

COMPREHENSIVE ANALYSIS OF WORKS CONTRACT SERVICE

A. Date of Applicability:

The works contract services are levied wef 01.06.2007.

Issue:

Now the question is that what would be the status of works contract entered prior to that date and taxable under other taxable services. This issue has been taken up by department and following clarification has been issued:

Answer:

As per Circular No. 128/10/2010-ST dated 24.08.2010

Subject: Service tax on on-going works contracts entered into prior to 01.06.2007 – regarding –

It has been brought to the notice of the Board that the following confusions/disputes prevail with respect to long term works contracts which were entered into prior to 01.06.2007 (when the taxable service, namely, Works contract came into effect) and were continued beyond that date:

(i) While prior to the said date services like Construction; Erection, commissioning or installation; Repair services were classifiable under respective taxable services even if they were in the nature of works contract, whether the classification of these activities would undergo a change?

(ii) Whether in such cases of continuing contracts, the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 under Notification No. 32/2007-ST dated 22/05/2007 would be applicable?

2. The matter has been examined. As regards the classification, with effect from 01.06.2007 when the new service 'Works Contract' service was made effective, classification of aforesaid services would undergo a change in case of long term contracts even though part of the service was classified under the respective taxable service prior to 01.06.2007. This is because 'works contract' describes the nature of the activity more specifically and, therefore, as per the provisions of section 65A of the Finance Act, 1994, it would be the appropriate classification for the part of the service provided after that date.

3. As regards applicability of **composition scheme**, the material fact would be whether such a contract satisfies rule 3 (3) of the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. **This provision casts an obligation for exercising an option to choose the scheme prior to payment of service tax in respect of a particular works contract.** Once such an option is made, it is applicable for the entire contract and cannot be altered. Therefore, in case a contract where the provision of service

commenced prior to 01.06.2007 and any payment of service tax was made under the respective taxable service before 01.06.2007, the said condition under rule 3(3) was not satisfied and thus no portion of that contract would be eligible for composition scheme. On the other hand, even if the provision of service commenced before 01.06.2007 but no payment of service tax was made till the taxpayer opted for the composition scheme after its coming into effect from 01.06.2007, such contracts would be eligible for opting of the composition scheme.

4. The Board's previous Circular No. 98/1/2008-ST dated 04.01.2008 and the ratio of judgement of the High Court of Andhra Pradesh in the matter of M/s. Nagarjuna Construction Company Limited vs. Government of India (2010 TIOL 403 HC AP ST) are in line with the above interpretation.

B. List of Applicable Notifications and Circulars:

S.NO.	NOTIFICATION	HEADING
GENERAL EXEMPTION		
1.	Notification No. 16/2002-ST, dated 2-8-2002	Services to UN Agencies
2.	Notification No. 12/2003-Service Tax dated 20.06.2003 effective from 01.07.2003	Exemption as to value of goods or material sold by service provider
3.	Notification No.17/2011 ST dated 01.03.2011 (previous notification 09/2009 ST dated 03.03.2009 & Notfn.No4/2004-ST dated 31.03.2004)	Exemption to services provided to a developer of SEZ or a unit of SEZ
4.	Notification No. 6/2005-ST, dated 1-3-2005. Last Amended by Notification No. 8/2008-ST dated 01.03.2008	Exemption up to Rs. 10 Lac (Exemption to Small Scale Service Providers)
5.	Notification No.09/2007 ST dated 01.03.2007	Exemption to taxable services provided by TBI and STEP
6.	Notification No.10/2007 ST dated 01.03.2007	Exemption to taxable services provided by entrepreneurs located within the premises of TBI or STEP
7.	Notification No. 33/2007-ST dated 23.05.2007	Exemption to services provided to Foreign Diplomatic Missions or Consular Post in India
8.	Notification No. 34/2007-ST	Exemption to services

	dated 23.05.2007	provided for personal use of a family member of Diplomatic Agent or Career Consular Officers posted in Foreign Diplomatic Mission/Consular Post in India
9.	Notification No. 11/2010 S.T., dated 27.02.2010	Exemption for services provided for transmission of electricity.
10.	Export of service (Rule 4 of Export of Services Rules, 2005)	Any service which is taxable under clause 105 of Section 65 may be exported without payment of service tax.
SPECIAL EXEMPTION		
1.	Notification No. 25/2007 – Service Tax dated 22.05.2007	Exempts works contract services in relation to construction of port or other port.
2.	Notification No. 41/2009-Service Tax dated 23.10.2009	Exempts works contract services in relation to construction of canals
3.	Notification No. 6/2011 – Service Tax dated 01.03.2011	Exempts works contract services in relation to construction and finishing of new residential complex under specified project.
4.	Notification No. 10/2011 – Service Tax dated 01.03.2011	Exempts works contract services wholly within an airport
5.	Notification No. 11/2011 – Service Tax dated 01.03.2011	Exempts works contract services wholly within an port or other port for specified purposes
Abatement		
1.	NIL	

S. NO.	CIRCULAR NO	HEADING
1.	D.O.F. No. 334 1 2007-TRU. DATED 28.02.2007	Briefing of changes brought by FA, 2007
2.	F. No. B1 16 2007 TRU DATED 22.05.2007	Post Budget 2007-08 notifications to give effect to the provisions of the Finance Act, 2007 - regarding.
3.	Circular No 96 7	Clarification on technical issues relating to taxation

	2007 ST DATED 23.08.07	of services under the Finance Act, 1994
4.	Circular No.98 1 2008-ST dated 04.01.08	Amendment to Circular No. 96/7/2007-ST dated the 23rd August, 2007 – Clarification in respect of renting of immovable property service and works contract service – Regarding.
5.	D.O.F.No.334 1 2008-TRU DATED 29.02.08	Briefing of changes brought by FA, 2008
6.	D.O.F. No. 334 13 2009-TRU, dated 6- 7-2009 (Extracts)	Budget 2009-10 — Changes and Clarification on Service tax
7.	CIRCULAR NO 116 10 2009 ST DATED 15.09.2009	Leviability of Service tax on construction of canals by Government agencies
8.	Circular No 123 5 2010 TRU dated 24.05.2010	Applicability of service tax on laying of cables under or alongside roads and similar activities
9.	Circular No 128 10 2010 DATED 24.08.2010	Service tax on on-going works contracts entered into prior to 01.06.2007
10.	Circular No 138 07 2011 dated 05 2011	Representation by Jaiprakash Associates Limited, Noida, in terms of Judgement dated 14.02.2011 in W.P. No. 7705 of 2008
11.	Circular No. 147 16 2011 DTD 21.10.11	levy of service tax on various service providers engaged / associated with such construction work
12.	Circular No 150 1 2012 ST 08.02.2012	Meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, as it stood prior to 07 th day of July 2009 - regarding.

C. Taxable Services

1. Definition and Scope of the service:

Taxable Service means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. (Section 65 (105) (zzzza) of Finance Act, 1994)

Key ingredient of above definition:

- I. Taxable services provided **by any person**.
- II. Taxable services provided **to any person**.
- III. Taxable services provided in relation to **execution of works contract**.
- IV. **Excludes** works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation.—For the purposes of this sub-clause, “works contract” means a contract wherein,—

(i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) such contract is for the purposes of carrying out,—

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

(Explanation to Section 65 (105) (zzzza) of Finance Act, 1994)

Key ingredient of above Explanation:

For being a work contract a contract should satisfy the following two conditions:

- I. Goods involved in the execution of works contract should be subject to levy of sales tax or vat.
- II. Works contract is for the purposes of carrying out of any of specified five works as stated in above definition (from (a) to (e))

2. Services to be included:

Following services are specifically included as per the definition of works contract services:

- A. Erection, commissioning or installation of plant, machinery, equipment; or
- B. Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, **primarily for the purposes of commerce or industry**; or
- C. Construction of a new residential complex or a part thereof; or
- D. Completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
- E. Turnkey projects including engineering, procurement and construction or commissioning (epc) projects;
- F. **Laying of cables under or alongside roads- Service tax liability-**
Circular No.123/5/2010-TRU, dated 24.5.2010, clarified under what circumstances laying of cables taxable is taxable or not taxable and if taxable under which category of taxable services it shall be taxed. For detail read the circular given below in this article.

3. Services to be excluded:

Following services are specifically excluded from the ambit of service tax under category of works contract services:

- I. Works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Dams, irrigation projects, buildings or infrastructure construction underturnkeys/ EPC contract by Government not covered under Works Contract service.-

The issue is about Government taking up construction activity of dams, irrigation projects, buildings or infrastructure construction etc. through turnkey or EPC (Engineering Procurement & Construction) mode. The said service is covered under Section 65(105)(zzzza) of Finance act, 1994. The said section itself excludes works contract in respect of dams, tunnels, canals or irrigation projects, road, airports, railways, transport terminals & bridges executed through such turnkey or EPC mode. Hence works contract in respect of above works even if done through turnkey or EPC mode are exempt from payment service tax.

[Based on CBE & C. Circular No.116/10/2009-S.T., dated 15.9.2009-2009 (16) S.T.R. (C9).]

- II. Construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, **primarily for the purposes other than the purpose of commerce or industry.**

4. Services generally exempted by issuing various exemption notifications:

- I. **Services to UN Agencies:** Services provided to United Nations or an International Organizations are exempt. [Notification No. 16/2002-ST, dated 2-8-2002]
- II. **Exemption to value of goods & material sold by service provider:**
In exercise of the powers conferred by section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby **exempts so much of the value of all the taxable services, as is equal to the value of goods and materials sold by the service provider to the recipient of service,** from the service tax leviable thereon under section (66) of the said Act, subject to condition that there is documentary proof specifically indicating the value of the said goods and materials. [Notification No. 12/2003-Service Tax dated 20.06.2003 effective from 01.07.2003]
- III. **Exemption to services provided to a developer of SEZ or a unit of SEZ:**
Exempts the taxable services specified in clause (105) of section 65 of the Finance Act, chargeable to tax under section 66 or section 66A of the Finance Act, received by a Unit located in a Special Economic Zone (hereinafter referred to as SEZ) or Developer of SEZ for the authorised operations, from the whole of the service tax, education cess and secondary and higher education cess leviable thereon. (Refer notification for details)

[Notification No.17/2011 ST dated 01.03.2011(previous notification 09/2009 ST dated 03.03.2009 & Notification No4/2004-ST dated 31.03.2004]

- IV.** As per NN 6 dated 01.03.05 last amended by NN 8 dated 01.03.08, assessee is not required to pay service tax on initial payment **RECEIVED** up to rs. 10 lac if, inter alia, aggregate value of taxable services **RENDERED** in the preceding financial year does not exceed rs. 10 lac.
- V. Exemption to taxable services provided by TBI and STEP:** All taxable services, provided by a Technology Business Incubator (TBI) or a Science and Technology Entrepreneurship Park (STEP) recognized by the National Science and technology Entrepreneurship Development Board (NSTEDB) of the Department of Science and Technology, Govt. of India from the **whole of the service tax** leviable thereon subject to certain conditions and procedures. (Refer notification for details)
[Notification No.09/2007 ST dated 01.03.2007]
- VI. Exemption to taxable services provided by entrepreneurs located within the premises of TBI or STEP:** All taxable services, provided by an entrepreneur located within the premises of a Technology Business Incubator (TBI) or a Science and Technology Entrepreneurship Park (STEP) recognized by the National Science and technology Entrepreneurship Development Board (NSTEDB) of the Department of Science and Technology, Govt. of India from the **whole of the service tax** leviable thereon subject to certain conditions and procedures. (Refer notification for details) [Notification No.10/2007 ST dated 01.03.2007]
- VII. Exemption to services provided to Foreign Diplomatic Missions or Consular Post in India:** All services provided by any person, for the official use of a Foreign Diplomatic Mission or Consular Post in India are exempted from service tax subject to certain conditions and procedures. (Refer notification for details)
[Notification No. 33/2007-ST dated 23.05.2007]
- VIII. Exemption to services provided for personal use of a family member of Diplomatic Agent or Career Consular Officers posted in Foreign Diplomatic Mission/Consular Post in India:** All services provided by any person, for personal use of family member of Diplomatic Agents or Career Consular officers posted in a Foreign Diplomatic Mission or Consular Post in India are exempted from service tax subject to certain conditions and procedures. (Refer notification for details)
[Notification No. 34/2007-ST dated 23.05.2007]
- IX. Exemption for services provided for transmission of electricity:**
In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to

any person, by any other person for transmission of electricity, from the **whole of service tax** leviable thereon under section 66 of the said Finance Act. [Notification No. 11/2010 S.T., dated 27.02.2010]

- X. Export of service:** Any service which is taxable under clause 105 of Section 65 may be exported without payment of service tax. (Rule 4 of Export of Services Rules, 2005)

5. Services specially exempted by issuing various exemption notifications:

I. Exempts works contract services in relation to construction of port or other port:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts **commercial or industrial construction service**, referred to in sub-clause (zzq) of clause (105) of section 65 of the Finance Act, and services provided in relation to the **execution of works contract**, referred to in sub-clause (zzzza) of clause (105) of section 65 of the Finance Act, provided to any person by any other person **in relation to construction of port or other port**, from the **whole of the service tax** leviable thereon under section 66 of the Finance Act.

Explanation: - For the purposes of this notification, it is hereby declared that,-

(i) commercial or industrial construction service or services provided in relation to the execution of works contract in relation to construction of port or other port shall not include services of completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port; and

(ii) "port" and "other port" have the meanings respectively assigned to them in clauses (81) and (76) of section 65 of the Finance Act.

Exemption to construction of port- Clarification-

Construction of ports is specifically exempted from levy of service tax under commercial or industrial construction service [section 65(25b)] vide Notification No. 16/2005-Service tax, dated 7.6.05. Construction of ports under the newly introduced commercial or industrial construction service provided in relation to the execution of works contract under Section 65(105)(zzzza) has also been exempted. Accordingly, Notification No. 16/2005-Service Tax, dated 7.6.05 has been rescinded and a combined Notification No. 25/2007-Service Tax, dated 22.5.07 has been issued exempting commercial or industrial construction service, and services provided in relation to the execution of works contract, provided to any person by any other person in relation to construction of a port or other port. However, services such as completion and finishing, repair, alteration, renovation, restoration, maintenance or repair provided in relation to existing port or other port shall be outside the scope of this exemption and hence, leviable to service tax.

[Based on M.F. (D.R.) Letter F.No. B1/16/2007-TRU, dated 22.5.2007-2007 (6) S.T.R. (C124).

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II. Exempts works contract services in relation to construction of canals:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service referred to in sub-clause (zzzza) of clause (105) of section 65 of the said Act, in relation to execution of a works contract in respect of canals, **other than those primarily used for the purposes of commerce or industry**, from the **whole of service tax** leviable thereon under section 66 of the said Act.

[Notification No. 41/2009-Service Tax dated 23.10.2009]

Canals constructed by Govt. or under Govt. projects not liable to Service tax under Commercial or Industrial Construction service:

On a reference being received by the Board, two following issues were examined for a clear understanding of facts. The first is regarding leviability of service tax on construction of canals for Government projects.

1. As per Section 65(25b) of the Finance Act, 1994 "commercial or industrial construction service" means —

- (a) construction of a new building or a civil structure or a part thereof; or
- (b) construction of pipeline or conduit; or
- (c) completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure; or
- (d) repair, alteration, renovation or restoration of, or similar services in relation to, building or civil structure, pipeline or conduit, which is —
 - (i) used, or to be used, primarily for; or
 - (ii) occupied, or to be occupied, primarily with; or
 - (iii) engaged, or to be engaged, primarily in,

commerce or industry, or work intended **for commerce or industry**, but does not include such services provided in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

2. Thus the essence of the definition is that the "commercial or industrial construction service" is chargeable to service tax if it is used, occupied or engaged either wholly or primarily for the furtherance of commerce or industry. As the canal system built by the Government or under Government projects, is not falling under commercial activity, the canal system built by the Government will not be chargeable to service tax. However, if the canal system is built by private agencies and is developed as a revenue generating measure, then such

construction should be charged to service tax.

[Based on CBE & C. Circular No.116/10/2009-S.T., dated 15.9.2009-2009 (16) S.T.R. (C9).]

III. Exempts works contract services in relation to construction and finishing of new residential complex under specified project:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service of execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Finance Act, when provided for the purpose of carrying out,-

(a) construction of new residential complex or part thereof; or

(b) completion and finishing services of new residential complex or part thereof ,

under **Jawaharlal Nehru National Urban Renewal Mission and Rajiv Awaas Yojana**, from the **whole of the service tax** leviable thereon under section 66 of the Finance Act.

[Notification No. 6/2011 – Service Tax dated 01.03.2011]

IV. Exempts works contract services wholly within an airport:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts services provided in relation to the **execution of works contract**, referred to in sub-clause (zzzza) of clause (105) of section 65 of the Finance Act, **when provided wholly within an airport** and classified under sub-clause (zzm) of clause (105) of section 65 of the Finance Act, 1994, from the **whole of service tax** leviable thereon under section 66 of the Finance Act.

[Notification No. 10/2011 – Service Tax dated 01.03.2011]

V. Exempts works contract services wholly within an port or other port for specified purposes:

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts services provided in relation to the **execution of works contract**, referred to in sub-clause (zzzza) of clause (105) of section 65 of the Finance Act, **when provided wholly within the port or other port, for construction, repair, alteration and renovation of wharves, quays, docks, stages, jetties, piers and railways** from the **whole of service tax** leviable thereon under section 66 of the Finance Act.

[Notification No. 11/2011 – Service Tax dated 01.03.2011]

6. Miscellaneous Issues:

Issue1:

Work contract services (WCS) in respect of construction of Dams, Tunnels, Road, Bridges etc. is exempt from service tax. WCS providers engage sub-contractors who provide services such as Architect's Service, Consulting Engineer's Service, Construction of Complex Service, Design Services, Erection Commissioning or Installation Service, Management, Maintenance or Repair Service etc. Whether services provided by subcontractors in respect of said WCS are also exempt?

Answer:

This issue has been taken up by CBEC vide circular no Circular No. 138/07/2011 – Service Tax dated may 2011 on representation made by M/s Jaiprakash Associates Limited. In this circular it has been clarified that the services provided by the subcontractors / consultants and other service providers are classifiable as per Section 65 A of the Finance Act, 1994 under respective sub clauses (105) of Section 65 of the Finance Act, 1944 and chargeable to service tax accordingly.

Issue2:

Clarification has been requested as to whether the exemption available to the Works Contract Service providers in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., is also available to the sub-contractors who provide Works Contract Service to these main contractors in relation to those very projects.

Answer:

This issue has been taken up by CBEC vide circular no Circular No. 147/16/2011 – Service Tax dated 21.10.2011 it was clarified that in case the services provided by the sub-contractors to the main contractor are independently classifiable under WCS, then they too will get the benefit of exemption so long as they are in relation to the infrastructure projects mentioned above.

D. Rate of Tax & Accounting Code:

S.No.	Particulars	Rate of Tax	Accounting Code
1.	Service Tax	10% of the value of Services	00440410
2.	Education Cess	2% of the service tax Payable	00440298
3.	Secondary and Higher Education cess	1% of the service tax Payable	00440426
4.	Other – Penalty/interest	As levied or applicable	00440411

(Rate of tax is effective from 24.02.2009 (See Notification No. 08/2009 S.T., dated 24.02.2009))

E. Overlapping Between works contract services or other services:

Issue1:

There is dispute that, after introduction of works contract services through new entry wef 01.06.2007 without changing any old entry, whether works contract services are not taxable if provided before that date under any other category of taxable services.

Answer:

In respect of same, some case laws are in favour of above contention and other are against the same.

RAMA RAO & COMPANY versus COMMR. OF CUS. C. EX. & S.T., HYDERABAD-IV dated 29-3-2011 (2011 (23) S.T.R. 49 (Tri. - Bang.)

Held:

Section 65(105)(zzzza) appears to be different from other clauses of Section 65(105) - Principle that introduction of new entry for purpose of levy of tax presupposes that same not covered by any pre-existing entries, not applicable to clause (zzzza).

Thus it is in the interest of service provider to collect and pay service tax in respect of works contract carried out before 01.06.2007 under any other category (like erection, commissioning, installation services, construction of residential complex etc).

Issue2:

2.1

In respect of works contract services there are number of issues like whether works contract is indivisible or divisible contract. It means whether a works contract can be said divisible in

1. Contract of sale of goods or services or
2. Contract of sale of goods or one or more services

2.2

If a contract is divisible in number of services like consulting engineers or erections, commissioning and installation services or works contract services etc then whether the same is taxable under one head of taxable services or respective different head of taxable services.

2.3

How to deal with works contract entered into before introduction of works contract services and on or after introduction of works contract services.

The above issue has been decided by Delhi tribunal in the given case:

2011 (23) S.T.R. 489 (Tri. - Del.)

ALSTOM PROJECTS INDIA LTD. *versus* COMMISSIONER OF SERVICE TAX, DELHI

The questions to be decided on the case are as under: -

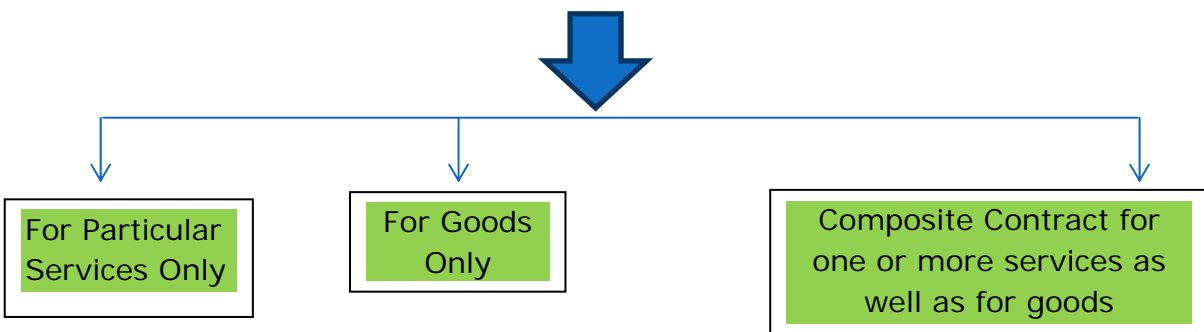
Question1.

Whether the contract of the appellant led consortium with DMRC (SYS-I) is an indivisible lumpsum turnkey contract for supply of a functional train control, signalling & telecommunication system in some particular Sections of Delhi Metro or whether the same is a divisible contract for supply of goods (machinery, equipment, etc.) and supply of services (consulting engineer's service & erection, installation or commissioning service)?

Reply:

Analysis by author for better understanding of above judgement

Indivisible contract may be any of following type:



This will be decided on the basis of the intention of the contracting parties, as expressed in the wordings of the contract. Accordingly if a work contract is indivisible contract for particular service and that particular service is taxable then service tax shall be paid in that particular service heading.

Similarly if in a contract there is intention to provide more than one service - A, B & C and charge for the same, it will be treated as a composite contract for the services A, B & C.

Important Note:

Like issue in the case of Commissioner v. Larsen & Toubro Ltd. — 2007 (5) S.T.R. J98 (S.C.) on 9-10-2006 has been admitted by SC for consideration. I hope soon judgement of SC would resolve all the queries in respect of the said issue.

WORDING OF ABOVE JUDGEMENT:

A contract for a **particular service** (say erection or commissioning) involving use of **other ancillary (not essential services or goods)** service (say consulting engineering) and/or goods for providing the service is an indivisible contract for that service and such contract will attract service tax if the service, the provision of which is the intention of the contract, is taxable. (Para 4.2)

Thus whether a contract is a composite contract for sale of goods as well as providing of service depends upon whether there is such intention in the contract and such intention has to be ascertained from the terms of the contract. Similarly if in a contract there is intention to provide more than one service - A, B & C and charge for the same, it will be treated as a composite contract for the services A, B & C. A contract would be an indivisible contract for a particular service if the intention of the contract is providing that particular service for some consideration and use of other service/services or goods or both is **incidental**. Charging of a fixed lump sum price or single point responsibility for performance of the contract involving use of goods and services do not make such a contract an indivisible contract as, as discussed above, the identity of a contract - **whether an indivisible contract for a service or an indivisible contract for sale of goods or a composite contract for sale as well as service or services depends upon the intention of the contracting parties, as expressed in the wordings of the contract.** (Para 4.2.2)

There is nothing in the language of Section 65(105) or Section 66 of the Finance Act, 1994 from which it can be inferred that for attracting service tax, the services specified in Section 65(105) must be **standalone activity** or that a service provided as a lump sum turnkey work contract or EPC contract or as part of such contracts will not be taxable. **If the work contract is an indivisible work contract for a particular service and that service is taxable under Section 65(105), Service Tax will be chargeable and the question whether the work contract is divisible or indivisible is irrelevant.** (Para 4.3)

But when a contract is a divisible contract of sales & service in which separate intention for sale of goods and rendering of service is discernible, even without invoking the legal fiction of Article 366(29A), it can be said that service tax can be charged on the service component, if the service/services are taxable service under Section 65(105) of the Finance Act, 1994. (Para 4.3)

The question of vivisection of an indivisible work contract is relevant only in the context of charging sales tax on the transfer of property in goods involved in providing of service, for which by 46th Constitutional amendment Article

366(29A) containing extended definition of "Tax on sale or purchase of goods" was introduced. But there is no need to invoke the legal fiction of Article 366(29A) for charging service tax on a work contract. (Para 4.4.1)

Therefore, this is a contract for sale as well as services and not an indivisible works contract as contended by the appellant. In fact there is nothing in this contract from which such a conclusion can be drawn.
(Para 4.5.2)

In this case, the plea of the appellant that the contract of the appellant with DMRC for "Design, Manufacture, Supply, Installation, Testing & Commissioning of trains control, signalling and telecommunication system" is an indivisible works contract, which cannot be vivisected for charging service tax on its service component, is fallacious; as if this plea of the appellant is accepted and the contract is accepted as an indivisible works contract, or in other words an indivisible service contract, the question will arise as to what is the objective of the contract - contract for which service? Since the ultimate purpose of the contract is installation & commissioning of a train control, signalling and telecommunication system, the contract will be treated as the contract for "installation & commissioning" service which is taxable since 1-6-2003. (Para 4.5.5)

Question2:

Whether the appellant, during the period of dispute, have provided the taxable services of 'consulting engineers service' and 'Erection, Installation or Commissioning Services" on which service tax was chargeable?

Reply:

In view of the above, while the activities covered by cost centres A & B are taxable as "Consulting Engineer's service', the activities covered by cost centre D & E are taxable as 'Erection, installation and Commissioning' service.

Question3:

Whether the services of 'Consulting Engineer's Services" and 'Erection, Installation or Commissioning Service" provided as a works contract or part of works contract could be charged to service tax during the period prior to 1-6-2007?

Reply:

Before 01.06.2007

Therefore, for the period prior to 1-6-07, the meaning of 'Works Contract' as commonly understood i.e. a contract for work and labour and in other words, a service contract has to be adopted and it would not be correct to treat a work contract as something different from a service contract. (Para 6.1)

Thus a contract for erection, installation and commissioning, even if involving transfer of property in goods on which state VAT/Sale Tax is paid, would attract service tax even for the period prior to 1-6-07. Similarly a divisible contract involving consulting Engineer's service (preparation of drawings/designs, preparation of operation manuals, or other technical assistance), procurement of goods, erection, installation and commissioning would attract Service Tax on Engineering Consultancy component and erection installation and commissioning component even prior to 1-6-07. (Para 6.1)

On or after 01.06.2007

While w.e.f. 1-6-07, following the principle of harmonious construction, it can be said that while Section 65(105)(zzzza) would cover the services defined by Section 65(105)(zzd), Section 65(105)(zzq), Section 65(105)(zzzh) and EPC contracts which involve transfer of property in goods on which tax as sale of goods is leviable, and Section 65(105)(zzd), 65(105)(zzq) and Section 65(105)(zzzh) will cover erection, installation or commissioning service, 'commercial or industrial construction services' and 'residential construction services' respectively not involving transfer of property in goods, but it does not mean that prior to 1-6-07, the services covered by Section 65(105)(zzd), 65(105)(zzq) and 65(105)(zzzh) involving transfer of property or goods were not taxable. Giving such an interpretation to Section 65(105)(zzzza) will be against the intention of the legislation to tax- "erection, installation or commissioning services", "commercial or industrial construction services", or "residential construction service" during the period prior to 1-6-07. Thus Section 65(105)(zzzza) is more like heading 98.01 of India Customs Tariff pertaining to Project Imports which provides a separate mode of assessment of Customs duty on a number of machines and other goods imported for initial setting up of a plant or a substantial expansion of an existing plant. (Para 6.1)

Question4:

If the answers to questions (1), (2) & (3) are in the affirmative, whether longer limitation period under proviso to Section 73(1) of the Finance Act, 1994 is available to the Department for recovery of allegedly non-paid service tax?

Reply:

Therefore, we are satisfied that longer limitation period under proviso to Section 73(1) has been correctly invoked and the tax demand is within time. (para 7.1)

Question5:

Whether penalty under Sections 76 and 78 of the Finance Act, 1994 is imposable on the appellant?

Reply:

In view of this, the penalty imposed on the appellant under Sections 76 & 78 are upheld.

CASE LAW:

S. No.	CASE LAW & CITATION	DECISION
1.	DAELIM INDUSTRIAL CO. LTD. [2006 (3) S.T.R. 124 (Tri. - Del.)]	Contract for construction, erection and installation of desulphurisation plant on payment of lump sum price - Drawings/documents submitted by the appellant/contractor to be reviewed by Engineers India Ltd./owner - Contract was on turnkey basis and not a consultancy contract - Work contract cannot be vivisected and part of it subjected to service tax - Section 65(13) of Finance Act, 1994.
2.	LARSEN & TOUBRO LTD. [2006 (3) S.T.R. 223 (Tri. - Del.)]	Tribunal held that a work contract cannot be vivisected a part of it subjected to service tax.
3.	FLEX ENGINEERING LTD. [2006 (1) S.T.R. 208 (Tri. - Del.)]	Modification in different equipments and facilities in factory amounted to works contract - Division of such works contract and part of it subject to service, not possible even if elements of engineering consultancy service found.
4.	Commissioner v. Daelim Industrial Co. Ltd. — 2007 (5) S.T.R. J99 (S.C.)]	The Supreme Court Bench comprising Hon'ble Mr. Justice S.N. Variava and Hon'ble Mr. Justice A.K. Mathur on 2-8-2004 dismissed the Petition for Special Leave to Appeal (Civil) No. 24294 of 2003 filed by Commissioner of Central Excise, Vadodara
5.	[Commissioner v. Larsen & Toubro Ltd. — 2007 (5) S.T.R. J98 (S.C.)]	The Supreme Court Bench comprising Hon'ble Mr. Justice H.K. Sema and Hon'ble Mr. Justice P.K. Balasubramanyan on 9-10-2006 after condoning the delay admitted the Civil Appeal No. D20554 of 2006 filed by Commissioner of Central Excise & Customs, Vadodara-II

F. Valuation

Provisions related to valuation of any taxable services are given in Section 67 read with SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006. **However, for services taxable under the category Works Contract Services, assessee has the option to pay service tax at concessional rate i.e. 4% (Earlier it was 2%)** under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Thus for provider of WCS there are two options for valuation which are given below:

1. Value of WCS as per rule 2A of SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006.
2. Valuation as per Composition Scheme, 2007.

It can be understood from the given table very easily:

S. NO.	PARTICULARS	OPT FOR COMPOSITION SCHEME	NOT OPT FOR COMPOSITION SCHEME
1.	Value	Value of all goods (including FOC) + value of all services-vat or sales tax-cost of machinery and tools used for execution of work. (As per explanation of rule 3 of Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007)	Gross amount charged – value of goods – salestax/vat (As per rule 2A of SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006)
2.	Cenvat credit may be taken	<p>1. Input services 2. Capital goods But cenvat credit cannot be taken of input and goods involved in execution of work. [Rule 3 (2) of of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007]</p> <p>The CENVAT credit of tax paid on following taxable services 1. Erection, commissioning and installation services u/s 65 (105)(zzd), 2. Commercial or industrial construction services u/s 65 (105) (zzq) 3. Construction of complex services u/s 65 (105)(zzh), shall be available only to the extent of 40% of the service tax paid when such tax has been paid on the full value of the service after availing CENVAT credit on inputs. { (WEF 01.03.11) [Rule 3 (2A) of of the Works Contract (Composition Scheme for Payment of</p>	<p>1. Inputs 2. Input services 3. Capital goods But cenvat credit cannot be taken of goods involved in execution of work. [As per Circular No.98 1 2008-ST dated 04.01.08]</p>

		Service Tax) Rules, 2007]]}	
3.	Rate of service tax	4.12%	10.30%

Relevant portion wrt WCS of changes in definition of input service (by Finance Act 2011) as per CENVAT Credit Rules, 2004

List of Services Specified Under Rule 2 (I)(ii)(A) of CENVAT Credit Rules, 2004

1. Port Services [65 (105) (zn)]
2. Port Services in other port [65(105)(zzl)]
3. Air Port Services [65(105)(zzm)]
4. Commercial or Industrial Construction Services [65(105)(zzq)]
5. Construction of Complex Services [65(105)(zzzh)]
6. Works Contract Services [65(105)(zzzza)]
7. Architect's Services [65 (105) (p)]

If the above services are used for the

- (a) construction of a building or a civil structure or a part thereof; or
 - (b) laying of foundation or making of structures for support of capital goods
- then these services shall not be considered as input services and accordingly CENVAT credit shall not be allowed. In other words, if the above services are used for provision of services other than construction etc in clause (a) & (b) then they shall be included in the definition of input services and accordingly CENVAT credit shall be taken.

Statutory provisions in respect of valuation of Works Contract Services are given below:

I.

Rule 2A of SERVICE TAX (DETERMINATION OF VALUE) RULES, 2006 Determination of value of services involved in the execution of a works contract:

(1) **Subject to the provisions of section 67**, the **value of taxable service** in relation to services involved in the execution of a works contract (hereinafter referred to as works contract service), referred to in subclause (zzzza) of clause (105) of section 65 of the Act, **shall be determined** by the service provider in the following manner: -

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

Explanation: - For the purposes of this rule,-

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

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

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;

- (iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;
- (v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract;
- (vi) cost of establishment of the contractor relating to supply of labour and services;
- (vii) other similar expenses relating to supply of labour and services; and
- (viii) profit earned by the service provider relating to supply of labour and services;

(ii) Where Value Added Tax or sales tax, as the case may be, has been paid on the actual value of transfer of property in goods involved in the execution of the works contract, then such value adopted for the purposes of payment of Value Added Tax or sales tax, as the case may be, shall be taken as the value of transfer of property in goods involved in the execution of the said works contract for determining the value of works contract service under clause (i).

II.

Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007

1. Short title and commencement.– (1) These rules may be called the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.
(2) They shall come into force with effect from the 1st day of June, 2007.

2. Definitions.– In these rules, unless the context otherwise requires, -

- (a) "Act" means the Finance Act, 1994 (32 of 1994);
- (b) "section" means the section of the Act;
- (c) "works contract service" means services provided in relation to the execution of a works contract referred to in sub-clause (zzzza) of clause (105) of section 65 of the Act;
- (d) words and expressions used in these rules and not defined but defined in the Act shall have the meanings respectively assigned to them in the Act.

3. (1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to **four per cent.** (upto 28.02.2008 it was 2%) of the gross amount charged for the works contract.

Explanation.- For the purposes of this rule, gross amount charged for the works contract shall not include Value Added Tax (VAT) or sales tax, as the case may be, paid on transfer of property in goods involved in the execution of the said works contract.

(2) The provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

(2A) The CENVAT credit of tax paid on taxable services as referred to under sub-clauses (zzd), (zzq) and (zzzh) of clause (105) of section 65 of the Finance Act, 1994, shall be available only to the extent of 40% of the service tax paid when such tax has been paid on the full value of the service after availing CENVAT credit on inputs.

(3) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and shall not be withdrawn until the completion of the said works contract.

Clarification by Various Circulars of CBEC w.r.t. Optional composition Scheme for WCS.

A. As Per M.F. (D.R.) Letter F.No. B1/16/2007-TRU, dated 22.5.2007-2007 (6) S.T.R. (C124)

Optional Composition Scheme for Works Contract- Clarifications.-

(1) Services provided in relation to the execution of a works contract [section 65(105) (zzzza)] is a taxable service. Works contract for the purposes of levy of service tax has been defined to mean a contract wherein:

(i) Transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and

(ii) Such contract is for the purposes of carrying out,-

(a) Erection, commissioning or installation,

(b) Commercial or residential construction and related completion and finishing services, and

(c) Turnkey projects including engineering, procurement and construction or commissioning (EPC) projects.

(2) Works contract is a composite contract for supply of goods and services. A composite works contract is vivisected and,-

(i) VAT/ sales tax is leviable on transfer of property in goods involved in the execution of works contract [Art.366(29A)(b)of the Constitution of India], and

(ii) Service tax will be leviable on services provided in relation to the execution of works contract.

(3) Service tax is chargeable on the gross amount charged by the service provider for the taxable services provided under section 67). In the case of works contract, the taxable value of services is to be determined by vivisecting the composite works contract. Rule 2A of Service Tax (Determination of Value) Rules, 2006 [Notification No. 29/2007-Service tax, dated 22.5.07], provides that value of works contract service shall be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract. Thus, wherever the service provider maintains records, the value of services shall be the gross amount charged for the works contract less the value of transfer of property in goods

involved in the execution of works contract.

(4) Wherever VAT/ sales tax on transfer of property in goods involved in the execution of works contract is paid on actual value, the same value is also taken for the purpose of determining the value of works contract service. In other cases, value of works contract service shall be determined based on the actual. It has also been explained that value of works contract service shall include:

- (i) labour charges for execution of the works;
- (ii) amount paid to a sub-contractor for labour and services;
- (iii) charges for planning, designing and architect's fees;
- (iv) charges for obtaining on hire or otherwise, machinery and tools uses for the execution of the works contract;
- (v) cost of consumables such as water, electricity, fuel, used in the execution of the works contract, the property in which is not transferred in the course of execution of works contract;
- (vi) cost of establishment of the contract relatable to supply of labour and services;
- (vii) other similar expenses relatable to supply of labour and services; and
- (viii) profit earned by the service provider relatable to supply of labour and services;

(5) If the gross amount charged for the works contract is inclusive of VAT or sales tax, the value for the purposes of service tax shall be computed as follows:

[Gross amount charged- (Value of transfer of property in goods involved in the execution of works contract and VAT or sales tax paid, if any, on the said transfer of property in goods involved in the execution of said works contract)].

(6) As a trade facilitation measure and also for ease of administrative convenience, the service provider has been given an option to adopt the composition scheme for payment of service tax on works contract service. The Works Contract (Composition Scheme for Payment of Service tax) Rules, 2007 has accordingly been notified vide Notification No. 32/2007-Service Tax, dated 22.5.07.

(7) * * *

(8) The provider of taxable service who opts to pay service tax under these rules shall exercise such option in respect of a works contract prior to payment of service tax in respect of the said works contract and the option so exercised shall be applicable for the entire works contract and cannot be withdrawn until the completion of the said works contract.

(9) Presently, erection, commissioning or installation service [section 65(105)(zzd)], commercial or industrial construction service [section 65(105)(zzq)] and construction of complex service [section 65(105)(zzzh)] are separate taxable services.

(10) Various trade and industry associations have raised apprehension in respect of classification of a contract either under the newly introduced works contract service or under erection, commissioning or installation and commercial or residential construction services.

(11) Contracts which are treated as works contract for the purpose of levy of VAT/ sales tax shall also be treated as works contract for the purpose of levy of service tax. This is clear from the definition under section 65(105)(zzzza).

B. As Per Master Circular No. 96/7/2007 –S.T., dated 23.8.2007 relevant to this service.

Ref. code	Issue	Clarification
(1)	(2)	(3)
<p>097.01 / 23.08.07</p>	<p>Whether CENVAT credit of duty paid on capital goods and service tax paid on input services can be taken by a service provider who opts to pay an amount equivalent to two per cent. of the gross amount charged for the works contract instead of paying service tax at the rate specified in section 66, under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, notified vide notification No.32/2007-Service Tax dated 22.05.07?</p>	<p>Rule 3(2) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provides that the provider of taxable service opting to pay service tax under the composition scheme is not entitled to take CENVAT credit of duty on inputs, used in or in relation to the said works contract, under the provisions of the CENVAT Credit Rules, 2004.</p> <p>There is no restriction under notification No.32/2007-Service Tax dated 22.05.07 to take CENVAT credit of duty paid on capital goods and service tax paid on input services.</p>
<p>097.02/ 4.1.08</p>	<p>Services provided in relation to execution of a works contract is leviable to service tax [section 65(105)(zzzza)]. VAT/ sales tax is payable on the transfer of property in goods involved in the execution of a works contract. Service Tax is leviable on the value equivalent to the gross amount charged for the works contract less value of the transfer of property in goods involved in the execution of the works contract which is leviable to VAT/ sales tax [Rule 2A of the Service Tax (Determination of Value) Rules, 2006]. Whether or not, excise duty paid on goods, subjected to levy of VAT/ sales tax under works contract service, can be taken as credit under the Cenvat Credit Rules, 2004?</p>	<p>Value for the purposes of levy of service tax under works contract service does not include the value pertaining to transfer of property in goods involved in the execution of a works contract leviable to VAT/ sales tax. Works contract service provider is, therefore, not eligible to take credit of excise duty paid on such goods involved in the execution of works contract.</p>

<p>097.03/ 4.1.08</p>	<p>Services provided in relation to execution of works contract is leviable to service tax w.e.f. 1.6.07 [section 65(105)(zzza)]. Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 provides option to pay service tax @ 2% (presently the rate is 4%) of the gross amount charged for the works contract. However, the service provider opting for composition scheme for payment of service tax should exercise the option prior to payment of service tax. The issue pertains to, - (i) contract entered into prior to 1.6.07 for providing erection, commissioning or installation and commercial or residential construction service, and (ii) service tax has already been paid for part of the payment received under the respective taxable service. Whether in such cases, the service provider can revise the classification to works contract service from the respective classification and pay service tax for the amount received on or after 1.6.07 under the Composition Scheme?</p>	<p>Prior to 1.6.07, service provider classified the taxable service under erection, commissioning or installation service [section 65(105)(zzd)], commercial or industrial construction service [section 65(105)(zzq)] or construction of complex service [section 65(105)(zzzh)], as the case may be, and paid service accordingly. The contract for the service was single composite contract. Part of service tax liability corresponding to payment received was discharged and the balance amount of service tax is required to be paid on or after 1.6.07 depending upon receipt of payment. Classification of a taxable service is determined based on the nature of service provided whereas liability to pay service tax is related to receipt of consideration. Vivisecting a single composite service and classifying the same under two different taxable services depending upon the time of receipt of the consideration is not legally sustainable. In view of the above, a service provider who paid service tax prior to 1.6.07 for the taxable service, namely, erection, commissioning or installation service, commercial or industrial construction service or construction of complex service, as the case may be, is not entitled to change the classification of the single composite service for the purpose of payment of service tax on or after 1.6.07 and hence, is not entitled to avail the Composition Scheme.</p>
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C. As per M.F. (D.R.) Letter D.O.F. No. 334/1/2008-TRU, dated 29.2.2008

Increase in rate under Composition Scheme- Service tax payable for works contract service under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 is being increased from 2% to 4% of the total value of the works contract. Rule 3(1) of the said rules is being amended suitably (Notification No. 7/2008-S.T., dated 1.3.2008).

D. Based on M.F. (D.R.) Letter D.O.F. No. 334/13/2009-TRU, dated 7.7.2009

Budget 2009-10- Changes in the Works Contract (Composition Scheme for Payment of service Tax) Rules, 2007.-

These rules provide a simplified procedure for working out the tax liability by the service providers providing works contract service. Instead of working out the service element from the value of works contract and paying service tax at full rate (i.e.10%) the service provider is allowed to pay 4% on the 'gross amount charged' for the works contract. The reason for prescribing the lower rate under the scheme is that the service provider need not bifurcate the gross value of works contract. **It was expected that the gross value should be shown to include the total value of materials as well as services used in providing the taxable services. However, it has been reported that in certain cases, the taxpayers are not including the full value of the goods required for execution of works contract for working out service tax liability under the Composition Scheme by either excluding the value of goods received free of cost from their client or splitting the contract into a sale contract (for a portion of goods required to execute the works contract) and works contract (for only a portion of the total value of goods and the labour charges), thus reducing the value of works contract for the purposes of calculating service tax.** In order to plug this loophole, the Explanation appearing in sub-rule (3) is being amended to provide that the composition scheme would be available only to such works contracts where the gross value of works contract includes the value of all goods used in or in relation to the execution of works contract whether received free of cost or for consideration under any other contract. **This condition would not apply to those works contracts, where either the execution of works contract has already started or any payment (whether in part or in full) has been made on or before the date of amendment, i.e. 7.7.2009, from which the said amendment becomes effective (refer Notification No. 23/2009-S.T.,dated 7.7.2009).**

Issue1:

Meaning of the expression 'gross amount' appearing in Rule 3(1) of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, as it stood prior to 07th day of July 2009

Answer:

This issue has been taken up by CBEC vide Circular No. 150/1/2012-ST dated 08.02.2012

it was clarified that the explanation appended to Rule 3(1) with effect from 07/07/2009, categorically says in the proviso that "...nothing contained in this

Explanation shall apply to a works contract where the **execution under the said contract has commenced or where any payment, except by way of credit or debit to any account**, has been made in relation to the said contract on or before the 7th day of July, 2009." Where execution of works contract has commenced prior to 07/07/2009 or where any payment(except payment through credit or debit) has been made towards a works contract prior to 07/07/2009, then in those cases 'gross amount' for the purpose of payment of service tax does not include the value of free of cost supplies.

Appendix I

As Per CBEC Circular No.123/5/2010-TRU, dated 24.5.2010

Laying of cables under or alongside roads- Service tax liability-

(1) Disputes have arisen in some parts of the country regarding applicability of service tax on certain activities such as shifting of overhead cables to underground on account of renovation/ widening of roads; laying of electrical cables under or alongside roads/ railway tracks; between grids/ sub-stations/ transformers the distribution points of residential or commercial complexes and such activities as electrification of railways, installation of street-lights, traffic lights, flood-lights. This clarification takes into account the taxability of different activities taking into account the scope of all services (such as site formation/ excavation /earth moving service, commercial or industrial construction services; erection, commissioning or installation services; or works-contract service) that are presently taxable as well as those which are covered under the Finance act, 2010.

(2) Scope of certain taxable services in brief;

(i) 'Commercial or industrial construction services', in brief, cover construction of and the completion, finishing, repair, alteration, renovation, restoration or similar activities pertaining to buildings, civil structures, pipelines or conduits. Therefore, only such electrical works that are parts of (of which result in emergence of a fixture of) buildings, civil structures, pipelines or conduits, are covered under the definition of this taxable service. Further, such activities undertaken in respect of roads, railways, transport terminals, bridges, tunnels and dams are outside the scope of levy of service tax under this taxable service.

(ii) Under 'Erection, commissioning or installation services', the activities relevant to the instant issue are (a) the erection, commissioning and installation of plant, machinery, equipment or structures; and (b) the installation of electrical and electronic devices, including wiring or fitting there for. Thus, if an activity does not result in emergence of an erected, installed and commissioned plant, machinery, equipment or structure or does not result in installation of an electrical or electronic device (i.e. machine or equipment that uses electricity to perform some other function) the same is outside the purview of this taxable service.

(iii) Works Contract incorporates the inclusions and exclusions of the aforementioned two taxable services (amongst others) and it is the nature of the contract (i.e. a contract wherein the transfer of property in goods involved in leviable to a tax as sale of goods) rather than the nature of activities undertaken, that distinguishes it from the previously stated taxable services.

Thus, even in the case of 'works contract' if the nature of the activities is such that they are excluded from aforesaid two services then they would generally remain excluded from this taxable service as well.

(iv) 'site formation and clearance, excavation, earthmoving and demolition services' are attracted only if the service providers provide these activities independently and not as part of a complete work such as laying of cables under the road.

(3) The taxable status of various activities, on which disputes have arisen

Based on the foregoing, the following would be the tax status of some of the activities in respect of which disputes have arisen,-

S.No.	Activity	Status
1.	Shifting of overhead cables/wires for any reasons such as widening/renovation of roads	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
2.	Laying of cables under or alongside roads	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
3.	Laying of electric cables between grids/sub-stations/transformer stations en route	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
4.	Installation of transformer/ sub-stations undertaken independently	Taxable service, namely Erection, commissioning or installation services [section 65 (105) (zzd)].
5.	Laying of electric cables up to distribution point of residential or commercial localities/complexes	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994
6.	Laying of electric cables beyond the distribution point of residential or commercial localities/complexes.	Taxable service, namely commercial or industrial construction' or 'construction of complex' service [section 65(105) (zzq)/(zzzh)], as the case may be.
7.	Installation of street lights, traffic lights flood lights, or other electrical and electronic appliances/devices or providing electric connections to them	Taxable service, namely Erection, commissioning or installation services [section 65 (105) (zzd)].
8.	Railway electrification, electrification along the railway track	Not a taxable service under any clause of sub-section (105) of section 65 of the Finance Act, 1994

4. The conclusions drawn above are essentially general in nature and would have to be applied in an individual case depending upon its facts and circumstances. The pending disputes /cases may be decided based on the clarifications contained in this circular.

With Warm Regards,

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