Note on counter filed by service tax department
Writ petition no. 26007 & 26012/09
Date: 21.04.2010

1. There is ambiguity about section under which we are liable to pay service tax. U/s. 65((105)(zzzh)) we may not be liable for service tax as per circular 332/35/206 dated 1.8.2006 wherein it is clarified that service tax is applicable to the contractor and not the builder.
2. Accordingly a clarification was given by JC on 21.2.2008 to Modi Developers, our sister concern for payment of service tax U/s. 65((105)(zzzza)). We have changed our registration and were paying tax under this section.
3. It is not clear as to whether the clarification given in circular no. 108/2/2009 dated 29.1.2009 is with reference to which section. Presume-ability, since builders are not liable U/s. 65((105)(zzzh)), the clarification is with respect to 65((105)(zzzza)).
4. As per proposed amendment in the Finance Bill 2010 and clarification issued by the department on 26.2.2010, the scope of the existing tax is proposed to be expanded to include activities wherein builders receives payment before completion of complex. The proposed amendment is to 65((105)(zzzh)).
5. Inference: Builders were exempted from paying tax under both the sections by way of two separate circulars mentioned above.
6. It is suggested that copy of the letter by JC dated 21.2.2008 should be filed in the court.
7. A note prepared by our service tax consultant Mr. V.S. Sudhir is enclosed.
8. Note on counter filed by department
   a. Stand taken by department for payment of tax U/s. 65((105)(zzzh)) is contrary to the stand taken by the JC (Higher authority) in his letter.
   b. All records including books of accounts, copies of all agreements and deeds, bank statements, etc., have been given to the department vide our letter dated 18.1.2010.
   c. No show-cause notice has ever been issued to us where a service tax liability was estimated and demand for payment raised as there was no clarity on method of computation, till the writ was filed.
9. A show-cause notice dated 12.4.2010 has been issued to M/s. Modi & Modi Constructions with a demand to pay about Rs. 6 lakhs u/s. 65((105)(zzzza)). No show-cause notice has been issued to M/s. Paramount Builders.
10. Even in the recent show-cause notice no demand is made u/s. 65((105)(zzzh)) which is contrary to the departments stand in the writ petition.
11. The discrepancy between the two chargeable sections must be brought to the notice of the court.
12. A reply to the show-cause notice is required.

Enclosures:

1. Letters dated 18.01.2010, 25.01.2010 & 4.2.2010 from Modi & Modi Constructions to department.
2. Letters dated 18.01.2010, 25.01.2010 & 4.2.2010 from Paramount Builders to department.
3. Abstract of Finance Bill 2010.
4. Abstract of clarification 332/35/2006-TRU dated 1.8.2006.
5. Opinion by Mr. V.S. Sudhir on service tax.
6. Sow-cause notice dated 12.4.2010 issued to Modi & Modi Constructions.
7. Copy of letter issued by JC to Modi Developers dated 21.2.2008.

Note on writ petition for service tax.

1. Service tax was imposed on construction of residential complex from 16.06.05 u/s. 65(105)(zzzh).

2. Service tax on works contracts was brought into effect from 01.06.2007 for residential complexes.

3. Vide circular no. 96/7/2007 dated 23.08.2007 (copy enclosed) a clarification was issued stating that a builder building a residential complex by employing direct labour is not liable to pay service tax u/s. 65(105)(zzzh). Further a contractor engaged by builder shall be liable to pay service tax under the said section.

4. Vide letter dated 21.2.08 addressed to M/s. Modi Developers the JC-ST has clarified that service tax is payable on the agreement of construction value executed in favour of the customer and the amount received towards sale deed would not be charged under service tax (copy enclosed).

5. Vide circular 108/02/2009-ST dated 29.01.009 (copy enclosed) issued in relation to section 65(105)(zzzh), it was further clarified that,

   ..... *"Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax."*

   "Further, if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'".

   "However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax".

   The said circular is very ambiguous and poorly drafted.

6. As per advice of JC we have changed the service tax registration from residential complex service u/s. 65(105)(zzzh) to works contract u/s. 65(105)(zzzza).

7. Summons were issued to us for producing certain documents on 27.01.09 (copy enclosed). We have submitted the required documents.

8. In view of circular no. 108/02/09, we have stopped payment of service tax from Jan 09, however, service tax was paid upto 31.12.08.

9. We have written to the department vide our letter dated 12.3.09 for withdrawal of our service tax registration.

10. We have also filed nil returns along with the representation on 8.7.09 (copy enclosed).

11. We have once again received a letter from the department on 6.11.09 (copy enclosed) asking for bank statements, balance sheets, challans, ST3 returns from 2004 - 2009.

12. Department has not sent any reply regarding our request for withdrawal of registration.

13. Our customers are refusing to pay service tax citing the latest circular from the department. To the best of our knowledge no other builder in Hyderabad is paying service tax.

Query:

Can we file a writ petition restraining the department from taking coercive measures like search and seizure without issuing a show cause notice and giving us a chance to reply to the show cause notice. We are willing to provide all required information and are not averse to any search operations by the department. The department is raiding several builders and threatening to seize all documents and computers from their office and under duress collecting cheques from builders.

Note:

We have 8 firms that have the same issue and notices have been served on all of them.

Date: 12.11.09

MODI & MODI CONSTRUCTIONS

5-4-187/3 & 4, II Floor, M.G. Road, SECUNDERABAD - 500 003.
✆ : 66335551 (4 lines) Fax : 040-27544058

To,
Mr. R.L. Ramesh, Asst. Commissioner, Service Tax
Office of the Commissioner of Custom,
Central Excise & Service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 04.02.2010.

Dear Sir,

Sub.: Requesting not to give any further notices to pay service tax –vide case nos. WPMP no. 33868/2009 and WP No. 26012/2009, which are pending in High Court – reg.

Ref.: Your letter dated 04.01.2010 (HQST No. __/2009) and 06.11.2009 (HQST No. ___/09).

We are in receipt of your above referred letters and directed us to furnish the following information which have been furnished to your by us.

1. Balance Sheets for the years 2004 -05 to 2008-2009 and trail balance for the period April 2009 to September 2009.
2. Bank statement for the preceding 5 years from 2004-05 to 2008-09.
3. Project wise details of income of sale deeds and agreements.
4. Copies of sale deeds and constructions agreement entered with the purchasers for the above period and respective ledgers.
5. ST3 returns and paid challan copies for the above period.
6. Work sheets furnishing month wise details of receipts.

We have filed a case vide WP No. 26012/2009 before Honorable High Court of Andhra Pradesh praying for a writ of mandamus declaring that in view of circular no. 108/2/2009 dated 29.01.2009 explaining the provisions of the Finance Act of 1994, agreements of sale/ sale deeds/ agreements of construction in respect of residential dwelling units do not attract service tax with respect to the consideration payable by the prospective buyer to the builder/ promoter/developer and, consequently, to issue a writ of prohibition against respondents no. 2 & 3 (Commissioner of Central Excise, Customs and Service tax, Hyd II Commissionerate and the Superintendent of Service Tax Hyd II, Commissionerate respectively) from raising any demand on the petitioner towards service tax in respect of agreement of sale / sale deeds/ agreement of construction in respect of residential dwelling units.

We have also filed W.P.M.P. No. 33868 of 2009 in W.P. No. 26012 of 2009 praying the honorable High Court to grant stay of all further proceedings pursuant to the notices issued by the respondents no.2 and 3 for levy of service tax in relation to the

MODI & MODI CONSTRUCTIONS

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✆ : 66335551 (4 lines) Fax : 040-27544058

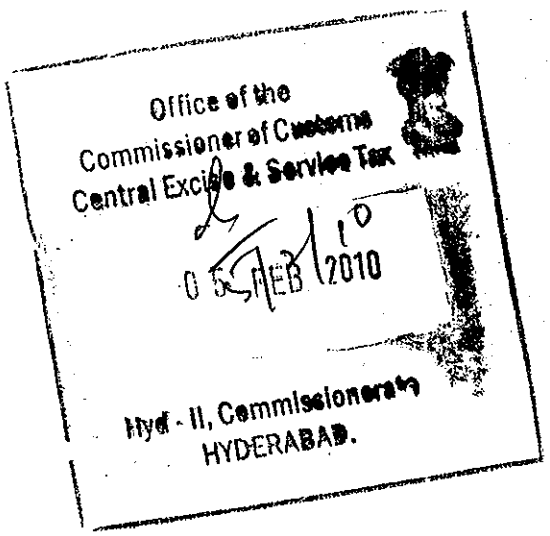
The above writ petition came up for admission before the honorable High Court of Andhra Pradesh on 02.12.2009. The Honorable High court was pleased to order a notice to the respondents in the writ petition directing them to show cause as why the writ petition should not be admitted (copy enclosed).

In view of the above facts the matter is sub judice before the Honorable High Court of Andhra Pradesh. Hence, you are requested to please keep the proceeding in relation to the same in abeyance until appropriate orders are passed by the Hon'ble high court in the writ petition.

Tank you.

Yours sincerely,
For Modi & Modi Constructions,

Soham Modi
Managing Partner.



MODI & MODI CONSTRUCTIONS

5-4-187/3 & 4, II Floor, M.G. Road, SECUNDERABAD - 500 003.
✆ : 66335551 (4 lines) Fax : 040-27544058

To,
Mr. R.L. Ramesh,
Asst. Commissioner, Service Tax
Office of the Commissioner of Custom,
Central Excise & Service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 25.01.2010.

Dear Sir,

Ref.: Your summons dated 13.1.2010 vide letter no. HQST No.: 59/09 AE –IV for personal appearance at 11 am on 27.01.2010.

We have received your summons dated 13.1.10 requesting for documents pertaining to the financial year 2005 – till date. Please note that all the documents requested for have already been provided to the service tax department vide our letters dated 18.1.2010 and 30.11.2009 (copy enclosed).

Please find enclosed scanned copies of following document on a CD as requested by you.

a. Bank statements from 1.4.2005 till 31.12.2009.
b. Copies of all sale deeds and construction contracts.
c. Books of accounts from 1.4.2005 till 31.03.2009.
d. Un audited books of accounts from 1.4.2009 till 31.12.2009.

We are unable to meet your request for providing a month wise statement of amounts received towards sale deed, construction contract, etc., for comparison with the balance sheet as we are not sure as to how to make such a statement. It is not possible to distinguish payments received from customers towards sale deed, construction agreement, VAT, stamp duty and other charges, etc., as payments are received from customers on an adhoc basis. In our books of accounts, we are debiting these costs periodically as and when due to the customer account. Payment received from them are credited to their accounts. Therefore, the ledger copy of each individual customer needs to be looked into to determine the details of payments towards sale consideration, VAT, registration charges, etc. Ledger copies of every customer is enclosed in the CD.

Further, several customers have paid us advances towards purchase of flats / villas wherein no sale deed has been executed in their favour. The amounts are received towards tentative booking subject to cancellation and refund. On later dates which may vary from customer to customer sale deed (in some cases construction agreement) is executed in favour of the customer. Therefore, it is not possible to make a month wise detailed statement as requested by you.

MODI & MODI CONSTRUCTIONS

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✆ : 66335551 (4 lines) Fax : 040-27544058

Further, we are not to certain about our liability under service tax rules and the method of computation to be adopted for payment of service tax. We are unsure about the section under which we are liable to pay service tax i.e., under works contract or under residential complex services. In light of circular 108/2/2009 we believe that we do not fall under the ambit of service tax.

However, please find enclosed a month wise statement of receipts from customers. Please note that this statement does not bifurcate payments received towards sale deed, construction contract, finishing and completion services, VAT, service tax, stamp duty and registration charges, etc. Further it does not distinguish payments received towards sales made for phases/blocks/residential units completed prior to the notification of service tax u/s. 65(105)(zzzh) or 65(105)(zzzza). Therefore, it may be difficult to compute service tax liability based on the monthly receipts statement.

We request you to please clarify the ambiguity in the application of service tax and the method for computation of service tax liability. Please clarify the following:

a. Whether we are liable to pay service tax under works contract or residential complex services.
b. Can we exclude residential units whose construction was completed before respective date of notification.
c. Can we exclude payments made towards sale deed, VAT, service tax, stamp duty and registration charges, etc., and calculate service tax liability only on value of construction contract.
d. Can we exclude construction contracts executed prior to date of notification.

We await your advise on the above issues so that we can prepare a month wise statement as requested by you. Please write to us if any further details or information is required.

Thank You.

Yours sincerely,
For Modi & Modi Constructions,

Soham Modi,
Managing Partner

MODI & MODI CONSTRUCTIONS

5-4-187/3 & 4, II Floor, M.G. Road, SECUNDERABAD - 500 003.
✆ : 66335551 (4 lines) Fax : 040-27544058

To,
The Superintendent (AE) Service Tax (AE – Group IV),
Office of the Commissioner of Custom,
Central Excise & service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 18.01.2010.

Dear Sir,

Sub.: Request for furnishing of certain information.
Ref.: Notice for furnishing of furnishing of certain information, vide letter no. HQST No. 59/2009 AE IV 4.1.2010.

We have received your notice dated 04.01.2010 requesting for documents pertaining to the financial year 2005 – till date. Please note that balance sheet, profit and loss statement and IT returns for those years have already been submitted to your office a few weeks ago. We have also given details of sale deeds, construction agreements and service tax paid vide our letter dated 29.12.09. Balance sheets, profit& loss statement, etc., have not been finalized for the financial year 2009-10 and therefore can not be produced.

Please find enclosed scanned copies of following document on a CD as requested by you.

a. Bank statements from 1.4.2005 till 30.09.2009.
b. Copies of all sale deeds and construction contracts.
c. Books of accounts from 1.4.2005 till 31.03.2009.

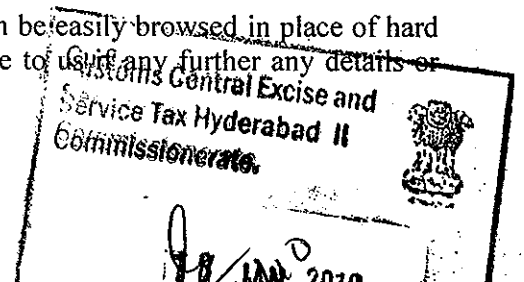
It is not possible to distinguish payments received from customers towards sale, construction agreement, VAT, stamp duty and other charges, etc., as payment s are received from customers on an adhoc basis. In our books of accounts, we are debiting these costs periodically as and when due to the customer account. Payment received from them are credited to their accounts. Therefore, the ledger copy of each individual customer needs to be looked into t determine the details of payments towards sale consideration, VAT, registration charges, etc. Ledger copies of every customer is enclosed in the CD. Further, several customers have paid us advances towards purchase of flats / villas wherein no sale deed has been executed in their favour. The amounts are received towards tentative booking subject to refund. On later dates which may vary from customer to customer sale deed (in some cases construction agreement) is executed in favour of the customer. Therefore, it is not possible to make a month wise detailed statement as requested by you.

Further, we are not to certain about our liability under service tax rules and the method of computation to be adopted for payment of service tax. In light of circular 108/2/2009 we believe that we do not fall under the ambit of service tax.

We have given all the above information on a CD which can be easily browsed in place of hard copies as the total no. of pages exceeds 5,500. Please write to us if any further any details or information is required.

Thank You.

Yours sincerely,
For MODI & MODI CONSTRUCTIONS,



PARAMOUNT BUILDERS

5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003.
Phone : +91-40-66335551, Fax :

To,
Mr. R.L. Ramesh, Asst. Commissioner, Service Tax
Office of the Commissioner of Custom,
Central Excise & Service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 04.02.2010.

Dear Sir,

Sub.: Requesting not to give any further notices to pay service tax –vide case nos. WPMP no. 33868/2009 and WP No. 26012/2009, which are pending in High Court – reg.

Ref.: Your letter dated 04.01.2010(HQST No. 15/2009) and 06.11.2009 (HQST No. 59/09).

We are in receipt of your above referred letters and directed us to furnish the following information which have been furnished to your by us.

1. Balance Sheets for the years 2004 -05 to 2008-2009 and trail balance for the period April 2009 to September 2009.
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We have filed a case vide WP No. 26012/2009 before Honorable High Court of Andhra Pradesh praying for a writ of mandamus declaring that in view of circular no. 108/2/2009 dated 29.01.2009 explaining the provisions of the Finance Act of 1994, agreements of sale/ sale deeds/ agreements of construction in respect of residential dwelling units do not attract service tax with respect to the consideration payable by the prospective buyer to the builder/ promoter/developer and, consequently, to issue a writ of prohibition against respondents no. 2 & 3 (Commissioner of Central Excise, Customs and Service tax, Hyd II Commissionerate and the Superintendent of Service Tax Hyd II, Commissionerate respectively) from raising any demand on the petitioner towards service tax in respect of agreement of sale / sale deeds/ agreement of construction in respect of residential dwelling units.

We have also filed W.P.M.P. No. 33868 of 2009 in W.P. No. 26012 of 2009 praying the honorable High Court to grant stay of all further proceedings pursuant to the notices issued by the respondents no.2 and 3 for levy of service tax in relation to the consideration receivables by the petitioner from

PARAMOUNT BUILDERS

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Tank you.

Yours sincerely,
For Paramount Builders,

Sohan Modi
Managing Partner.

Office of the
Commissioner of Customs
Central Excise & Service Tax

05 FEB 2010

Hyd - II, Commissionerate
HYDERABAD.

PARAMOUNT BUILDERS

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Phone : +91-40-66335551, Fax :

To,
Mr. R.L. Ramesh,
Asst. Commissioner, Service Tax
Office of the Commissioner of Custom,
Central Excise & Service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 25.01.2010.

Dear Sir,

Ref.: Your summons dated 13.1.2010 vide letter no. HQST No.: 55/09 AE –IV for personal appearance at 11 am on 27.01.2010.

We have received your summons dated 13.1.10 requesting for documents pertaining to the financial year 2005 – till date. Please note that all the documents requested for have already been provided to the service tax department vide our letters dated 18.1.2010 and 30.11.2009 (copy enclosed).

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PARAMOUNT BUILDERS

5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003.
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d. Can we exclude construction contracts executed prior to date of notification.

We await your advise on the above issues so that we can prepare a month wise statement as requested by you. Please write to us if any further details or information is required.

Thank You.

Yours sincerely,
For Paramount Builders,

Soham Modi,
Managing Partner

PARAMOUNT BUILDERS

5-4-187/3 & 4, II Floor, Soham Mansion, M.G. Road, Secunderabad - 500 003.
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To,
The Superintendent (AE) Service Tax (AE – Group IV),
Office of the Commissioner of Custom,
Central Excise & service Tax,
Hyderabad –II, Commissionerate,
Shakar Bhavan, Basheerbagh,
Hyderabad.

Date: 18.01.2010.

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Further, we are not to certain about our liability under service tax rules and the method of computation to be adopted for payment of service tax. In light of circular 108/2/2009 we believe that we do not fall under the ambit of service tax.

We have given all the above information on a CD which ~~can be easily~~ browsed in place of hard copies as the total no. of pages exceeds 16,500. Please write to us if any further any details or information is required.

Thank You.

Yours sincerely,
For PARAMOUNT BUILDERS,

Customs Central Excise and
Service Tax Hyderabad II
Commissionerate.

18 JAN 2010

Confidential

Draft

Date:
To,
Mr. Soham Modi,
Modi & Modi Constructions
5-4-187/3 & 4, II Floor,
M G Road,
Secunderabad – 500 003

Dear Sir,

Sub: Opinion under Service Tax

Ref: your mail dated

BACKGROUND:

1. M/s Modi & Modi Constructions (herein after referred to as MMC) is engaged in the business of promoting, developing and constructing residential complexes.
2. MMC was remitting service tax till December 2008. Relying on Circular 108/2/2009 ST dated 29.01.2009. they had stopped making payment of service tax.
3. MMC had been receiving various letters and correspondence from the department requiring for the information and payment of service tax.
4. MMC has filed Writ Petition before AP High Court in this regard. Department has also filed its counter affidavit in this regard.
5. A copy of both the affidavit has been provided to us.

QUERY:

With the above back ground, MMC requires our comments and grounds that can be taken to counter the department affidavit.

OPINION:

We provide our opinion to the best of our knowledge and belief based on interpretation of provisions pertaining to Service Tax, relevant notifications and circulars issued there under and reported decisions examined in the context subject to information and explanation provided in

Any change in facts of the case or the amendment or change in the law would require our opinion to be reviewed upon specific and independent request for the same in future.

Discussion on the Affidavit filed by MMC

1. The main ground taken by MMC was that their activity is covered under the personal use and hence service tax should not be made applicable on them in view of the clarification provided vide circular no 108/2/2009 ST dated 29.01.2009. We shall continue to discuss the strength of this ground.

2. The definition of the residential complex, its exclusion portion is extracted as under for the ready reference.
   *"but does not include a complex which is constructed by **a person** directly engaging any **other person** for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by **such person**"*

3. From the above definition it is clear that there are three persons referred in the definition, the first person may be referring to the person who does the actual construction (may be contractor), the second person is the person, who provides the service of planning and designing, such person may be an architect, the last person now refers as personal use by such person now whether the personal use is the contractor or the architect or the builder or the customer would be confusing.

4. The other way of reading the provision is that the first person is being referred to be the customer who is not doing the actual construction but he is getting the construction done by others for which he has been referred to as constructed by the person and the last refereed person again refers to the customer.

5. To rest the confusion in this regard, the reliance on the circular 108/2/2009 ST dated 29.01.2009 can be place, where it was specifically clarified that the last referred person in the exclusion part of the definition was customer and hence the construction for the personal use of customer would not be taxable.

6. On the count of validity of the circulars the two important judgments gains attention. In case of Dhiren Chemical Industries Vs CCE Vadodara (2002 (139) ELT 3 (SC)), the court held that a circular would be binding on the departmental officers even if the interpretation therein was different from that taken by the Supreme Court itself. However, the circular cannot be contrary to statutory provisions as such circular would not have existence in law as held by the Supreme Court in case of Ratan Melting & Wire industries Vs CCE Bolpur (2008 (231) ELT 22 (SC)). Since circular 108/2/2009 ST dated 29.01.2009 cannot be construed as being contradictory with statutory provisions as of now, the interpretation therein should prevail and be binding on the revenue.

7. Therefore the ground taken by MMC was valid enough to question the taxability. Now we shall proceed to examine the counter affidavit filed by the department.

Counter affidavit by the department.

8. The main grounds taken by the department in this regard is summarized as under:
    a. The exclusion portion of the definition applies in a scenario where builder constructing entire complex for one person for his personal use as residence by such person.
    b. Petitioner has misinterpreted the provision of law and the clarification of the board.
    c. Only records and documents were requested for issuance of the SCN to follow the principle of natural justice.

9. Form the above the most crucial ground taken by the department is that the service tax would be exempted only in case the entire complex has been constructed for his personal use. We shall proceed to examine whether circular intended to clarify the same.

10. The preamble of the referred circular has been extracted as under for understanding what issue exactly the board wanted to clarify. The relevant part of the said circular (para 1) is extracted hereunder for ready reference.

"....Doubts have arisen regarding the applicability of service tax in a case where developer/builder/promoter enters into an agreement, with the ultimate owner for ***selling***

a dwelling unit in a residential complex *at any stage of construction (or even prior to that) and who makes construction linked payment..." (Para 1)*

11. From the above extract, it is clear that the subject matter of the referred circular is to clarify the taxability in transaction of dwelling unit in a residential complex by a developer. Therefore the clarification aims at clarifying exemption of residential unit and not the residential complex as alleged in the impugned order.

12. It is important to consider what arguments are considered by board for providing this clarification. The relevant part as applicable in the context has been extracted as under for ready reference.

"...It has also been argued that even if it is taken that service is provided to the customer, ***a single residential unit bought by the individual customer*** *would not fall in the definition of 'residential complex' as defined for the purposes of levy of service tax and hence construction of it would not attract service tax..." (Para 2)*

13. The argument is in context of single residential unit bought by the individual customer and not the transaction of residential complex. The clarification has been provided based on the examination of the above argument among others.

14. The final clarification was provided by the board based on the preamble and the arguments. The relevant portion of the circular is provided here under for the ready reference.

"... The matter has been examined by the Board. Generally, the initial agreement between the promoters/builders/developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, if the ultimate owner enters into a contract ***for construction of a residential complex*** *with a promoter/builder/developer, who himself provides*

service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax..." (Para 3)

15. From the above, it is clear that exclusion is the scenarios where the ultimate owner enters into a contract with the builder for the construction of a residential complex. In terms section 65(30a) of the definition of the construction of complex includes construction of part of the residential complex. Therefore even if the builder has any agreement with the multiple owners for each residential unit, they also form part of the definition of construction of the residential complex referred in the above circular.

16. The circular or the definition does not give any meaning as to personal use by a single person. In fact it is very clear that the very reason for issuance of the circular is to clarify the applicability of residential unit and not the residential complex.

17. In the definition "*complex which is constructed by **a person** directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for **personal use** as residence by **such person**.*" Since the reference is "constructed by **a** person" in the definition, it cannot be interpreted as "complex which is constructed by **ONE person**....." similar the reference "personal use as residence by **such** person" also cannot be interpreted as "personal use by **ONE persons**" Such interpretation would be highly illogical.

18. From the above discussion we shall conclude that the grounds taken by the department in this regard is not in line with the provision of the act.

Further Grounds

19. The grounds that were discussed above for the circular interpretation may be adopted. Further there is a proposed amendment in the provision in the Finance Bill 2010, where the under extracted explanation is proposed to be inserted.

Explanation.—For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

20. The relevant part of the CBEC Clarification 334/1/2010-TRU dated 26.02.2010 on the above explanation is as under

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. ***This would only expand the scope of the existing service, which otherwise remain unchanged.***

21. Circular 332/35/2006-TRU, dated 1-8-2006 & Circular No. 108 clarified that service tax was applicable only on the contractor and not on the builder. Therefore it was clear that service was not applicable to Builder/developer/promoter. From the insertion of the above mentioned explanation a deeming provision was created to cover the builder into the tax net which was specifically clarified by the board that this was expansion in scope. Therefore it can be concluded that since builder is first time being proposed to tax and it is expansion, then prior to such date, there may not be any liability.

We hope the above clarification is adequate. Please feel free to get back for any clarification in this regard.

Thanking You,
Yours truly,
For Hiregange & Associates
Chartered Accountants

Sudhir V S
Partner

Note: *Our opinion is based on facts and assumptions indicated by you. No assurance is given that the revenue and statutory authorities/courts will concur with the opinion expressed herein. In view of our having opined based on the existing provisions of law and its interpretation, which are subject to change from time to time, we do not assume any responsibility to update the views consequent to such changes. We shall not be liable to you for any claims, liabilities or expenses relating to this opinion except to the extent of fees relating to this assignment, as finally judicially determined to have resulted primarily from bad faith or intentional misconduct.*

CHAPTER V

SERVICE TAX

Amendment of Act 32 of 1994.

75. In the Finance Act, 1994,—

(A) in section 65, save as otherwise provided, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint,—

(1) in clause (*19*), in sub-clause (*ii*), the *Explanation* shall be omitted;

(2) after clause (*19a*), the following clause shall be inserted, namely:—

'(*19b*) "business entity" includes an association of persons, body of individuals, company or firm but does not include an individual;';

(*3*) in clause (*25b*), for the words "commercial or industrial construction service", the words "commercial or industrial construction" shall be substituted;

(*4*) for clause (*82*), the following clause shall be substituted, namely:—

(5) in clause (*105*),—

(a) for sub-clause (*zn*), the following sub-clause shall be substituted, namely:—

"(*zn*) to any person, by any other person, in relation to port services in a port, in any manner:

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the port;";

(b) in sub-clause (zzc), the following *Explanation* shall be inserted and shall be deemed to have been inserted with effect from the 1st day of July, 2003, namely:—

'*Explanation.*—For the removal of doubts, it is hereby declared that the expression "commercial training or coaching centre" occurring in this sub-clause and in clauses (*26*), (*27*) and (*90a*) shall include any centre or institute, by whatever name called, where training or coaching is imparted for consideration, whether or not such centre or institute is registered as a trust or a society or similar other organisation under any law for the time being in force and carrying on its activity with or without profit motive and the expression "commercial training or coaching" shall be construed accordingly;';

(*c*) for sub-clauses (*zzl*) and (*zzm*), the following sub-clauses shall be substituted, namely:—

"(*zzl*) to any person, by any other person, in relation to port services in other port, in any manner:

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within other port;";

(*zzm*) to any person, by airports authority or by any other person, in any airport or a civil enclave:

Provided that the provisions of section 65A shall not apply to any service when the same is rendered wholly within the airport or civil enclave;";

(*d*) in sub-clause (*zzq*),—

(*i*) the word "service" shall be omitted;

(*ii*) the following *Explanation* shall be inserted, namely:—

"*Explanation.*—For the purposes of this sub-clause, the construction of a new building which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or the person authorised by the builder before grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;";

(*e*) in sub-clause (*zzzh*), the following *Explanation* shall be inserted, namely:—

"*Explanation.*—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer;";

(*f*) for sub-clauses (*zzzn*) and (*zzzo*), the following sub-clauses shall be substituted, namely:—

"(*zzzn*) to any person, by any other person receiving sponsorship, in relation to such sponsorship, in any manner;

(*zzzo*) to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for domestic journey or international journey;";

(*g*) in sub-clause (*zzzr*), the following *Explanation* shall be inserted, namely:—

'*Explanation.*—For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "auction by the Government" means the Government property being auctioned by any person acting as auctioneer;';

(*h*) in sub-clause (*zzzz*),—

"business or commerce", the following shall be substituted and shall be deemed to have been substituted with effect from the 1st day of June, 2007, namely:—

"to any person, by any other person, by renting of immovable property or any other service in relation to such renting, for use in the course of or, for furtherance of, business or commerce.";

(*ii*) in *Explanation* 1, after item (*iv*), the following item shall be inserted, namely:—

"(*v*) vacant land, given on lease or license for construction of building or temporary structure at a later stage to be used for furtherance of business or commerce;";

(*i*) in sub-clause (*zzzze*), the words "for use in the course, or furtherance, of business or commerce," shall be omitted;

(*j*) in sub-clause (*zzzzf*), in the *Explanation*, for clauses (*ii*) and (*iii*), the following clause shall be substituted, namely:—

"(*ii*) the gross amount charged by the insurer from the policy holder for the said service provided or to be provided shall be equal to the maximum amount fixed by the Insurance Regulatory and Development Authority established under section 3 of the Insurance Regulatory and Development Authority Act, 1999, as fund management charges for unit linked insurance plan or the actual amount charged for the said purpose by the insurer from the policy holder, whichever is higher;";

41of 1999.

(*k*) *Explanation* to sub-clause (*zzzzm*) shall be omitted;

(*l*) after sub-clause (*zzzzm*), the following sub-clauses shall be inserted, namely:—

'(*zzzzn*) to any person, by any other person, for promotion, marketing, organising or in any other manner assisting in organising games of chance, including lottery, Bingo or Lotto in whatever form or by whatever name called, whether or not conducted through internet or other electronic networks;

(*zzzzo*) by any hospital, nursing home or multi-specialty clinic,—

(*i*) to an employee of any business entity, in relation to health check-up or preventive care, where the payment for such check-up or preventive care is made by such business entity directly to such hospital, nursing home or multi-specialty clinic; or

(*ii*) to a person covered by health insurance scheme, for any health check-up or treatment, where the payment for such health check-up or treatment is made by the insurance company directly to such hospital, nursing home or multi-specialty clinic;

(*zzzzp*) to any business entity, by any other person, in relation to storing, keeping or maintaining of medical records of employees of a business entity;

(*zzzzq*) to any person, by any other person, through a business entity or otherwise, under a contract for promotion or marketing of a brand of goods, service, event or endorsement of name, including a trade name, logo or house mark of a business entity by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event.

Explanation.—For the purposes of this sub-clause, "brand" includes symbol, monogram, label, signature or invented words which indicate connection with the said goods, service, event or business entity;

(*zzzzr*) to any person, by any other person, by granting the right or by permitting commercial use or exploitation of any event including an event relating to art, entertainment, business, sports or marriage organised by such other person;

(*zzzzs*) to any person, by an electricity exchange, by whatever name called, approved by the Central Electricity Regulatory Commission constituted under section 76 of the Electricity Act, 2003, in relation to trading, processing, clearing or settlement of spot contracts, term ahead contracts, seasonal contracts, derivatives or any other electricity related contract;

36 of 2003.

(*zzzzt*) to any person, by any other person, for—

(a) transferring temporarily; or

(b) permitting the use or enjoyment of,

any copyright defined in the Copyright Act, 1957, except the rights covered under sub-clause (*a*) of clause (*1*) of section 13 of the said Act;"

14 of 1957.

(*zzzzu*) to a buyer, by a builder of a residential complex, or a commercial complex, or any other person authorised by such builder, for providing preferential location or development of such complex but does not include services covered under sub-clauses (*zzg*), (*zzq*), (*zzzh*) and in relation to parking place.

Explanation.—For the purposes of this sub-clause, "preferential location" means any location having extra advantage which attracts extra payment over and above the basic sale price;'.

(B) in section 66, with effect from such date as the Central Government may, by notification in the Official Gazette, appoint, for the word, brackets and letters "and (*zzzzm*)", the brackets, letters and word ",(*zzzzm*), (*zzzzn*), (*zzzzo*), (*zzzzp*), (*zzzzq*), (*zzzzr*), (*zzzzs*), (*zzzzt*) and (*zzzzu*)" shall be substituted;

(*C*) in section 73, in sub-section (*3*), the *Explanation* shall be numbered as *Explanation* 1 thereof and after *Explanation 1* as so numbered, the following *Explanation* shall be inserted, namely:—

"*Explanation* 2.—For the removal of doubts, it is hereby declared that no penalty under any of the provisions of this Act or the rules made thereunder shall be imposed in respect of payment of service-tax under this sub-section and interest thereon.";

(*D*) in section 95, after sub-section (*1F*), the following sub-section shall be inserted, namely:—

"(*1G*) If any difficulty arises in respect of implementing, classifying or assessing the value of any taxable service incorporated in this Chapter by the Finance Act, 2010, the Central Government may, by order published in the Official Gazette, not inconsistent with the provisions of this Chapter, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of one year from the date on which the Finance Bill, 2010 receives the assent of the President.".

Validation of action taken under sub-clause (zzzz) of clause (*105*) of section 65.

76. Any action taken or anything done or omitted to be done or purported to have been taken or done or omitted to be done under sub-clause (*zzzz*) of clause (*105*) of section 65 of the Finance Act, 1994, at any time during the period commencing on and from the 1st day of June, 2007 and ending with the day, the Finance Bill, 2010 receives the assent of the President, shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done or omitted to be done as if the amendment made in sub-clause (*zzzz*) of clause (*105*) of section 65, by sub-item (i) of item (h) of sub-clause (*5*) of clause (*A*) of section 75 of the Finance Act, 2010 had been in force at all material times and, accordingly, notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,— 32 of 1994.

(*a*) any action taken or anything done or omitted to be taken or done in relation to the levy and collection of service tax during the said period on the taxable service of renting of immovable property, shall be deemed to be and deemed always to have been, as validly taken or done or omitted to be done as if the said amendment had been in force at all material times;

(*b*) no suit or other proceedings shall be maintained or continued in any court, tribunal or other authority for the levy and collection of such service tax and no enforcement shall be made by any court of any decree or order relating to such action taken or anything done or omitted to be done as if the said amendment had been in force at all material times;

(*c*) recovery shall be made of all such amounts of service tax, interest or penalty or fine or other charges which may not have been collected or, as the case may be, which have been refunded but which would have been collected or, as the case may be, would not have been refunded, as if the said amendment had been in force at all material times.

Explanation.—For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this amendment not come into force.

Government of India
Ministry of Finance
Department of revenue
Tax Research Unit
Gautam Bhattacharya
Joint Secretary (Tax Research Unit-II)
Telephone No. 011-23093027 Fax No. 011-23093037
e-mail. g.bhattacharya@nic.in

D.O.F. No.334/1/2010-TRU
New Delhi, dated 26th February 2010

Dear Madam/Sir,

Subject: Changes proposed in service tax law and procedure in Union Budget 2010-11 – regarding

The Finance Minister has introduced the Finance Bill, 2010, in the Lok Sabha on 26th February 2010. Clause 75 and 76 of the said Bill covers the legislative changes relating to Chapter V of the Finance Act, 1994 (i.e. Service Tax). While some fresh exemptions from service tax have been granted, some existing exemptions have either been withdrawn or modified. All these changes have been notified under notification nos. 2/2010-ST to 17/2010-ST all dated 27th February 2010. While most of the legislative changes in the Finance Act, 1994 would come into force from a date to be notified after the enactment of the Finance Bill, 2010, the notifications (except notification nos. 7/2010-ST, 8/2010-ST and 9/2010-ST which would come into effect from 01.04.2010) would become effective from 27th February 2010. We have attempted to bring all the important changes pertaining to service tax relevant at this stage to your notice through this letter and its Annexures. Upon enactment of the Finance Bill, 2010, when the legislative provisions come into effect, another communication would be sent to you explaining the changes in detail and addressing the doubts and queries raised by you and the trade in the intervening period. To avoid repetition, no separate Explanatory Notes are being issued for service tax.

2. **NEW SERVICES INCLUDED IN THE LIST OF TAXABLE SERVICES**

2.1 Eight services, hitherto not included separately within the list of taxable services, are being included in the said list through appropriate amendments in sub-section 105 of Section 65 of the Finance Act, 1994. One of them, namely promotion, marketing etc. of lottery and similar games of chance presently figures as part of Business Auxiliary Service (BAS). This is now being introduced as an independent entry in the list of taxable services. Consequential amendments have been made in the definition of the BAS.

2.2 The new services are,- • Services of promoting, marketing or organizing of games of chance, including
lottery [Section 65 (105) (zzzzn)].

- Health services, namely:

D health check up undertaken by hospitals or medical establishments for the employees of business entities[##]; and **D** health services provided under health insurance schemes offered by insurance companies[##]. [Section 65 (105) (zzzzo)]

[##The tax on these health services would be payable only to the extent payment for such medical check up or preventive care or treatment etc. is made directly by the business entity or the insurance company to the hospital or medical establishment].

- Services provided for maintenance of medical records of employees of a business entity [Section 65 (105) (zzzzp)].
- Services of promoting of a 'brand' of goods, services, events, business entity etc [Section 65 (105) (zzzzq)].
- Services of permitting commercial use or exploitation of any event organized by a person or organization [Section 65 (105) (zzzzr)].
- Services provided by Electricity Exchanges [Section 65 (105) (zzzzs)].
- Services related to two types of copyrights hitherto not covered under existing taxable service 'Intellectual Property Right (IPR)', namely, those on (a) cinematographic films; and (b) sound recording [Section 65 (105) (zzzzt)].
- Special services provided by a builder etc. to the prospective buyers such as providing preferential location or external or internal development of complexes on extra charges [Section 65 (105) (zzzzu)].

2.3 The scope of these services and other significant details are enclosed in **Annexure A**. The tax on these services would come into effect from a notified date after the enactment of the Finance Bill, 2010. It is requested that during this interim period, the relevant information for each of the aforementioned services such as revenue and taxpayer potential, issues that require further clarification, anticipated legal or implementation problems that are likely to be faced, may please be gathered and inputs of significance, if any, may be brought to the notice of Tax Research Unit latest by the second week of March, 2010.

3. ALTERARTION OR EXPANSION IN THE SCOPE OF EXISTING SERVICES

3.1 In the case of following existing taxable services, the scope has been altered either to expand their scope or to remove certain difficulties that have been faced during tax implementation. These changes are as follows,-

- The scope of the taxable service 'Air Passenger Transport Service' [section 65 (105) (zzzo)] is being expanded to include domestic journeys, and international journeys in any class.
- Presently the taxable service, 'Information Technology Software Service' [section 65 (105) (zzzze)] is subjected to tax only in cases where such IT software is used for furtherance of business or commerce. The scope of the taxable service is

being expanded to tax such service even if the service provided is used for purposes other than business or commerce.

- An Explanation is being added in the definition of the taxable service 'Commercial Training or Coaching Service' [section 65 (105) (zzc)] to clarify that the term 'commercial' appearing in the relevant definitions, only means that such training or coaching is being provided for a consideration, whether or not such training or coaching is conducted with a profit motive. This change is being given retrospective effect from 01.07.2003.
- In the definition of the taxable service 'Sponsorship Service' [section 65 (105) (zzzn)], the exclusion relating to sponsorship pertaining to sports is being removed.
- In the definition of the taxable services 'Construction of Complex service' [section 65 (105) (zzzh)], and 'Commercial or industrial construction service' [section 65 (105) (zzq)], it is being provided that unless the entire consideration for the property is paid after the completion of construction (i.e. after issuance of completion certificate by the competent authority), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly.
- Amendments are being made in the definition of the taxable service 'Renting of immovable property' [section 65 (105) (zzzz)] to,-(i) provide explicitly that the activity of 'renting' itself is a taxable service.

This change is being given retrospective effect from 01.06.2007; and (ii) provide that renting of vacant land, where the agreement or contract between the lessor and lessee provides for undertaking construction of buildings or structures on such land for furtherance of business or commerce during the tenure of the lease, shall be subjected to service tax.

- The definitions of the taxable services, namely the 'Airport Services' [section 65 (105) (zzm)], the 'Port Services' [section 65 (105) (zn)] and the 'Other Port Services' [section 65 (105) (zzl)] are being amended to provide that,-

(a) all services provided entirely within the airport/port premises would fall under these services; and (b) an authorization from the airport/port authority would not be a precondition for taxing these services.

- An explanation is being added in the definition of the taxable service 'Auctioneer's Service' [section 65 (105) (zzzr)] to clarify that the phrase 'auction by government' means an auction involving sale of government property by any auctioneer and not when the government acts as an auctioneer for sale of the private property.
- The definition of the taxable service 'Management of Investment under ULIP Service' [section 65 (105) (zzzzt)] is being amended to provide that the value of the taxable service for any year of the operation of policy shall be the actual amount charged by the insurer for management of funds under ULIP or the maximum amount of fund management charges fixed by the Insurance Regulatory & Development Authority (IRDA), whichever is higher.

3.2 The scope of modifications in the aforesaid taxable services and other significant details pertaining to amendments being made in the Finance Act, 1994 are enclosed in **Annexure 'B'**. These modifications would come into effect from a notified date after the enactment of the Finance Bill, 2010. It is requested that during this interim period, the impact of the above changes, issues that require further clarification, anticipated legal or implementation

problems may please be assessed and inputs in this regard may be brought to the notice of Tax Research Unit latest by the second week of March, 2010.

4. OTHER AMENDMENTS TO THE FINANCE ACT, 1994

4.1 Finance Act, 1994 is being amended to,-

a) insert an explanation in sub-section (3) of Section 73 to clarify that no penalty shall be imposed where service tax along with interest has been paid before issuance of notice by the department. This would be effective from the date of enactment of the Finance bill, 2010; and

b) provide definition of the term 'business entity' so as to include an association of persons, body of individuals, company or firm but to exclude an individual. This would be effective from a notified date after the enactment of the Finance bill, 2010

4.2 For other editorial changes being made in the Finance Act, 1994, please refer to the Finance Bill, 2010.

5. EXEMPTIONS

5.1 The following exemptions from service tax are being provided with effect from 27th February, 2010, namely,-

- Statutory taxes charged by any government (including foreign governments, where a passenger disembarks) on air passenger would be excluded from taxable value for the purpose of levy of service tax under the Air Passenger Transport Service. (Notification No.15/2010-ST, dated 27th February, 2010 refers).
- Exemption from service tax is being provided to services relating to 'Erection, Commissioning or Installation' of,-

o Mechanized Food Grain Handling Systems etc.;

o Equipment for setting up or substantial expansion of cold storage; and o Machinery/equipment for initial setting up or substantial expansion of units for processing of agricultural, apiary, horticultural, dairy, poultry, aquatic, marine or meat products. (Notification No.12/2010-ST, dated 27th February, 2010 refers).

- Packaged I.T. software, pre-packed in retail packages for single use, is being exempted from service tax leviable under IT Software Service, subject to specified conditions. These conditions include that either the customs duty (in case of import) or excise duty (in case of domestic production) has been paid on the entire amount received from the buyer (Notification No.17/2010-ST and No.2/2010-ST, both dated 27th February, 2010 refer).
- At present, exemption from service tax is available to transport of fruits, vegetables, eggs or milk by road by a goods transport agency. The scope of exemption is being expanded by including food grains and pulses in the list of exempted goods (Notification No.4/2010-ST, dated 27th February, 2010 refers).
- Exemption from service tax is being provided to Indian news agencies under 'Online Information and Database Retrieval Service' and 'Business Auxiliary

Service' subject to specified conditions (Notification No.13/2010-ST, dated 27th February, 2010 refers).

- Exemption from service tax is being provided to the 'Technical Testing and Analysis Service' and 'Technical Inspection and certification service' provided by Central and State seed testing laboratories, and Central and State seed certification agencies (Notification No.10/2010-ST, dated 27th February, 2010 refers).
- Exemption from service tax is being provided to the transmission of electricity (Notification No.11/2010-ST, dated 27th February, 2010 refers).

6. WITHDRAWALS OR AMENDMENTS TO EXISTING EXEMPTIONS

6.1 The following changes have been brought about in the existing exemptions,-

a) Exemption from service tax on service provided in relation to 'Transport of Goods by Rail' by notification No.33/2009, dated 1st September, 2009 is being withdrawn (Notification No.7/2010-ST, dated 27th February, 2010 refers). The exemption provided to certain specified goods transported by rail vide Notification No. 28/2009-ST, dated 31st August, 2009, which was subsequently withdrawn vide notification No. 36/2009-ST dated 9th September, 2009, has been restored. (Notification No. 8/2010-ST, dated 27th February, 2010 refers). An abatement of 70% of the gross value of the freight charged on goods (other than exempted goods) is being provided vide notification No. 9/2010-ST dated 27th February, 2010 by adding the service of 'Transport of goods by rail' in notification No. 1/2006-ST dated 01.03.2006. All these changes will also come into effect from 01.04.2010.

b) The exemption from service tax on 'Commercial training or coaching service' extended to vocational training institutes vide notification No. 24/2004-ST dated 10.09.2004 is being limited by introducing a new definition of vocational training institutes. Service tax exemption will be available only to industrial training institutes or industrial training centres affiliated to National Council of Vocational Training (NCVT) and offering courses in the designated trades covered under Schedule I of the Apprentices Act, 1961. The List figuring under Schedule I of the Act covers engineering as well as non-engineering skills/trades (Notification No.3/2010-ST, dated 27th February, 2010 refers).

c) Exemption from service tax, presently available to Group Personal Accident Scheme provided by Govt. of Rajasthan to its employees, under General Insurance Service is being withdrawn (Notification No.5/2010-ST, dated 27th February, 2010 refers).

d) Notification No.1/2002-ST dated 01.03.2002 is being superceded by Notification No.14/2010-ST, dated 27th February 2010 to provide that the construction and operation of installations, structures and vessels for the purposes of prospecting or extraction or production of mineral oils and natural gas in the Exclusive Economic Zone and the Continental Shelf of India and supply of any goods connected with these activities would be within the purview of the provisions of Chapter V of the Finance Act, 1994. Similar changes have been made in the definition of the term 'India' appearing in the Export of Services Rules, 2005 and Taxation of Services (Provided from Outside India & Received in India) Rules, 2006. (Notification No.6/2010-ST and Notification No.16/2010-ST, both dated 27th February, 2010 refers).

6.2 The revenue impact of these withdrawals and amendments [especially those mentioned under S. Nos. (1) and (2)] is significant. In the case of service tax on railway freight, a period of one month (i.e. upto 31.03.2010) has been provided for the railways to adjust freight rates, accounting system etc. During this period the jurisdictional officers should contact the local railways officials to finalize the modalities to operationalize this levy. Similarly, a quick survey should be conducted to ascertain the number of commercial coaching and training centres, which hitherto were availing the exemption and would now fall under the tax net. For finding out the eligible vocational training courses listed under of the Apprentices Act, 1961, please look at the web site of the Directorate General of Employment and Training, Ministry of Labour (dget.nic.in). Immediate steps should be taken to identify and allot registration to such institutes. Broad estimation of the numbers of the new taxpayers, revenue potential must be carried out and the legal/administration issues, if any, should be identified.

7. AMENDMENT TO EXPORT OF SERVICE RULES, 2005

7.1 Export of Service Rules, 2005 have been amended as follows:

- The taxable service, namely 'Mandap Keeper Service' has been shifted from the list under rule 3(1)(ii) [i.e. performance related services] to the list under rule 3(1)(i) [immovable property related services] and three taxable services, namely 'Chartered Accountant Services', 'Cost Accountant Services' and 'Company Secretary's Services', have been shifted from the list under rule 3(1) (ii) [i.e. performance related services] to the list under rule 3(1)(iii) [residual category of services]. Notification No.6/2010-ST, dated 27th February 2010 refers. Identical changes have been made under the Taxation of services (Provided from Outside India and Received in India) Rules, 2006 as well (Notification No.16/2010-ST, dated 27th February 2010 refers);
- The condition prescribed under rule (2) (a) i.e. 'such service is provided from India and used outside India' has been deleted (Notification No.6/2010-ST, dated 27th February 2010 refers).

6.1 These changes have been carried out keeping in view certain difficulties that were faced by the trade while following the aforesaid rules.

8. AMENDMENT TO NOTIFICATION NO. 5/2006-CE(NT) ISSUED UNDER RULE 5 OF THE CENVAT CREDIT RULES, 2004

8.1 It may be recalled that a number of representations were received from exporters, especially the exporters of services regarding difficulties being faced in availing the benefit of refund of accumulated credit under the scheme prescribed under Notification No. 5/2006-CE (NT) dated 14.03.2006, issued under rule 5 of the CENVAT Credit Rules, 2004. While certain issues germinated from the wordings used in the provisions of the notification or interpretation of such provisions, other issues were more in the nature of administrative difficulties in operating the scheme. As an immediate measure, CBEC issued a clarificatory circular No. 120/01/2010-ST, dated 19.01.2010. It was however felt that a permanent solution would require supplementing the clarification with certain amendments to the notification, part of which had to be 'retrospective' in nature. Accordingly, Notification No. 5/2006(CE) (NT) has been amended vide Notification No. 7/2010-CE (NT), dated 27th February 2010. This mainly deals with the

procedure that needs to be adopted in case of the new refund claims. However, to resolve the disputes arising on account of the wordings/ illustration provided in the notification, the same is being amended retrospectively (w.e.f. 14.03.2006) (Clause 73 of the Finance Bill, 2010 refers) so as to resolve the disputes in respect of pending cases as well. Therefore to visualize the entire revamped and simplified refund scheme, both the amending notification and the Finance Bill provision must be read in conjunction. A note on the issue is enclosed as **Annexure C.**

9. It may be noted that this d.o. letter does not set out the changes in an exhaustive fashion. It gives a broad view of the changes made in the service tax law and procedure in Budget 2010. It should not be used for interpreting any provisions in the case of any ambiguity. The wordings used in the statutory provisions and the notifications alone have legal standing. Therefore, they must be read carefully for interpretation, tax compliance and tax administration purposes.

10. Although all efforts have been made to draft the statutory provisions in the Finance Bill and the notifications correctly, it is possible that some errors, inconsistencies, omissions may have escaped our notice inadvertently. I shall be extremely thankful if you could point out such errors to me or to my colleagues immediately so that the same can be rectified. Further, please do not hesitate to contact us in case of any doubt, difficulty, and suggestion relating to interpretation or implementation of the provisions mentioned above. For this, you may contact either me or my colleagues,-

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11. I take this occasion to thank the Hon'ble Ministers, the Secretary Revenue and other senior officers of the Ministry of Finance, the Chairman and the Members of (CBEC) for their guidance, direction and support. Member (Budget) was kind enough to participate with us throughout the budget exercise at the shop floor level and no amount of thanks can reciprocate that. I thank all my colleagues in the department, whether posted in the Board's office or in the field formations as well as the trade representatives who gave us useful inputs and suggestions. Finally, my personal thanks to all the colleagues, officers and the staff members of TEAM-TRU for giving me advice, help and support especially during certain tiring, agonizing and frustrating moments.

Wish you a very Happy Holi and with regards,

Yours sincerely,
(Gautam Bhattacharya)

To

All Chief Commissioner/Directors General All Commissioners of Central Excise All Commissioners of Central Excise & Customs All Commissioners of Service Tax

Annexure- A
[to JS (TRU-II) D.O.]

Scope and the background of the new services included in the List of Taxable Services

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1. Services of promoting, marketing or organizing of games of chance, including lottery.

1.1 Lotteries are conducted by various State Governments and are regulated by a Central legislation, i.e. the Lotteries (Regulation) Act, 1998. The said Act provides the conditions, restrictions and prohibitions pertaining to organization of lotteries conducted by the State Governments. Section 4 of the said Act enjoins upon the State Governments to print lottery tickets bearing the imprint and the logo to ensure authenticity of the lottery ticket. It also provides that 'the State Government shall sell tickets either itself or through distributors or selling agents'.

1.2 The State Governments appoint distributors to advertise, promote and sell lottery tickets. Besides the State Governments organizing lotteries, some other games of chance are also being organized. The services provided for promotion or marketing or organizing such games of chance are now being covered by introducing a separate taxable service to cover the services in connection with games of chance, organized conducted or promoted by the client, in whatever form or by whatever name called (such as lottery, lotto) under the 'Games of chance' service. The tax would be applicable also to such games conducted online. Consequently, the Explanation appearing under 'Business Auxiliary Service' is being deleted.

2. Health services undertaken by hospitals or medical establishments for the employees of business organizations and health services provided under health insurance schemes offered by insurance companies.

2.1 With the change in the style of functioning of the business organizations, health check up is a routine facility provided by the employers to their employees. The main purpose is to ensure that the productivity of the organization is not adversely affected due to ill health of its employees. Such activities, commonly known as corporate health check up schemes, are undertaken by designated hospitals in order to detect any medical indicator or to ensure timely diagnosis of any disease so that prophylactic measures can be taken. In such cases, the hospital providing these services charge the employer i.e. the business organization and it constitutes expenditure for the latter. In certain cases (for example, in case of flight crew) pre-flight check ups are conducted not only to test the fitness levels but also to rule out the possibility of the flying crew being under intoxication. Such health check up schemes are being brought within the ambit of service tax under the new service.

2.2 A large number of health insurance schemes are being offered by the insurance companies under which charges for hospitalization, surgery, post-surgical nursing etc. are generally paid by the insurance company. Such insurance policies, which fall under the category of general insurance service, are already taxable. Under general insurance service, an insurance company is a service provider to its clients. Under the proposed new service, tax is also being imposed on the medical charges paid by the insurance companies to the hospitals

on behalf of a business entity for its employees. As such, the insurance company would be the service receiver and the tax paid by the hospital would be available to the insurance companies as credit.

2.3 The tax on the above mentioned health services would be payable only if and to the extent the payment for such medical check up or treatment etc. is made directly by the business entity or the insurance company to the hospital or medical establishment. Any additional amount paid by the individual (i.e. the employee or the insured, as the case may be) to the hospital would not be subjected to service tax. This is to ensure that an individual is not required to pay a tax for which he cannot take credit.

3. Services provided for maintenance of medical records of employees of a business entity

3.1 World over, business organizations maintain medical histories of their employees which are used not only for medical purposes but also for finding the suitability of a person for a particular job or for promotion etc. Increasingly, this activity is being outsourced for a consideration. Such records are either maintained by certain designated hospitals or even by independent record keepers for a charge. This activity is now being brought under service tax.

4. Promoting a 'brand' of goods, services, events, business entity etc.

4.1 Commercial advertisement has taken different shapes and forms. Apart from the advertisements in print and visual media and sponsorship, one of the recent trends is to advertise a brand (i.e. of goods, services, events, business houses bearing a particular brand name or house name) usually by using a celebrity (such as sportsperson, film stars, etc.) to associate him/her with the brand. The intended impression that is created in the minds of customers or users is that the products and services of that brand have the level of excellence comparable to that of the celebrity. Unlike in case of advertisements using models, a brand ambassador works under a contract of a reasonably long period, where under he is not only required to advertise the goods or service in different media but also to attend promotional, product launching events, make appearances in public activities related to the brand or the brand holder or use such goods or services in public. The contractual amounts are substantial and it may not only involve an individual celebrity but a group of celebrities such as a cricket team or the actors of a successful film.

4.2 It is important to note that promotion or marketing of sale of goods produced, provided or belonging to a client and promotion or marketing of services provided by the client are already covered under Business Auxiliary Services (BAS). Such activities would continue to remain classified under BAS. The difference between the services classifiable under BAS and the newly proposed service is that the latter has a wider coverage in the sense that mere promotion of a brand would attract tax under this service even if such promotions cannot be directly linked to promotion of a particular product or service. Many companies/corporate houses (for example Sahara, ITC or Tatas) are associated with a range of activities including production/marketing/sale of goods, provision of services, holding of events, undertaking social activities etc. If the brand name / house mark etc. is promoted by a celebrity without reference to any specific product or services etc., it is difficult to classify it under BAS. Such activities, like mere establishing goodwill or adding value to a brand would fall under this newly introduced service.

5. Services of permitting commercial use or exploitation of any event organized by a person or an organization.

5.1 Like intellectual property rights there are certain personal rights such as, right to privacy, easement right, right to secrecy. With expansion in the field of information technology and broadcasting sector, many individuals or organizations offer to share/part with these rights for a consideration. A corporate sponsored cricket match or company sponsored music concert; film award events; celebrities' marriages; beauty contests are some of such private functions, which a large number of viewers like to see on TV or media. In such cases, companies, broadcasting agencies and video producers are given right to capture these events or programmes for their commercial exploitation in future. Often such commercial exploitation results in provision of another taxable service such as broadcasting service or programme production service. The proposed service now seeks to tax the amount received by the person or organization, who permits the recording and broadcasting of the event from the broadcaster, or any other person, who seeks to commercially exploit the event. In many cases, the credit of the tax paid would be available to the receiver of the service.

6. Services provided by Electricity Exchanges

6.1 Under 'Forward Contract Service', tax is payable by exchanges who offer assistance in sale of goods or forward contracts in commodities. However, only forward contracts covered by the Forward Contract (Regulation) Act, 1952 are covered in the scope of taxation In the recent past, exchanges have been set up for transactions in electricity. The Central Electricity Regulatory Commission authorizes such exchanges. Since electricity exchanges are not covered by Forward Market Regulations, such transactions are not covered under the commodity exchange taxation. The proposed new service seeks to tax the charges recovered for services in relation to assisting, regulating, controlling the business of trading, processing and settlement pertaining to sale or purchase of electricity by the associations authorized by Central Electricity Regulatory Commission.

7. Services related to two types of copyrights hitherto not covered under existing taxable service 'Intellectual Property Right (IPR)', namely, that on (a) cinematographic films and (b) sound recording.

7.1 The right to temporarily transfer or permit the use of Intellectual Property Rights (IPR), namely, trademarks, designs and patents was brought under tax net in 2004. However, one of the IPRs, i.e. copyright has been specifically kept out of the purview of the tax with an intent to encourage authors and artists, as it involves creative works, such as literary work, musical work and artistic work. In Budget 2008, Information Technology (IT) Software Service was also brought under tax net, which apart from involving development, up-gradation, assistance etc. also covered the IPR aspect i.e. right to use the information technology.

7.2 The provisions of copyright are incorporated in the Indian Copyright Act, 1957. As per section 13 of the said Act, the copyright subsists in the following classes of work:

(a) Original literary, dramatic, musical and artistic works;
(b) Recording of cinematographic films;
(c) Sound recordings.

7.3 The first category of copyright has been kept out of the tax net while the second and third categories of copyrights are being made taxable under this service. A cinematographic film means any work of visual recording on **any medium** (emphasis added) produced through a process from which a moving image may be produced. The same may be accompanied with sound reproduction also. Both the recording of the cinematographic film and the accompanying sound track are the property of the producer, who can temporarily transfer it or permit its use by another person for a consideration. It is this activity, which is being taxed under this service. It would have an impact on the royalty payments on both imported and indigenously produced films when the producer/right holder allows such use to another person, say the distributor.

7.4 Similarly, song, its music, lyrics and composition also enjoy the copyright protection to its owner who can commercially exploit it in the manner stated above. Normally, the copyright of music vests in the composer and the copyright of music recorded vests in the producer of the sound recording. It is possible that a lyricist or a singer may hold copyright for the words of a song or the song itself. Merely allowing that song to be recorded is a copyright, which would fall under category (a) of section 13 of the Copyright Act and thus would not be subject to service tax. However, after the performer has transferred his rights to a sound recording company, the sound recording company acquires the copyright mentioned in category (c) of section 13 supra. It is the transfer or allowing use of this right, which would be subjected to tax under the new service.

7.5 As such, depending upon the nature and conditions of the contract, companies distributing music, owners of copyright of cinematographic films etc. would be prospective taxpayers. It may be noted that this taxable service will not cover individual artists, composers, performers etc. as their copyrights fall under clause (a) of Sec. 13 of the Copyright Act.

8. Special services provided by builder etc. to the prospective buyers such as providing preferential location or external or internal development of complexes on extra charges.

8.1 Construction of commercial or industrial structures was brought under service tax net in 2004 while construction of residential complexes became a taxable service in 2005. The scope of the existing services includes construction, completion and finishing, repairs, alterations, renovation or restoration of complexes. It has been reported that in addition to these activities, the builders of residential or commercial complexes provide other facilities and charge separately for them and these charges do not form part of the taxable value for charging tax on construction. These facilities include,-(a) prime/preferential location charges for allotting a flat/commercial space according to the choice of the buyer (i.e. Direction- sea facing, park facing, corner flat; Floor- first floor, top floor, Vastu- having the bed room in a particular direction; Number- lucky numbers); (b) internal or external development charges which are collected for developing/maintaining parks, laying of sewerage and water pipelines, providing access roads and common lighting etc; (c) fire-fighting installation charges; and (d) power back up charges etc.

8.2 Since these charges are in the nature of service provided by the builder to the buyer of the property over and above the construction service, such charges are being brought under the new service. Charges for providing parking space have been specifically excluded from the scope of this service. Development charges, to the extent they are paid to State Government or local bodies, will be would be excluded from the taxable value levy. Further, any service provided by Resident Welfare Associations or Cooperative Group Housing Societies consisting of residents/owners as their members would not be taxable under this service.

Annexure – B

[to JS (TRU-II) D.O.]

Alteration and expansion in the scope of existing services and other significant changes in the Finance Act, 1994

1. Services provided in an airport or port

1.1 Two services, namely 'port services' and the 'airport services' were introduced in Budgets 2001 and 2004 respectively. The services provided by minor ports covered under 'other ports' became taxable from 2003. The purpose behind creating these services was that since a number of activities are undertaken within the premises of ports and airports, it would be easier to consolidate all such services under one head.

1.2 It was reported that divergent practices are being followed regarding classification of services being performed within port/airport area. In some places, all services performed in these areas [even those falling within the definition of other taxable services] are being classified under the port/airport services. Elsewhere, individual services are classified according to their individual description on the grounds that the provisions section 65 A of Finance Act, 1994 prescribes adoption of a specific description over a general one.

1.3 Further, both the definitions use the phrase 'any person authorised by port/airport'. In many ports/airports there is no procedure of specifically authorizing a service provider to undertake a particular activity. While there may be restriction on entry into such areas and the authorities often issue entry-passes or identity cards, airport/port authorities seldom issue authority/permission letters to a service provider authorising him to undertake a particular task. Many taxpayers have claimed waiver of tax under these services on the ground that the port/airport authority has not specifically authorised them to provide a particular service.

1.4 In order to remove these difficulties, the definitions of the relevant taxable services are being amended to clarify that all services provided entirely within the port/airport premises would fall under these services. Further, specific authorisation from the port/airport authority would now not be a pre-condition for the levy.

2. Auctioneer's service

2.1 Auctioneer's service was introduced in 2006 and is applicable to any service provided in relation to auction of property whether moveable or immoveable, tangible or intangible. However, the service, by definition excludes 'auction by government'. This phrase has given rise to confusion. In certain cases, the property belonging to or vested in the Central or the State governments (such as goods confiscated by Customs department) are sold in an auction that is conducted by private organizations. Conversely, in certain cases government bodies, such as 'Tobacco Board' conducts auction of properties that belong to private individuals or organizations.

2.2 In order to avoid the confusion, it is being clarified through an explanation that the phrase 'auction by government' appearing in the taxable service, namely

'Auctioneer's service' means an auction where government property is being auctioned and not when the government acts as an auctioneer for the private goods.

3. Unit Linked Insurance Plans

3.1 Tax on insurers issuing Unit Linked Insurance Plans (ULIP) was imposed w.e.f. 1-06-2008. The taxable service is the "Management of investment, under unit linked insurance business, commonly known as Unit linked Insurance Plans (ULIP) scheme" by an insurer carrying life insurance business.

3.2 ULIPs are broadly similar to the mutual funds, except that they are required to segregate a certain part of the premium towards the life insurance of the plan holder. Further, unlike in the mutual fund industry, where the funds are managed by an independent Asset Management Company (which is a separate legal entity), in case of ULIP the funds are managed by the insurance company itself. Thus, it is difficult to ascertain the component of the total charges that is attributable to the management of investment.

3.3 Accordingly, for the purpose of valuation for charging of service tax, an Explanation was prescribed which in brief, explained that the taxable value for the purpose of this service is the difference between the (a) premium paid by the policy holder for the Unit Linked Insurance Plan policy; and (b) the sum of premium paid for or attributable to risk cover, whether for life, health or other specified purposes, and the amount segregated for actual investment. In other words the differential amount was considered as the charges for asset management.

3.4 It is however a fact that the amount appropriated by the insurance company is not only asset management but for various activities, such as,-a) Premium Allocation Charge: is an upfront deduction from the policy premium, which is generally more than 10% in the first year of ULIP, and continues to be very high for the initial three years. This amount is used for following purposes:

i) Initial expenses in marketing the issue, including commission paid to distributors.

ii) Cost of conducting medical check up of the ULIP holder and other miscellaneous charges.

b) Policy administration charges; monthly charges for managing the paperwork and other formalities for the insurance, and are not related to asset management. It is chargeable to service tax under insurance services.

c) A number of other charges are also charged by the insurance companies, which, *inter alia*, include, policy surrender charges, switching charges, partial withdrawal charges, miscellaneous charges etc.

d) Fund management charges: This is the amount charged by the insurance company for managing the investible funds, which is intended to be taxed under this service. This amount has been capped for ULIPs by Insurance Regulatory and Development Authority (IRDA) at 1.5% of the gross yield for schemes below 10 years, and 1.25% for schemes above 10 years.

3.5 Since the charge pertaining to asset management alone should form the value for taxable purpose, the explanation provided under the definition of the taxable service is being suitably amended to provide that that the value of the taxable service for any year of the operation of policy shall be the actual amount charged by the insurer for management of funds under ULIP or the maximum amount of fund management charges fixed by IRDA, whichever is higher.

3.6 The method of computation for monthly payment of tax by such service providers, would be prescribed at the appropriate time.

4. Transport of passengers by air service:

4.1 The taxes on transport of passengers traveling by air were in operation in the past. These were not in the nature of service tax but operated through separate legislations. Inland Air Travel Tax [@ 15%] was levied on domestic travel in 1989. Foreign Travel Tax [@ Rs. 500 per trip, except to neighboring countries for which the rate was Rs. 150 per trip] was levied on international travel in 1979. These taxes were withdrawn in the interim Budget 2004. In 2006, tax was imposed on international air travel by a passenger embarking in India and traveling in higher [other than economy] classes. This tax continues.

4.2 The taxable service is being suitably amended to extend this levy to cover all domestic and international air passengers embarking in India. The, modalities of working out the tax amount including exemptions, abatement etc. would be prescribed at the appropriate time.

5. Expansion of the scope of IT Software Service

5.1 In Budget 2008, services provided in relation to Information Technology (IT) Software, such as development, designing, programming, up-gradation of IT software, providing advice, consultancy and assistance on the matters of IT software and providing right to use IT software, whether supplied on a media or electronically, were brought in the ambit of service tax. However, the tax was limited to cases where such IT software was to be used in the course or furtherance of business or commerce. In other words, these activities are taxable only when the receiver of service exploits them for commercial or business purposes.

5.2 The definition of this taxable service is being suitably amended to extend this levy to cover the aforesaid IT software services provided in all cases i.e. whether or not used in the course or furtherance of business or commerce.

6. Redefining the scope of commercial training and coaching service

6.1 Commercial training and coaching service was introduced in Budget 2003 with a view to tax the mushrooming coaching institutes and training centres which either provide coaching classes for examinations or unrecognized courses in various areas such as, management, marketing, engineering etc. The schools, institutes, colleges and universities providing courses that lead to award of recognized diplomas/degrees and sports education were kept out of tax net. These include universities created under a Central or State Act, institutes recognized by UGC as universities or deemed universities, institutes granted recognition professional councils like AICTE, Medical Council of India, Bar Council of India etc. To distinguish the former types of institutes/centres from the latter, the word

'commercial' was used in the definitions of 'Commercial training and coaching', 'Commercial training and coaching centres' and 'taxable service'.

6.2 The use of the word 'commercial' in these definitions has led to certain unintended consequences. A view has been taken that the term 'commercial' appearing in various definitions implies that the institute must be run with a profit motive to fall under the taxable service. A number of taxpayers resisted paying tax on this ground. In order to clarify the legislative intent, the definition of the taxable service is being suitable amended, through insertion of an Explanation, to clarify that the word 'commercial' means any training or coaching that is provided for a consideration irrespective of the presence or absence any profit motive. This amendment is being carried out retrospectively (from July 2003) so as resolve the disputes pending at different levels of the dispute settlement system.

7. Expanding the scope of Sponsorship Service

7.1 Business entities often associate their brand names, products or services by sponsoring popular or successful events with intent to obtain commercial benefits of spreading their name, goodwill or reputation to public. It is a form of advertisement. Sponsorship service was brought under tax net in Budget 2006. However, sponsorship of sports events was kept out of the purview of the taxation with a view to encourage sports activity and to provide an avenue for funding sports events.

7.2 Corporate involvement in certain sports such as cricket, golf and tennis has grown rapidly in the recent years and there is a substantial increase in sports events organized by private organizations or business entities. Further, the concept of owning and forming sports clubs that hire the services of sports persons has made many such events highly commercial and profitable activities. The advertisements through sponsorship of such events have created a disparity, as unlike advertisements displayed otherwise, advertisement (through sponsorship) when associated with sports, does not attract service tax.

7.3 Therefore, the exclusion available for sponsorship pertaining to sports is being removed by suitable amendment. Suitable exemption to certain categories of sports events would be considered at the appropriate time.

8. Service tax on construction services

8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the

full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale Of Undivided Portion Of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parrallely executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of service tax payment.

8.6 In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged.

9. Renting of immovable property service

9.1 This service was introduced in 2007 with a view to tax the commercial use of immovable property hired on rent. The tax on rent paid is available as input credit if the commercial activity involves provision of taxable service or manufacture of dutiable goods. However, the Hon'ble High court of Delhi in its order dated 18.04.2009 in the case of Home Solutions Retail India Ltd. & Others vs. UOI has struck down this levy by observing that the renting of immovable property for use in the course of furtherance of business or commerce does not involve any value addition and therefore, cannot be regarded as service. Apart from the revenue loss caused to the exchequer, the judgement has placed the landlords in a very precarious situation. In view of this judgement, the commercial tenants have stopped them reimbursing the tax element. However, the landlords are receiving regular demand notices from the department issued to protect government's revenue for the interim period.

9.2 In order to clarify the legislative intent and also bring in certainty in tax liability the relevant definition of taxable service is being amended to clarify that the activity of renting of immovable property *per se* would also constitute a taxable service under the relevant clause. This amendment is being given retrospective effect from 01.06.2007.

10. Renting of vacant land

10.1 Under the definition of taxable service pertaining to renting of immovable property, the renting of vacant land used for agriculture, farming, forestry, animal husbandry, mining, education, sports, circus, entertainment and parking purposes, is excluded from the purview of service tax. Further, *'vacant land', whether or not having facilities clearly incidental to the use of such vacant land* has also been excluded from the tax net.

10.2 It has been reported that in many states, the local industrial corporations or PSUs or even private organizations rent vacant land on a long term leases with an explicit understanding that lessee would construct factory or commercial building on that land. In such cases the ownership of the land is not transferred to the lessee and thus it is a service provided by the lessor to the lessee. The situation is similar to renting out a constructed structure for commercial purposes except that at the time of executing the lease agreement the land is in a vacant state and that later the lessee constructs commercial structure thereon after executing the lease deed. Such lease agreements escape service tax because of the exclusion mentioned above.

10.3 Suitable amendment in the definition of taxable service relating to renting to immovable property is being made so as to provide that tax would be charged on rent of a vacant land if there is an agreement or contract between the lessor and lessee that a construction on such land is to be undertaken for furtherance of business or commerce during the tenure of the lease.

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Annexure – C

[to JS (TRU-II) D.O.]

Refund of accumulated Cenvat credit to Exporters : Amendments in Notification No. 5/2006-CE (NT)

Representations had been received by the Board that refund of accumulated CENVAT credit to the exporters of services and other service providers like call centers and BPO's were getting delayed and most of them are ultimately getting rejected,-

(i) On account of difference in perception/interpretation between the department and the export of services as to whether their actives fall under the purview of 'export of service at all';

(ii) Difference in wordings used in Notification No. 5/2006-CE (NT) dated 14.03.2006, issued under Rule 5 of CENVAT Credit Rules, 2004 as regards the definitions of terms such as 'inputs'/ 'input services' (iii) The procedural requirements prescribed under the notification and illustrations given therein were causing difficulties both in terms of delays and filing of incorrect/incomplete refund forms.

2. The issue was discussed both with the departmental officers as well as the trade and as an immediate solution, Circular No. 120/01/2010-ST dated 19th January, 2010 was issued.

3. To give legal backing to the above said circular, leading to faster and fair settlement of the refunds claims, changes have been effected in Notification No. 5/2006-CE (NT). Some of the changes have been made retrospective so that the pending cases are also covered. Other changes are being brought in prospectively, and are aimed at assisting the Departmental officers in faster processing of refund claims. The retrospective amendments are contained in clause 73 of the Finance Bill, 2010 while the prospective changes are contained in Notification no.7/2010-Central Excise (Non Tariff) dated the 27th February, 2010. Both these documents may be carefully read together for appreciating the full impact of the changes. The salient features of these changes are as follows:-Retrospective changes effected from 14.03.2006 (i.e. from the date of issue of notification)

1) The words "in relation to" have been added in main condition (a) of the Notification.

2) The word "in' contained in main condition (b) of the said Notification has been replaced with "for".

The above two changes ensure that the provisions of the refund notification and the CENVAT Credit Rules are aligned and that refund is granted on all goods or services on which CENVAT can be claimed by the exporter of goods or services.

3) The illustration given in condition 5 of the Appendix to the Notification has been deleted. This ensures that refund of CENVAT credit which has been availed in the period prior to the quarter/ period for which the refund has been claimed is also eligible for refund. The refund claims should be calculated only on the basis of

the ratio of the export turnover to the total turnover of the claimant. Thus, if the CENVAT credit available to the exporter at the end of the quarter, or month, as the case may be, is Rs. 1 crore, and the ratio of export to total turnover during the quarter is 50%, then Rs. 50 lakh should be refunded to the exporter. The essence of the changes is that refund shall be available for all goods, or input services, on which CENVAT is permissible and should be processed accordingly. Further, refund of CENVAT should not be linked to CENVAT taken in a particular period only.

Prospective changes

1. The conditions A and B given in the Annexure to the Notification are being deleted, and the details required to be given under these conditions, along with certain additional details, are to be furnished by the claimant in a table, which has been prescribed in condition A. The table should be certified by a person authorized by the Board of Directors (in the case of a limited company) or the proprietor/partner (in case of firms/partnerships) if the amount of refund claimed is less than Rs.5 lakh in a quarter. In case the refund claim is in excess of Rs.5 lakh, the declaration should also be certified by the Chartered Accountant who audits the annual accounts of the exporter for the purposes of Companies Act, 1956 (1 of 1956) or the Income Tax Act, 1961 (43 of 1961), as the case may be. This verification is aimed at reducing the checking of voluminous records which is required to be done by the officers processing the refund claims and ensure faster processing of refund claims.

2. Consequential changes by introducing the words "in relation to" and "for" in the Annexure to the Notification have been brought to bring them in line with the amendments made in the main conditions of the Notification.