

## **SERVICE TAX ON REAL ESTATE TRANSACTIONS AND FEW OTHER SERVICES**

### **Relevant Services:-**

- ✚ Architect Service – sec.65 (105) (p) , 65 (6)- Date of levy -16-10-98.
- ✚ Auction of Property – sec.65 (105) (zzzr); sec. 65(7a)- Date of levy 1.05.2006
- ✚ Construction of Commercial & Industrial complex – sec.65 (105)(zzq), 65 (25b)- 10.09.2004
- ✚ Construction of residential complex – sec.65 (105) (zzzh),65 (30a); 65 (91a)- 16.06.2005
- ✚ Engineering Service- Sec 65 (105)(g), 65 (31), dated 16-07-1997
- ✚ Erection, Commissioning & Installation Service. Sec65 (29), 65 39a), 65(105)(zzd)- 1.07.2003
- ✚ Interior Decorator Sec 65 (59); 65( 105)(q) -16.10.1998
- ✚ Real Estate Agent & Consultants –sec 65 (88),65 (89), 65 (105)(v)- 16.10.1998.
- ✚ Renting of Immovable Property- Sec 65 (90a), 65 (105)(zzzz)- 1.06.2007
- ✚ Management Repair and Maintenance – Sec 65 (64), 65(105)(zzg) – 1.07.2003
- ✚ Site formation, clearance excavation, earthmoving and demolition service;- Sec 65 (105) (zzza), 65 (97a) -16.06.2005.
- ✚ Works Contract – sec. 65 (105)(zzza) -1.06.2007.

Other few Services

### **Taxable Service:- Sec.65(105) – e.g.**

Taxable service means any service provided or to be provided –

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(zzzh) to any person, by any other person, in relation to construction of complex.

In this reference, the relevant abstract of the decision in MAGOUS CONSTRUCTION PVT. LTD. Vs. UOI 2008 (11) S.T.R. 225 (GAU) is reproduced as follows:-

In the light of what has been laid down in the catena of decision referred to above, it becomes clear that the circular, dated August 1, 2006, aforementioned, is blinding on the Department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relation-ship of “service provider” and “service recipient” the question of providing “taxable service” to any person by any other person does not arise at all. In the present case too, the material placed by the writ petitioners clearly show that **the construction activities, which the petitioners have been undertaking, are in respect of the petitioners, own work and it is only the completed construction work, which is sold by the petitioner-company to the buyers, who may have made agreements for sale before the construction had actually started or during the progress of the construction activity or at the end or completion of the construction activity. Any advance, made by a prospective buyer, or deposit received by the petitioner company, is against consideration of sale of the flat / building to such prospective buyer and not for the purpose of obtaining “service” from the petitioner-company.**

**CONSTRUCTION SERVICE:-**

**(A) Residential Complex:-**

1. For the word “Construction of Complex”, kindly refer sec. 65(30a) is reproduced as follows-

Construction of complex means:-

- (a) construction of a new residential complex or a part thereof; or
- (b) completion and finishing services in relation to residential complex 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; or
- (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;

The term “taxable service” means any service provided or to be provided to any person, by any other person, in relation to construction of complex - Sec. 65 (105) (zzzh) the Finance Act, 1994.

The term 'residential complex' as per section sec. 65 (91a) of the Finance Act, 1994, means any complex comprising of—

- (i) a building or buildings, having more than twelve residential units;
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

**Explanation:** – For removal of doubts, it is hereby declare that for the purposes of this clause-

- (a) "personal use" includes permitting the complex for use as residence by an other person on rent or without consideration;
- (b) "residential unit" means a single house or a single apartment intended for use as a place of residence."

2. For the levy, there are several conditions such as:-

- (a) in a building or buildings, there shall be more than twelve residential units;
- (b) the area for all such units shall be common one;
- (c) there shall be at least one of various facilities i.e. common park, common lift, common parking space, community hall, common water supply or a common effluent treatment system located within such premises;
- (d) the layout shall be approved by the appropriate local authority;
- (e) there must be two persons – one is service receiver i.e. the owner of the residential complex and another is the contractor.

Now the issue is whether a builder who after construction of residential complex or industrial / commercial complex on his own account, sells such complex or units, he is liable to pay tax. The answer would be in the negative, because tax is not on sale or purchase, but on construction services given to any other person. However, the contractor who is engaged in the construction shall be liable to pay tax.

3. In this reference, the relevant abstract of CBEC Circular No. 332/35/2006 TRU dt 01/08/2006 is as follows:-

<i>Sr.No.</i>	<i>Issue</i>	<i>Legal Position</i>
1.	Is service tax applicable on Builder, Promoter or Developer who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one F/Y?	<p>In a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder/promoter/developer under 'construction of complex' service falling under section 65(105)(zzzh) of the Finance Act, 1994.</p> <p><b>If no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise.</b></p> <p>Service tax exemption for small service providers upto an aggregate value of taxable services of Rs. 4 lakh provided in any financial year vide notification No. 6/2005-ST, dated 1-3-2005 is applicable for 'construction of complex' service also.</p>

In this reference, see also CBEC Circular No. 80/10/2004 TRU dt.10.9.2004.

In this reference, Reference Code No. 079.01/23-08-07 of CBEC Circular No. 96/7/2007 S.T. dt 23-8-2007 is reproduced as follows:-

<p>079.01 / 23.08.07</p>	<p>Whether service tax is liable under construction of complex service [section 65(105)(zzzh)] on builder, promoter, developer or any such person,-</p> <p>(a)who gets the complex built by engaging the services of a separate contractor, and</p> <p>(b)who builds the residential complex on his own by employing direct labour?</p>	<p>(a) In a case where the builder, promoter, developer or any such person builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of the said residential complex, the contractor in his capacity as a taxable service provider (to the builder / promoter / developer / any such person) shall be liable to pay service tax on the gross amount charged for the construction services under 'construction of complex' service [section 65(105)(zzzh)].</p> <p>(b) If no other person is engaged for construction work and the builder / promoter / developer / any such person undertakes construction work on his own without engaging the services of any other person, then in such cases,-</p> <p>(i) service provider and service recipient relationship does not exist,</p> <p>(ii) services provided are in the nature of self-supply of services.</p> <p>Hence, in the absence of service provider and service recipient relationship and the services provided are in the nature of self-supply of services, the question of providing taxable service to any person by any other person does not arise</p>
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4. The Revenue cannot plead the case by placing an interpretation by ignoring the CBEC circulars even if such CBEC circular is placing a different interpretation then given by the Supreme Court – CCE Vs. DHIREN CHEMICAL

INDUSTRIES 2002 (143) ELT 19 (SC) because CBEC circulars are binding on the Revenue – CCE Vs. DHIREN CHEMICAL INDUSTRIES 2002 (139) ELT 3 (SC). The Department has no right to plead against a circular or trade notice – BRITISH MACHINERY SUPPLIERS CO. Vs. UOI 1996 (86) ELT 449 (SC); RANADEY MICRONUTRIENTS Vs. CCE 1996 (87) ELT 19 (SC); CCE Vs. JAYANT DALAL PVT. LTD. 1996 (88) ELT 638 (SC); PUREWAL ASSOCIATES LTD. Vs. CCE 1996 (87) ELT 321 (SC); KIRLOSKAR OIL ENGINES LTD. Vs. UOI 1995 (77) ELT 479 (SC); POULOSE AND MATHEN Vs. CCE 1997 (90) ELT 264 (SC); CCE Vs. USHA MARTIN INDUSTRIES 1997 (94) ELT 460 (SC). The show cause notice or consequential demand is ab initio bad if they are contrary to the existing Circulars of the Board – 1999 (112) 765 (SC).

However, where the Supreme Court or the High Court has declared the law on the question at issue, it will not be open to a court to direct that a circular should be given effect to and not the view expressed in the decision – HINDUSTAN AERONAUTICS LTD. Vs. CIT 2000 (119) ELT 513 (SC). CBEC has no right to issue a circular contrary to a decision pronounced by the Tribunal or the Court – RAY MONGLUES & CHEMICALS Vs. UOI 2000 (117) ELT – 29 (Guj.) Trade Notices issued by Excise authorities are not decisive before the Supreme Court or CEGAT – UOI Vs. BAJAJ TEMPO LTD. 1997 (94) ELT 285 (SC). Moreover, against an assessee, such circular cannot be given with retrospective effect – UNIQUE PLASTIC INDUSTRIES Vs. CCE 2002 (145) ELT 604 (T). Consistency and discipline are of far greater importance than winning or losing court proceedings – PAPER PRODUCTS LTD. Vs. CCE 1999 (112) ELT 765 (SC); COMMISSIONER OF C. EX., BOLPUR Vs. RATAN MELTING & WIRE INDUSTRIES 2005 (181) E.L.T. 364 (S.C.); KOHINOOR ELASTICS PVT. LTD. Vs. COMMISSIONER OF CENTRAL EXCISE, INDORE 2005 (188) E.L.T. 3 (S.C.); CONTROL TOUCH ELECTRONICS P. LTD. Vs. COMMISSIONER OF C. EX., PUNE 2005 (190) E.L.T. 155 (S.C.).

5. So far as the taxability is concerned, the subject is not to be taxed without clear words for that purpose, according to the natural construction of its words – *ST. AUBYN Vs A.G. (1951) 2 ALL ER 473 (HL)*, there is no room for any intendment, there is no equity about a tax, there is no presumption as to tax, nothing is to be read in, nothing is to be implied – *CANADIAN EAGLE OIL CO. LTD. Vs R (1945) 2 ALL ER 499 (HL)*; *TARULATA Vs CIT, AIR 1977 SC 1802 [1977- (108) ITR 345 (SC)]*. Fiscal matters are not built upon any theory of taxation-*CC Vs TOP TEN PROMOTIONS (1969) 3 ALL ER 39 (HL)*. To interact charging section, if law is certain, strange meaning should not be given to it – *TATA CONSULTANCY SERVICE Vs. STATE OF AP 2004 (178) ELT – 22(SC)*.

In other words, the maxim is that in construing fiscal statutes to determine tax liability or penal consequences, one must have regard to the strict letter of the law and not merely to the spirit of the law – *A.VS FERNANDEZ Vs STATE OF KERALA, AIR 1957 SC 657, MURARILAL Vs B.R.VAD, AIR 1976 SC 313. A*

subject cannot be charged even if it falls with the spirit of law. A subject can not be charged unless the language of statute clearly imposes the obligation and if once the person ought to be taxed comes within the letters of law, he must be taxed, however, great the hardship may appear to the judicial mind – *RUSSEL Vs SCOTT (1948) AC 422; D. MIGATOR GOLDSMITH Vs IRC (1953) AC 347.*

It is well settled law that while construing the law reasonably, if there are two views i.e. there is a doubt, it must be interpreted strictly, but the results are different, depends upon the nature of the provision and the context. For example, where there are two views i.e. doubt about the imposition or measurement of the levy, the benefit shall be given to the assessee – *CIT Vs NAGA HILLS TEA CO. LTD., AIR 1973 SC 2524; CIT Vs SHAHZADA NANDA & SONS (1966) 60 ITR 392 (SC).* The rule is similar in case of imposition of penal consequences – *CIT Vs VEGETABLE PRODUCTS LTD. (1973) 88 ITR 192 (SC); CCE Vs. ORIENT FABRICS PVT LTD 2003 (158) ELT – 545(SC).*

**(B) Commercial Complex:-**

**a.** “Commercial or industrial construction service” means -

- (a) construction of new building or 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 fitting and other similar services, in relation to building or civil structure;or
- (d) repair, alteration or restoration of, or similar services in relation to, building or civil structure, pipepline 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 road, airports, railways, transport terminals bridges, tunnels and dams; [sec. 65 (25b) as amended by Finance Act, 2005].

**b. *Analysis:-***

For easy reference, the definition could be perused in two parts - one relates to specified structures; and second is for specified intended use of such structure.

If both the stipulations are fulfilled, specified services in relation to such structure was subject to the levy.

**c.** In the definition itself, the excluded categories of civil structure are [road, airport, railway, transport terminal, bridge, tunnel, long distance pipeline and dam]. So the structure as a whole, i.e., construction, repair, alteration or restoration of, a similar service in relation to such structure shall be outside the scope of the levy. In other words, booking room, parcel room, cloak room etc., of railway shall not be covered under the specified structure.

**d. *Taxable service:-*** Taxable Services means any services provided or to be provided by any other person to any person in relation to construction [sec. 65(105) (zzq)] i.e. new building or structure or parts thereof for commerce or industry, construction of pipelines or conduit, completion and finishing service in relation to such building or civil structure; or repair, alteration, restoration, renovation or similar other service in relation to such building or structure except those structures which are outside the scope of commercial or industrial structure.

**(C) *Real Estate Agent and Consultant:-***

Sec. 65(88) & (89) of the Act, 1994, defines the terms as follows:-

“Real estate agent” means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant;

“Real estate consultant” means a person who renders in any manner, either directly or indirectly, advice, consultancy or technical assistance, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate.

Taxable service means any service provided or to be provided to any person, by a real estate agent in relation to real estate – sec. 65(105)(v).

***Analysis:-***

The word “real estate agent” has been defined in two independent parts :-



Ist Part: One is for one who is engaged in rendering any service in relation to sale purchase, lease or renting of real estate. In this part, the expression “such as “ ; “or any other service” etc. has not been employed, so, under this part, the service must be in relation to any of the categories i.e. sale, purchase, leasing or renting of a real estate only.

IInd Part: Second Part of the definition is to expand the word “real estate agent” by including word “real estate consultant” which is having very wide coverage. One of various expressions is”.....advice, consultancy or technical assistance...”. It is the service, which shall be in relation to “evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing, acquisition or management, of real estate. It is having too much coverage ,but such advice, consultancy or technical assistance shall be in relation to specified issues of real estate only.

However, for real estate consultant, one is there shall be any advice, consultancy or technical assistance. So any work in relation to evaluation, conception, design, development, construction ..... etc. is not sufficient to impose the levy under the title. What is relevant is that such work shall be an advice, technical assistance or consultancy in relation to such specified areas otherwise; there is no imposition of the levy under the title. For example, an advocate prepares a search report about title of a piece of land, it is not in the category of advice, consultancy or technical, assistance in relation to such specified areas so, the same shall not be taxable under the title.

Under the definition, apart from the traditional service in respect of sale / purchase / leasing of real estate, the service to real estate developers and promoters in respect of evaluation of a proposed real estate scheme / project by conducting techno-economic studies, providing feasibility report and by even helping in marketing real estate projects have also been included so the consideration for the same shall also be a part of the value of taxable service. However, building construction work has not been included, so the same shall be outside the scope of the levy under this title.

**(D) Auction of Property:-**

Sec.65 (7a) by the Finance Act, 1994 lays down that:-

“auction of property” includes calling the auction or providing a facility, advertising or illustrating services, pre-auction price estimates, short-term storage services, repair or restoration services in relation to auction of property.

Sec.65 (105) (zzzr) of the Finance Act, 1994 stipulates that :-

Taxable service means any service provided or to be provided to any person, by any other person, in relation to auction of property, movable or immovable, tangible or intangible, in any manner, but does not include auction of property under the directions or orders of a court of law or auction by the Government.

***Analysis:-***

In this title, auction of property [under the direction or order of a court of law or by the Government] is completely outside the scope of the taxable services so, any specified service in such relation is outside the service tax net.

In this title, calling the auction or providing a facility, advertising or illustrating services, pre-auction price estimates, short-term storage services, repair or restoration services in relation to auction of property is also a part of such service.

**(E) Erection Commissioning & Installation Service:-**

Commissioning and installation agency means any agency providing service in relation to erection, commissioning or installation – Sec. 65 (29) of the Finance Act, 1994.

“Erection, commissioning or installation” means any service provided or to be provided by a commissioning and installation agency, in relation to,-

- (i) erection, commissioning or installation of plant, machinery or equipment or structures whether pre-fabricated or otherwise; or
- (ii) installation of -
  - (a) electrical and electronic devices, including wirings or fittings therefore; or
  - (b) plumbing, drain laying or other installations for transport of fluids; or
  - (c) heating, ventilation or air –conditioning including related pipe work, duct work and sheet metal work; or
  - (d) thermal insulation, sound insulation, fire proofing or water proofing; or
  - (e) lift and escalator; fire escape staircases or travelators; or
  - (f) such other similar services.

[Sec.65(39a) as amended by the sec 68(A)(13) of the Finance Act, 2006].

The term “taxable service means any service provided or to be provided to any person, by a commissioning and installation agency in relation to erection, commissioning or installation – Sec. 65(105) (zsd).

**(F) Works Contract:-**

**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.-

**Explanation:-**

For the purpose 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;-sec 65 (105)(zzzza) [see also sec 135 (A) (13) (h) of the Finance Act 2007]

**Analysis:-**

In the first condition is transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods.

Second thing is under “commercial or industrial construction service”, services provided in respect of road, airports, railways, transport terminals, bridges,

tunnels and dams are not taxable which is also excluded under the title “works contract” while.

In other words, erection, commissioning or installations etc as specified in clause (ii) (a) of the Explanation to sec 65 (105) (zzzza) of the Finance Act,1994; construction of structures etc given under clause (ii) (b) of the Explanation to sec 65 (105) (zzzza)of the Finance Act,1994; construction of structures etc given under clause (ii) (b) of the Explanation to sec 65 (105) (zzzza); repairs alteration completion etc as expressed in clause (ii) (d) of explanation to sec 65 (105) (zzzza); turnkey projects etc given under clause (ii) (c) of sec 65 (105) (zzzza) of the Finance Act, 1994 in respects of roads, airports, railways, transport terminals, bridges, tunnels and dams are outside the scope of the levy. Residential Complex in such respect is also non taxable.

Thirdly , specified services in relation to execution of works contract for specified purposes are taxable under this title. These specified services in relation to execution of works contract for specified purposes are taxable under this title. These specified purposes are those given under clause (ii) of explanation to sec 65 (105) (zzzza) of the Finance Act, 1994.

Fourth , it is composite one for supply of goods and services. Because of composite contract, it is bifurcated VAT/Sales Tax is leviable because of transfer of property in goods involved in execution of works contract.

Fifth is that if the agreement is treated as works contract for the purpose of levy of VAT/Sales Tax, the same shall also be treated as Works Contract for the purpose of levy of Service Tax so in case of any conflict regarding classification as works contract or as [erection, commissioning or installation]/[construction of industrial commercial/resident complex], the same shall be solved by applying the above formula.

#### **Valuation:-**

Service tax is chargeable on the gross amount charged by the service provider for the taxable services provided (section 67). In the case of works contract, the taxable value of services is to be determined by bifurcating the composite works contract. Rule 2A of Service Tax (Determination of Value) Rules, 2006 [Notification No.29/2007-Service Tax dated 22.05.07], 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 the works contract.

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 actuals. 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 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, the property in which is not transferred in the course of execution of a 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;

As per explanation inserted by notification No. 23/2009 S.T. dt 7/7/2009, gross amount charged for the works contract shall be the sum,-

(a) including-

- (i) the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise; and
- (ii) the value of all the services that are required to be provided for the execution of the works contract;

(b) excluding-

- (i) the value added tax or sales tax as the case may be paid on transfer of property in goods involved; and
- (ii) the cost of machinery and tools used in the execution of the said works contract except for the charges for obtaining them on hire:

Provided 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.”;

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 the said works contract)].

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 22.05.07.

The scheme provides that the service provider shall have an option to pay an amount equivalent to four percent of the gross amount charged for the works contract instead of paying service tax at the rate specified in section 66. Gross amount charged for the works contract shall not include VAT or sales tax paid on transfer of property in goods involved in the execution of the said works contract. The provider of taxable service opting to pay service tax under the said 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 CENVAT Credit Rules, 2004. The option under sub-rule (3) shall be permissible only where the declared value of the works contract is not less than the gross amount charged for such works contract.”.

**(G) Renting Of Immovable Property:-**

***“Renting of immovable property”*** includes renting, letting, leasing, licensing or other similar arrangements of immovable property for use in the course or furtherance of business or commerce but does not include —

- (i) renting of immovable property by a religious body or to a religious body; or
- (ii) renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, other than a commercial training or coaching centre;

*Explanation.1*—For the purposes of this clause, “for use in the course or furtherance of business or commerce” includes use of immovable property as factories, office buildings, warehouses, theatres, exhibition halls and multiple-use buildings;’[Sec 65 (90a)]

*Explanation.2* – for the removal of doubts, it is hereby declared that for the purpose of this clause “renting of immovable property” includes allowing or permitting the use or space in the immovable property, irrespective of the transfer of the possession or control of the said immovable property.

**Taxable Services** means any service provided or to be provided to any person, by any other person in relation to renting of immovable property for use in the course or furtherance of business or commerce.

*Explanation 1.*—For the purposes of this sub-clause, “immovable property” includes—

- (i) building and part of a building, and the land appurtenant thereto;
- (ii) land incidental to the use of such building or part of a building;
- (iii) the common or shared areas and facilities relating thereto; and
- (iv) in case of a building located in a complex or an industrial estate, all common areas and facilities relating thereto, within such complex or estate,

but does not include-

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;
- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

*Explanation 2.*—For the purposes of this sub-clause, an immovable property partly for use in the course or furtherance of business or commerce and partly for residential or any other purposes shall be deemed to be immovable property for use in the course or furtherance of business or commerce;-Sec.65(105)(zzzz)

**Analysis:-**

Under this title, an open land for following purposes shall not be taxed:-

- (a) vacant land solely used for agriculture, aquaculture, farming, forestry, animal husbandry, mining purposes;

- (b) vacant land, whether or not having facilities clearly incidental to the use of such vacant land;
- (c) land used for educational, sports, circus, entertainment and parking purposes; and
- (d) building used solely for residential purposes and buildings used for the purposes of accommodation, including hotels, hostels, boarding houses, holiday accommodation, tents, camping facilities.

Once the building is common i.e. the composite use i.e. the residential as well as commercial [or business purposes], instead of based on key portion i.e. essential i.e. substantial part, the same shall be assumed as non residential building but as immovable property used in the course of or furtherance of business or commerce

In addition to the above categories of immovable property, the renting of immovable property to an educational body, imparting skill or knowledge or lessons on any subject or field, shall also be outside the scope of the levy except those immovable property which has been used for commercial coaching or training centre. In other words, immovable property used for commercial coaching or training centre shall not be exempt. Moreover, renting of immovable property to a religious body or by a religious body shall also be outside the scope of the levy under this title.

And any consideration for providing service in relation to renting, letting, leasing for temporarily possession for use in the course of furtherance of business or commerce shall be taxed. The word "other similar arrangement" shall be constructed by adopting rule of interpretation "word of rank" which means sale of property is not taxed.

### **Forms of Business:-**

- ✚ Sole ownership basis i.e. whether individual or a Corporate Entity or a Co-operative society  
Tax effect: - the contractor is the service provider while the land owner is the service receiver.
- ✚ Partnership Firms i.e. partnership between land owner and contractor-cum-builder;  
Tax effect:- since both are the service receiver, while the small contractor is the service provider
- ✚ Joint Venture- i.e. AOP between land owner and builder – cum – contractor – basis of distribution



- ❖ Net income after tax;
- ❖ Gross consideration without determining the income
  - ⇒ distribution of sale consideration
  - ⇒ distribution of residential / commercial unit.

***Tax effect: - since both are the service receiver, while the small contractor is the service provider***

***Whether there is a AOP or a pure contractor agreement, it depends upon the facts and circumstances of each case. Terms and conditions of the agreement is quite considerable.***

Xxxxx

Xxxxx

### ***Valuation:-***

Under sec 67, on gross amount of recovery, tax is to be paid. However valuation is subject to the following exemptions:-

#### **Notification No 12/2003 S.T.– Exemption to goods and materials sold by service provider to recipient of service.**

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.

"Provided that the said exemption shall apply only in such cases where-

- (a) no credit of duty paid on such goods and materials sold, has been taken under the provisions of the Cenvat Credit Rules, 2004; or
- (b) where such credit has been taken by the service provider on such goods and materials, such service provider has paid the amount equal to such credit availed before the sale of such goods and materials.

2.This notification shall come into force on the 1<sup>st</sup> day of July, 2003.

#### **Notification No. 1/2006 S.T.**

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 the description specified in column (3) of the Table below and specified in the relevant sub-clauses of clause (105) of section 65 of the Finance Act, specified in the corresponding entry in column (2) of the said Table, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (5) of the said Table, of the gross amount charged by such service provider for providing the said taxable service, subject to the relevant conditions specified in the corresponding entry in column (4) of the Table aforesaid:

Table

S. No	Sub-clause of clause (105) of Section 65	Description of taxable service	Conditions	Percentage
(1)	(2)	(3)	(4)	(5)

XXXX

XXXX

5.	(zzd)	Erection, commissioning or installation, under a contract for supplying a plant, machinery or equipment and erection, commissioning or installation of such plant, machinery or equipment.	This exemption is optional to the commissioning and installation agency. <i>Explanation.</i> - The gross amount charged from the customer shall include the value of the plant, machinery, equipment, parts and any other material sold by the commissioning and installation agency, during the course of providing erection, commissioning or installation service.	33
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7.	(zzq)	Commercial or industrial construction service.	This exemption shall not apply in such cases where the taxable services	33
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			<p>provided are only completion and finishing services in relation to building or civil structure, referred to in sub-clause (c) of clause (25b) of section 65 of the Finance Act.</p> <p><i>Explanation.</i>- The gross amount charged shall include the value of goods and materials supplied or provided or used by the provider of the construction service for providing such service.</p>	
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10	(zzzh)	Construction of complex.	<p>This exemption shall not apply in cases where the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act.</p> <p><i>Explanation.</i>- The gross amount charged shall include the value of goods and materials supplied or provided or used for providing the taxable service by the service provider.</p>	33
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Provided that this notification shall not apply in cases where, -

- (i) the CENVAT credit of duty on inputs or capital goods or the CENVAT credit of service tax on input services, used for providing such taxable service, has been taken under the provisions of the CENVAT Credit Rules, 2004; or
- (ii) the service provider has availed the benefit under the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 12/2003-Service Tax, dated the 20th June, 2003[G.S.R. 503 (E), dated the 20<sup>th</sup> June, 2003].

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**H. "Business auxiliary service"** means any service in relation to, -

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or

Explanation- For the removal of doubts, it is hereby declared that for the purpose of this sub-clause "input " means all goods or services intended for use by the client; or

- (v) production or processing of goods on behalf of the client; or
- (vi) provision of service on behalf of the client; or
- (vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision,

and includes services as a commission agent, but does not include any information technology service and any activity that amounts to "manufacture" of excisable goods within the meaning of clause (f) of section 2 of the Central Excise Act, 1944 (1 to 1994).

*Explanation* – For the removal of doubts, it is hereby declared that for the purposed of this clause-

- (a) "**Commission agent**" means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person-

- (i) deals with goods or services or documents of title to such goods or services; or
  - (ii) collects payment of sale price of such goods or services; or
  - (iii) guarantees for collection or payment for such goods or services; or
  - (iv) undertake any activities relating to such sale or purchase of such goods or services;
- xxxxx –Sec.65(19)

**I. Business Support Services or Support Services of Business:-**

**“Support Services of Business or Commerce”** means services provided in relation to business or commerce and includes evaluation of prospective customers, telemarketing, processing of purchase orders and fulfilment services, information and tracking of delivery schedules, managing distribution and logistics, customer relationship management services, accounting and processing of transactions, operational assistance for marketing, formulation of customer service and pricing policies, infrastructural support services and other transaction processing.

*Explanation.*—For the purposes of this clause, the expression **“Infrastructural Support Services”** includes providing office along with office utilities, lounge, reception with competent personnel to handle messages, secretarial services, internet and telecom facilities, pantry and security - Sec.65 (104c)

**Taxable service** means any service provided or to be provided to any person, by any other person, in relation to support services of business or commerce, in any manner - Sec.65 (105) (zzzq).

**J. Management, Maintenance or Repair Services:-**

**“management, maintenance or repair”** means any service provided by—

- (i) any person under a contract or an agreement; or
- (ii) a manufacturer or any person authorised by him, in relation to,—
  - (a) management of properties, whether immovable or not;
  - (b) maintenance or repair of properties, whether immovable or not; or
  - (c) maintenance or repair including reconditioning or restoration, or servicing of any goods, excluding a motor vehicle; [Sec.65 (64) of the Finance Act, 1994].

*Explanation.*—For the removal of doubts, it is hereby declared that for the purposes of this clause,-

(a) “goods” includes computer software;

(b) “properties” includes information technology software;

**K. **“Tour operator”** means any person engaged in the business of planning, scheduling, organizing or arranging tours (which may include arrangements for**

accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours in a tourist vehicle or a contract carriage by whatever name called, covered by a permit, other than a stage carriage permit, granted under the Motor Vehicles Act, 1988 or the rules made thereunder.

*Explanation.*— For the purposes of this clause, the expression “tour” does not include a journey organized or arranged for use by an educational body, other than a commercial training or coaching centre, imparting skill or knowledge or lessons on any subject or field –Sec 65(115);

#### **Other Titles:-**

- **“technical testing and analysis agency”** means any agency or person engaged in providing service in relation to technical testing and analysis - **Sec. 65 (107)**.
- **“technical inspection and certification agency”** means any agency or person engaged in providing service in relation to technical inspection and certification- **Sec. 65 (109)**
- ▲ **"video production agency"** means any professional videographer or any commercial concern engaged in the business of rendering services relating to video-tape production - **Sec. 65 (119)**;
- ▲ **"photography studio or agency"** means any professional photographer or any person engaged in the business of rendering service relating to photography- **Sec. 65 (79)**;
- ☉ **"security agency"** means any person engaged in the business of rendering services relating to the security of any property, whether movable or immovable, or of any person, in any manner and includes the services of investigation, detection or verification, of any fact or activity, whether of a personal nature or otherwise, including the services of providing security personnel- **Sec. 65 (94)**;
- ☉ **"sound recording studio or agency"** means any person engaged in the business of rendering any service relating to sound recording- **Sec. 65 (99)**;