of the category III services, the Ghost of Explanation under Section 65 (105), still taunts. Such services shall be considered as taxable services and the Indian

recipient of such service shall be deemed to be the service provider, merely because of the fact that the service recipient is located in India. The fact that the service itself might have been rendered outside India, is completely overlooked in respect of this category III Services. Thus the issues of legislative competence and territorial nexus have not been out totally but are now narrowed down to this category III Services only.

Before parting….

Most of the Indian goods and services are exported by availing the services of Commission Agents. In other words, the exporters engage the services of Commission Agents, who are situated outside India, to procure overseas orders and market their products abroad. Such procurement of orders and marketing of goods/services by the Commission Agents, are squarely covered by the definition of BAS and are thus covered by the levy. Now it may be observed that, one of the category III services is the "Business Auxiliary Service", which includes Commission Agents. Even though the said service, *per se*, is meant for export promotion, it is going to be taxed at the hands of the Indian exporter, which is against the cardinal principle, "Goods and services can be exported but not the duties and taxes!"