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IT is not going to be easy !

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Software is a definitely a revolution like the French revolution and India is a major beneficiary in the last two decades. Over the years, software had been blue-eyed baby of Indian economics, because of the enormous employment it created for the Indian youth and also the Forex it generated. But, today, it appears that the honeymoon is all over which is well manifest in this Budget. There is an increase in the Central Excise duty from 8% to 12% on the packaged / canned software. A fresh levy of service tax has been proposed on near-to-all activities of the software industry. The existing exemptions from the already existing taxable services like the Consulting Engineers / Business Auxillary Services are also to be withdrawn.

The taxable service in this case is defined as,

> *"any service provided or to be provided to any person, by any other person in relation to information technology software for use in the course, or furtherance, or business or commerce, including*
>
> *(i) development of information technology software,*
>
> *(ii) study, analysis, design and programming of information technology software,*
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> *(iii) adaptation, upgradation, enhancement, implementation and other similar services related to information technology software,*
>
> *(iv) providing advice, consultancy and assistance on matters related to information technology software, including conducting feasibility studies on implementation of a system, specifications for a database design, guidance and assistance during the startup phase of a new system, specifications to secure a database, advice on proprietary information technology software,*
>
> *(v)* ***acquiring*** *the right to us information technology software for commercial exploitation including right to reproduce, distribute and sell information technology software and right to use software components for the creation of and inclusion in other information technology software products.*
>
> *(vi)* ***acquiring*** *the right to use information technology software supplied electronically.*

Now the he moot question is, as to how **"acquiring"** can become a taxable service?

Generally service tax is levied on the services provided and the tax is paid by the service provider. In certain cases, on a method called as "reverse charge", the Government has made the service recipient liable to pay the service tax (in cases of GTA, foreign service provider, etc.). Nowhere there is any levy of service tax levied on the service recipient, by treating the receipt of service as a taxable service. As stated above, only liability to pay the tax is cast on the service recipient.

Whereas in the case above, "acquiring" is defined as a service, i.e receiving is treated as a service in the hands of the recipient. Had it been the intention of the Government to levy service tax on such transfer of various rights over the software, the appropriate description would be "allowing" or "transferring", or "permitting the right of use or enjoyment", etc. Even if the intention of the Government is to levy service tax on "reverse charge" basis on these categories of service, the taxable service should be defined only from the point of rendering of such service and only the person liable for payment of service tax has to be specified under Rule 2 (1) (d) (iv). Further, if we read the other clauses of Section 65 (105) (zzzze), the taxable services are defined to mean only the services rendered.

To us, it appears that the use of the word "acquiring" is a drafting error. Will the Board clarify or rectify ???

The definition of taxable service in case of consulting engineering service, as per Section 65 (105) (g) of the Act, read as

"any service provided, or to be provided to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering but not in the discipline of computer hardware engineering or computer software engineering".

From the above it may be observed that the services of consulting engineer, in relation to both computer hardware and software engineering were excluded from the ambit of the levy.

This definition has been amended as below, with effect from 01.06.2007.

"any service provided, or to be provided to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering but excluding the discipline of computer software engineering".

From the above, it may be observed that services in relation to computer software engineering continue to be excluded from the ambit of levy, though services in relation to computer hardware engineering were made taxable from 01.06.2007.

Now, the present Finance Bill proposes to replace the definition as below:

"any service provided, or to be provided to a client, by a consulting engineer in relation to advice, consultancy or technical assistance in any manner in one or more disciplines of engineering including the discipline of computer hardware engineering

Explanation : For the purposes of this sub-clause, it is hereby declared that services provided by a consulting engineer in relation to advice, consultancy or technical assistance in the disciplines of both computer hardware engineering and computer software engineering shall also be classifiable under this sub-clause"

Had it been the intention of the Government to cover both hardware and software, they could have done so, by simply deleting the portion *including the discipline of computer hardware engineering* from the main part of the definition. Now, while the main part refers only to hardware engineering, the Explanation goes beyond the main provision and tries to cover software engineering.

Before Parting…

Lastly, when this Explanation at all? As per the new definition of the IT software, *supra*, the advice, consultancy and assistance relating to information technology software are all included in sub clause (iv) of the definition. That being the case, what is the necessity of the explanation to the Consulting Engineer definition? Similarly, there could be a direct conflict between the Intellectual Property Services vis–a-vis the present IT services. As there is an exemption for the Copyrights under the IPR services, the present IT services proposes to include such IT software, which are in the nature of Copyrights too, under its belt, thereby, providing a grand scope of intrepretaional warfare. One thing is for sure! IT is not going to be easy!!!