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Construction sector – after negative list

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Levy of service tax on construction sector, ever since its introduction in 2004 is beset with lot of complications. Let us see how the sector has been dealt with in the proposed negative list of services, as per the provisions of the Finance Bill, 2012 and other relevant notifications. As the provisions of the Finance Bill 2012 and the notifications may undergo changes before their introduction, the current analysis is as per the provisions as they are contained now.

None of the construction related services are finding a place in the negative list. So once has look into the exemption notification only for any relief.

The following activities are specifically declared as “services” as per Section 66 E.

Clause (b) Construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion certificate by the competent authority.

The term “construction” includes additions, alterations, replacements or remodelling of any existing civil structure.

Clause (b) Service portion in the execution of “works contract”.

The term works contract is defined in section 65B (54) of the Act as "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, improvement, repair, renovation, alteration of any building or structure on land or for carrying out any other similar activity or a part thereof in relation to any building or structure on land.

Notification 12/2012 ST Dated 17.03.2012 would provide for various exemptions, after the negative list comes into effect. As per this notification, the following exemptions would available.

S.No. 12. *Services provided to the Government or local authority by way of erection, construction, maintenance, repair, alteration, renovation or restoration of –*

- (a) a civil structure or any other original works meant predominantly for a non-industrial or non-commercial use;*
- (b) historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);*
- (c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;*
- (d) canal, dam or other irrigation works;*

- (e) pipeline, conduit or plant for (i) drinking water supply (ii) water treatment (iii) sewerage treatment or disposal; or
- (f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Finance Act.

S.No. 13. Services provided by way of erection, construction, maintenance, repair, alteration, renovation or restoration of, -

- (a) road, bridge, tunnel, or terminal for road transportation for use by general public;
- (b) building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;
- (c) pollution control or effluent treatment plant, except located as a part of a factory; or
- (d) electric crematorium;

S.No. 14. Services by way of erection or construction of original works pertaining to,-

- (a) airport, port or railways;
- (b) single residential unit otherwise as a part of a residential complex;
- (c) low- cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;
- (d) post- harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or
- (e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;

From the above, the following may be observed.

- The present exclusion for "personal use" available under residential complex construction service would now be available only for Government or local authority, constructing a residential complex for their personal use, for their staff and for MPs, MLAs, constitutional authorities, etc. mentioned in the Explanation under Section 65 B (44). Hitherto, such complexes constructed even by a business entity is entitled for exclusion. It is also being argued now that such exclusion for "personal use" is also available when an individual is getting a residential unit in a residential complex constructed for his personal use. No such claims can henceforth be made.
- Services relating to construction of a single residential unit otherwise as part of residential complex would be eligible for exemption. The term "residential complex" is defined in the notification as "residential complex means any complex comprising of a building or buildings having more than one single residential unit. The term "single residential unit" is also defined as "single residential unit means an independent residential unit with specific facilities for living, cooking and sanitary requirements". Hitherto, residential complex means only a complex comprising of more than 12 residential units. Hereafter, any complex having more than one residential unit would attract the levy of service tax.

- Canals built by Government or Local authority finds a specific mention. At present, absence of canals in the exclusion part has led to several demands being raised by the department.
- While the exemption mentioned at S.No. 12 above is available only if the services are provided to Government or Local authority, the exemption under S.Nos. 13 and 14 would be available, irrespective of the status of the service recipient.
- It may be observed that the scope of the exemption would cover, construction, erection, maintenance, repair, alternation, renovation and restoration under S.Nos 12 and 13, whereas maintenance and repair is not covered under S.No.14.

Rule 2A of the Service Tax (Determination of Value) Rules, 2006, dealing with non composition method of paying service tax on works contracts is being substituted as below: (Notification 11/2012 ST Dated 17.03.2012)

2A. Determination of value of taxable services involved in the execution of a works contract. - Subject to the provisions of section 67, the value of taxable service involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in clause (8) of section 66E of the Act, shall be determined by the service provider in the following manner, namely:-

(i) Value of works contract service shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;
- (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
- (v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;
- (vi) cost of establishment of the contractor relating to supply of labour and services;
- (vii) other similar expenses relating to supply of labour and services; and
- (viii) profit earned by the service provider relating to supply of labour and services;

(c) Where value added tax has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under this clause.

(ii) Where the value has not been determined under clause (i), the person liable to pay tax on the taxable service involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent. of the total amount charged for the works contract:

Provided that where the gross amount charged includes the value of the land, in respect of the service provided by way of clause (8) of section 66E of the Act, service tax shall be payable on twenty five per cent. of the total amount including such gross amount; (B) in case of other works contracts including completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings not

covered under sub-clause (A), service tax shall be payable on sixty per cent. of the total amount charged for the works contract;

Explanation 1.- For the purposes of this rule,- (I) "original works" means-

- (i) all new constructions;
- (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(II) "total amount" means the sum total of gross amount and the value of all goods, excluding the value added tax, if any, levied on goods and services supplied free of cost for use in or in relation to the execution of works contract, under the same contract or any other contract:

Provided that where the value of goods or services supplied free of cost is not ascertainable, the same shall be determined on the basis of the fair market value of the goods or services that have closely available resemblance;

Explanation 2.--For the removal of doubts, it is clarified that duty of excise paid on any goods, property which is transferred (whether as goods or in some other form) in the execution of works contract, shall not be availed as CENVAT credit."

From the above, the following can be observed.

- Under non composition scheme of payment of service tax, the value shall be gross amount including the value of free supply materials minus VAT paid and value of goods sold. If the value of goods sold is determined for VAT purposes, the same can be excluded here also. It may be

noted, that hitherto, the value of free supply material needs to be included only under composition scheme.

- If value of goods sold cannot be ascertained as above, the value of taxable service shall be 40 % of total amount for original work; and 60 % of total amount for works other than original works. If the value of land is also included, then the value of taxable service shall be 25 % of the total amount.
- Input service credit and capital goods credit would be permissible, as being allowed now.

Notification 15/2012 ST Dated 17.03.2012 would govern the cases of reverse charge. If works contract services are provided by an individual, HUF, proprietary firm or partnership firm, to a Company formed or registered under the Companies Act, or a business entity registered as a body corporate, then, the service provider shall pay 50 % of his service tax liability. He can independently opt for either composition scheme or Rule 2 A of the Valuation rules and 50 % of his liability as per either of these two schemes. Further, the service recipient shall also pay 50 % of the liability under any of the above two methods. Such payments by two parties are independent of the compliance or otherwise by the other person.

The composition rate of service tax has been raised from 4 % to 4.8 % with effect from 01.04.2012.

