

Budget Highlights: Service Tax

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New Service in tax net

The Finance Bill 2010 has proposed to introduce eight new services into tax net, listed as under

- a. Game of chance service
- b. Health services (in specified cases)
- c. Maintenance of medical records service
- d. Brand promotion service
- e. Event Organization service
- f. Electricity Exchanges service
- g. Copyright service
- h. Builder's special service

Game of chance service

1. This service aims at taxing the services provided for promotion or marketing or organizing such games of chance, assisting in organising games of chance in any manner. This service intends to cover the said service in relation to lottery, bingo, lotto, or any other name in whatever the form the same is conducted, irrespective of whether the same is conducted through internet, or other electronic network.
2. The department attempted earlier to tax the above mentioned service under Business Auxiliary Service, under promotion of goods. This was litigated and High Court in case of *Martin Lottery Agencies Ltd . v. Union of India* 2007 (8) S.T.R. 561 (Sikkim) held that the activity does not cover under Business Auxiliary Service for the reason that lottery was 'actionable claim' and not 'goods'. To overcome this judgment an explanation was inserted in the

definition to cover the promotion of lottery specifically with effect from 16.05.2008.

3. After insertion of the said explanation, Supreme Court in case of UOI vs. *Martin Lottery Agencies Ltd* . 2009 (014) STR 0593 (S.C.) expressed a doubt as to whether the clarification/declaration is permissible in the situation where there was possibility of two view
4. To overcome with this lacuna the said explanation was deleted and this new category of service was introduced. This service would be taxable with effect from the notified date on enactment of the Finance Act 2010.

Health Service

5. This service intends to cover the service provided by any hospital, nursing home or a multi-specialty clinic in relation to health check-up, preventive care or treatment in certain cases. The situation of taxability and non taxability has been tabled as under.

Service Recipient	Service Provided	Consideration recei ved by	Taxabili ty
Employee of a Business Entity	Health Check-up or preventive care	Business Entity directly	Taxable
Individual	Health Check-up or preventive care	Individual	Non-Taxable
Employee of a Business Entity	Medical Treatment	Business Entity directly	Non- Taxable
Employee of a Business Entity	Health Check-up or preventive care	Individual	Non-Taxable
Employee of a Business Entity	Health Check-up or preventive care	Individual (reimbursed by Business Entity to Individual)	Non-Taxable

Owner of Business Entity	Health Check-up or preventive care	Business Entity directly	Non- Taxable
Employee of a Business Entity	Health Check-up or preventive care	Partly by Business Entity and partly by employee	Taxable Proportionately
Person covered under health insurance scheme	Health Check-up or treatment	Insurance Company directly	Taxable
Person covered under health insurance scheme	Health Check-up or treatment	Such person	Non-Taxable
Person covered under health insurance scheme	Health Check-up or treatment	Such person (later Insurance Company reimburses)	Non-Taxable
Person covered under health insurance scheme	Health Check-up or treatment	Partly by Insurance Company and partly by such person	Taxable Proportionately

6. With the introduction of this service, now the hospitals, nursing homes and multi specialist clinics are also into tax net. These units would be eligible to avail the CENVAT credit on the excise duty (additional duty of customs (CVD)) paid on capital goods and inputs used in providing the service as well as the service tax paid on input service. The capital goods in hand as well as duty paid inputs as on date of introduction should be available to such entities subject to the eligibility as well as fulfillment of conditions thereto.

7. Further the Insurance Company or the Business Entity (if manufacturer or taxable service provide) would be eligible take the credit of the same as it is an

expenditure incurred for business. For such service receivers there maybe no cost implication other than a possible renegotiation with such service providers.

8. However for the service receivers who do not provide any taxable services or manufacture excisable goods this would be an additional cost.
9. In the previous year budget the service provided in ration to cosmetic and plastic surgery was covered. An indication that slowly the health sector would be covered substantially. However the hospitals will be benefited by this service being taxable if the credit availment and planning is done effectively.
10. The term business entity is also defined. This service would be taxable with effective from the date to be notified on enactment of the Finance Act.

Maintaining of Medical Record Service

11. This service intends to cover any service provided by any person to a business entity in relation to storing, keeping or maintaining of medical records of such business entity. This generally the outsourcing activity, which would have otherwise covered under “Business Support Service”. The effective date would be the notified date on enactment of the Finance Act.

Brand Promotion Service

12. This service intends to cover the under mentioned activity done by appearing in advertisement and promotional event or carrying out any promotional activity for such goods, service or event
 - a. promotion or marketing of a brand of
 - i. goods,
 - ii. service,
 - iii. event
 - b. endorsement of name including a
 - i. trade name,
 - ii. logo of a business entity
 - iii. house mark of a business entity

13. Brand has also been defined for this purpose to include symbol, monogram, label, signature or invented words which indicate connection with the said goods, service, event or business entity.

14. The service in relation to promoting or marketing or sale of goods is already covered under the category “Business Auxiliary Service”, however the cases of promotion of the brand of the company per say and not related to any product was escaping tax net. To tap this type of promotion, a new service has been introduced. TRU circular express the intention of introduction of this circular is to tax the celebrities (film stars, cricketers etc) who acts a brand ambassador

Event Organization service

15. This service intends to tax the service of granting of the right or by permitting commercial use or exploitation of any event organized. The event here also includes the event relating to art, entertainment, business, sports or marriage organised by such other person granting the right.

16. The TRU circular clarifies that the proposed service 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. This is common in case of cricket match, music concert; film award events; celebrities marriages, beauty contests etc. Applicable from a notified date.

Electricity exchange Service

17. This service intends to tax the service provided by the electricity exchange in relation to trading, processing, clearing or settlement of spot contracts, term ahead contracts, seasonal contracts, derivatives or any other electricity related contract. The service provider should be an electricity exchange approved by Central Electricity Regulatory Commission.

18. This is similar to the recognised stock exchange service. The exchanges such as Indian Energy Exchange Limited, NCDEX etc would be under the tax net now on.

Copyright Service

19. This service intends to tax temporary transfer or permitting the user/enjoyment of any copy right in relation to cinematograph films and sound recording, which is defined under the Copyright Act, 1957. However the transfer of copy right in relation to original literary, dramatic, musical and artistic works do not attract service tax.
20. The transfer of the copy right from the producer of a movie to the distributor may attract service tax under this category of service. The TRU circular clearly states that the prospective tax payer in this regard would be companies distributing music, owners of copyright of cinematographic films etc.
21. It is possible that the same transaction is covered under the local VAT laws as a transfer of goods or right to use goods and a position similar to sale of software licenses may arise which would be litigated for some time. Applicable from a notified date. The importance of clarity in the terms and condition of the contract cannot be understated here.
22. Maybe a case to examine whether the same should be disputed or paid under protest. This service would be taxable from a specified date.

Special Service by Builder

23. This service intends to cover the charges collected by the builder by the prospective buyer for the providing preferential location or for the development of residential complex, or a commercial complex. This service does not include the service provided in relation to Repairs, Management or Maintenance, commercial or industrial construction, construction of complex and in relation to parking place.

24. Explanation defines “preferential location” to mean to have any location having extra advantage which attracts extra payment over and above the basic sale price.
25. The definition appears to be wide to cover the development of commercial or residential complex. However the TRU circular has clarified that scope of tax under this service to be internal or external development charges which are collected for:
- a. developing/maintaining parks,
 - b. laying of sewerage and water pipelines,
 - c. providing access roads and common lighting etc;
 - d. fire-fighting installation charges;
 - e. power back up charges etc
26. TRU circular also clarifies Development charges, to the extent they are paid to State Government or local bodies, would be excluded from the taxable value levy, however the notification for the same is not in place as of now.
27. The service of construction of complex, commercial construction and works contract for both has become an area of confusion and this service being related to those would also go the same way. This is an example of how the revenue plays unfair games where there is no clarity or stability in the tax laws. The service would be taxable from the notified date.

Expansion in the scope of the existing service

28. The Finance Bill 2010 has expanded the scope of following existing taxable:
- a. Port service, other port service and airport service
 - b. Commercial training and coaching service
 - c. Residential complex and industrial construction service
 - d. Sponsorship service
 - e. Travel by Air
 - f. Renting of immovable property service

- g. Information technology software service
- h. Management of Investment under ULIP service

All these services would be liable on enactment of Finance Act 2010.

Port service, other port service and airport service

29. The taxable service definition of all the three service has been amended to expand the scope of taxability to any person providing the said service in the port. Earlier it was taxable only if the service was provided by the authorized person.
30. Another important proposed amendment is an explanation has been added stating the section 65A, which deals with the classification principle would not be applicable to this category. One of the classification principles was that in case the service is classifiable under one or more category of service, the specific category would be preferred over general. Now this principle has been done away with, which is a move which goes against the basic premise of making tax laws simple and understandable.
31. This may have high impact for the cargo handling service providers, where service related to export cargo was specifically exempted under category “Cargo Handling Service”, which is not in the case of port service. This amendment overrides the High Court decision in case of Commissioner of C. Ex., Mangalore vs Konkan Marine Agencies 2009 (013) STR 0007 Kar., where it was held the classification would be “cargo handling service” and not the “port service”.

Commercial training and coaching service

32. The service provider in the taxable service definition is “commercial training and coaching center” based on the term “commercial” it was concluded that in case the service is provided by a non commercial/ non-profit organization such as charitable origination , trust, NGO, philanthropic organizations etc, the service would not be covered. Several judgment of the Tribunal followed this view.

33. However to overcome these decisions an explanation has been inserted to deem even the non-profit oriented organization also “commercial training and coaching center” as long as they receive any consideration. The explanation so inserted starts with words “for removal of doubts”. The intention is to retrospectively clear the doubt from 2003.
34. This retrospective amendment is patently unfair. Thousands of cases would be attempted to be investigated and untold harassment of such organizations would result. Further the fate of such organizations who have won at various levels in the past would again be in doubt.
35. The period of limitation of 1 year could possibly be a defense in disputes. However this may be legally sustainable in view of the Supreme Court decision in case of UOI vs. *Martin Lottery Agencies Ltd* . 2009 (014) STR 0593 (S.C.).

Residential complex and industrial construction service

36. The service of construction by the contractor to builder was taxable in this service. There were many circulars and clarifications issued by the board, which concluded that the service provided by the builder to the buyer was not taxable the latest being 108 of January 2009.
37. Now the new inserted explanation states that 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 shall be deemed to be service provided by the builder to the buyer .
38. That is to say that this entry has extended the scope to tax the transaction between the builder and the buyer by deemed provision.
39. However such deeming provision would not attract 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 which means very wide coverage.

40. TRU Circular clarify that in order to bring parity tax treatment among different practice the said explanation was inserted. The circular also clarifies that by this explanation the scope has been enhanced. This gives the conclusion of the same being prospective and also clarifies that the transaction between the builder and buyer of the flat is presently not taxable.
41. However this explanation has been inserted in the taxable service definition of 'construction of complex service' and 'commercial or industrial construction service' and not in the definition of "Works Contract Service" leaving room for more confusion and litigation.
42. Further this explanation is not in line with the clarification given on the exclusion portion of the "residential complex" definition (Section 65(91a)) under Circular No. 108 dated 29.01.2009. The issues that arises is that, when there is a specific exclusion for the personal use of the buyer and explanation deeming the same transaction as taxable service would hold?
43. Further the question of contracts in progress where payment of service tax has been stopped would be another issue.
44. The legal question could be whether the deeming provision can come by way of an explanation imposing new liability on the activity. Is it constitutionally valid? Whether the completed building which is subject/ subjected to the stamp duty can be made liable for service tax? Whether the agreement to sell the land can be subject matter of service which is clearly a state subject?
45. This badly drafted, short sighted, high handed only indicates the overzealous face of the tax collector who unfortunately is also the law maker in India today.

46. It is certain that this amendment would be hotly debated and contested in the next few years.

Sponsorship service

47. The definition of the sponsorship specifically excluded the services in relation to sponsorship of sports events till date. This exclusion has been proposed to be deleted in the Finance Bill 2010 obviously due to the huge sums of monies paid for sponsorship of cricket.

48. The important point to be noted is that the liability to pay service tax is on the sponsorer and not the person receiving such money

Travel by Air

49. Any service provided to any passenger, by an aircraft operator, in relation to scheduled or non-scheduled air transport of such passenger embarking in India for international journey was taxable. However the travel by economy class was excluded.

50. Now this definition has been proposed to amended to include the service provided to passenger embarking in India for domestic travel also. Further the exclusion of economic class has been proposed to be removed.

Renting of immovable property service

51. The definition of the taxable service in this regard has been amended to include mere renting of immovable property and also any service provided in relation to such renting in the tax net.

52. This amendment has been proposed to overcome the decision in case of Home Solution Retail India Ltd. vs Union of India 2009 (014) STR 0433 Del, where in it was held that mere renting of immovable property was not covered under the tax net. This matter is presently pending before Supreme Court. This amendment is proposed retrospectively.

53. The Writ petition before the High Court was filed on the following grounds

- a. Levy of service tax on letting out/renting out of immovable property *per se*
- b. Section 66 insofar as they relate to the levy of service tax on renting of immovable property would amount to a tax on land and would therefore fall outside the legislative competence of Parliament

54. High Court started to examine the first ground and came to the conclusion that mere renting of immovable property, without any facility being provided was not covered under the taxable service definition. Since the relief for the petitioners was granted on the first ground High Court did not examine the second ground.

55. The second grounds maybe be tested even after this amendment. The question of service tax being a value added service may also be re-agitated.

56. In the present day many landlords have not been paying, many paying under protest, tenants refusing to pay and a large majority of landlords not being registered across India. Widespread harassment and resentment is expected for the next few years.

57. In some case there was a practice of leasing the vacant land for the long term lease, where the lessee would construct the building for the commercial use. The rent paid by the lessee was for the vacant land, which was specifically exempted under the definition. Now an amendment in the definition has been proposed to cover such case specifically. This amendment luckily has been proposed prospectively.

Information technology software service

58. The definition of the information technology software service provided tax only on the software used for the furtherance of business or commerce. Now this amendment has been made to propose to tax all software irrespective of its use.

59. This may also enable the refunds for the ITS service exporters.

Management of Investment under ULIP service

60. Service tax was imposed on the asset management service provided to the ULIP holder. Now an amendment has been proposed to levy service tax only on 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.

Other amendments in statute

61. The definition of business entity has been defined separately, which was earlier defined by an explanation to legal consultancy service.

62. An explanation has been inserted to clarify that there would be no penalty in case the entire amount of service tax along with the interest has been paid before issue of show cause notice. This is a welcome measure which would close substantial number of pending cases.

Exemption Notification

63. Canned software: Service taxable under “information technology software service” has been exempted when service is provided for packaged or canned software, intended for single use and packed accordingly. The major issue is that the central excise duty should have been paid on the value payable by the buyer. The manufacturer who sells to the intermediary or the importer who sells to the intermediary may find that impracticable unless he fixes a MRP and follows payment on the gross amount.

64. Goods transport agency: The service of the transport of good in road provided in relation to transportation of fruits, vegetables, eggs or milk was exempted under notification 33/2004-ST dated 03.12.2004, now this notification has been amended to extend the benefit to transportation of food grains and pulses also.

65. Transport of goods by Rail: Certain goods transported by rail are exempted based on for whom etc.

66. Extension of abatement: The abatement under notification 1/2006-ST as amended has been extended for transport of goods by rail.

67. Transmission of Electricity: The taxable service of transmission of electricity has been exempted

68. Erection, commissioning & Installation: The following services have been exempted:

- a. erection, commissioning or installation of mechanised food grain handling systems
- b. erection, commissioning or installation of equipment for setting up or substantial expansion of cold storage
- c. installation and commissioning of machinery or equipment for initial setting up or substantial expansion of units for processing agricultural, apiary, horticultural, dairy, poultry aquatic and marine products and meat.

69. It would be very important to note in this regard that the same service provided under category “Works Contract Service” would not be exempted as the first entry relates to pure service. Therefore the terms of the contract and divisibility of the contract may play a vital role.

70. News agency: The service covered under “Business Auxiliary Service” and “on-line information and database access or retrieval services” provided to news agency is exempted subject to certain conditions.

Amendment in notification restricting exemption

71. The exemption notification 24/2004-ST dated 10.09.2004 exempted the “commercial training and coaching service” provided in relation to vocational training. Vocational training was defined as impart skills to enable the trainee

to seek employment or undertake self-employment, directly after such training or coaching.

72. Now this definition of vocational training has been narrowed by replacing the said definition to exempt an Industrial Training Institute or an Industrial Training Centre affiliated to the National Council for Vocational Training, offering courses in designated trades as notified under the Apprentices Act, 1961(52 of 1961). It appears that while the Government has failed to provide education the advantage of exemption enjoyed by those who do their job of making the students employable is not to be.

73. Exemption for Rajasthan under Group Personal Accident Scheme, to its employees in relation to general insurance business, from whole of the service tax was exempted vide notification 1/2000-ST dated 09.02.2000, this has been rescinded.

74. Exemption for taxable service provided to any person in relation to transport of goods by rail was exempted vide notification 33/2009-ST dated 01.09.2009, this notification has been rescinded making the service taxable.

Amendment to Export of Service

75. The general conditions for the service to satisfy export of service was an under

- a. Service has to be provided from India and received outside India
- b. Consideration has to be received in convertible foreign exchange

76. Now the first condition that is “service provided from India and received outside India has been done away.

77. The specific condition for these under mention services has been changed

Service	Existing	New
Mandap keeper Service	Performance outside India	Immovable Property Situated outside India

Chartered Accountant Services	Performance outside India	Recipient located outside Indi
Cost Accountant Services	Performance outside India	Recipient located outside India
Company Secretary's Services	Performance outside India	Recipient located outside India

78. The explanation which defined India has been amended to include installations structures and vessels located in the continental shelf of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof

Amendment to service provided from outside India and received in India Rules

79. The specific condition for these under mention services has been changed

Service	Existing	New
Mandap keeper Service	Performance in India	Immovable Property Situated in India
Chartered Accountant Services	Performance in India	Recipient located in India
Cost Accountant Services	Performance in India	Recipient located in India
Company Secretary's Services	Performance in India	Recipient located in India

80. The explanation which defined India has been amended to include installations structures and vessels located in the continental shelf of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof