

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE & SERVICE TAX
NO.1, WILLIAMS ROAD, CONTONMENT, TIRUCHIRAPPALLI-620 001.

Trade Notice No.4/2009 S. Tax

Dated: 2-3-2009.

Subject: Service Tax – Circular No. 110/4/2009-ST and Circular
No.111/05/2009-ST – Communication –Regarding.

Ministry's Service Tax Circular No.110/4/2009-ST dated 23-2-2009 issued in F.No.345/17/2008-TRU and Circular No. 111/05/2009-ST dated 24-2-2009 issued in F.No.137/307/2007-CX.4(Pt)are enclosed herewith for information, guidance and necessary action.

The contents of this Trade Notice may be brought to the notice of all constituent members of the Trade Associations and Chambers of Commerce.

(Issued from C.No.IV/16/805/2009 STC)

Encl.: As above.

Sd./-
(A. RAJENDRAN)
ASSISTANT COMMISSIONER.

To
The Mailing list I / II / III.

Ministry's Service Tax Circular No.101/4/2009-ST dated 23-2-2009 and
Circular No. 111/05/2009-ST dated 24-2-2009 are reproduced below.

Circular No.110/4/2009-ST.
The 23rd February, 2009.

**Subject:Reference from Commissioner Nashik seeking clarification in
respect of levy of service tax on Repair/ renovation/ widening of
roads – Regarding.**

Representations have been received by the Board pointing out divergent practices being followed by field formations with regard to levy of service tax on maintenance and repair of roads.

2. Commercial or industrial construction service [section 65(105) (zzq)] specifically excludes construction or repairs of roads. However, management, maintenance or repair provided under a contract or an agreement in relation to properties, whether immovable or not, is leviable to service tax under section 65(105) (zzg) of the Finance Act, 1994. There is no specific exemption under this service for maintenance or repair of roads etc. Reading the definitions of these two taxable services in tandem leads to the conclusion that while construction of road is not a taxable service, management, maintenance or repair of roads are in the nature of taxable services, attracting service tax.

3. The next issue requiring resolution is the types of activities that can be called as 'construction of road' as against the activities which should fall under the category of maintenance or repair of roads. In this regard the technical literature on the subject indicate that the activities can be categorized as follows,-

(A) Maintenance or repair activities:

- I. Resurfacing
- II. Renovation
- III. Strengthening
- IV. Relaying
- V. Filling of potholes

(B) Construction Activities:

- I. Laying of a new road
- II. Widening of narrow road to broader road (such as conversion of a two lane road to a four lane road)
- III. Changing road surface (graveled road to metalled road / metalled road to blacktopped/ blacktopped to concrete etc)

4. The cases may be decided/ revenue should be protected based on the above classification.

Yours faithfully,

(Unmesh Sharad Wagh)
Under Secretary (TRU)

Circular No.111/05/2009-ST
The 24th February, 2009.

Subject: Applicability of the provisions of the Export of Services Rules, 2005 in certain situations

In terms of rule 3 (2) (a) of the Export of Services Rules 2005, a taxable service shall be treated as export of service if “*such service is provided from India and used outside India*” Instances have come to notice that certain activities, illustrations of which are given below, are denied the benefit of export of services and the refund of service tax under rule 5 of the Cenvat Credit Rules, 2004 [notification No. 5/2006-CE (NT) dated 14.03.2006] on the ground that these activities do not satisfy the condition ‘used outside India’,-

- (i) Call centres engaged by foreign companies who attend to calls from customers or prospective customers from all around the world including from India;
- (ii) Medical transcription where the case history of a patient as dictated by the doctor abroad is typed out in India and forwarded back to him;
- (iii) Indian agents who undertake marketing in India of goods of a foreign seller. In this case, the agent undertakes all activities within India and receives commission for his services from foreign seller in convertible foreign exchange;
- (iv) Foreign financial institution desiring transfer of remittances to India, engaging an Indian organisation to dispatch such remittances to the receiver in India. For this, the foreign financial institution pays commission to the Indian organisation in foreign exchange for the entire activity being undertaken in India.

The departmental officers seem to have taken a view in such cases that since the activities pertaining to provision of service are undertaken in India, it cannot be said that the use of the service has been outside India.

2. The matter has been examined. Sub-rule (1) of rule 3 of the Export of Services Rule, 2005 categorizes the services into three categories:

- (i) Category (I) [Rule 3(1)(i)]: For services (such as Architect service, General Insurance service, Construction service, Site Preparation service) that have some nexus with immovable property, it is provided that the provision of such service would be ‘export’ if they are provided in relation to an immovable property situated outside India.

(ii) Category (II) [Rule 3(1)(ii)]: For services (such as Rent-a-Cab operator, Market Research Agency service, Survey and Exploration of Minerals service, Convention service, Security Agency service, Storage and Warehousing service) where the place of performance of service can be established, it is provided that provision of such services would be 'export' if they are performed (or even partly performed) outside India.

(iii) Category (III) [Rule 3(1)(iii)] : For the remaining services (that would not fall under category I or II), which would generally include knowledge or technique based services, which are not linked to an identifiable immovable property or whose location of performance cannot be readily identifiable (such as, Banking and Other Financial services, Business Auxiliary services and Telecom services), it has been specified that they would be 'export',-

(a) If they are provided in relation to business or commerce to a recipient located outside India; and

(b) If they are provided in relation to activities other than business or commerce to a recipient located outside India at the time when such services are provided.

3. It is an accepted legal principle that the law has to be read harmoniously so as to avoid contradictions within a legislation. Keeping this principle in view, the meaning of the term 'used outside India' has to be understood in the context of the characteristics of a particular category of service as mentioned in sub-rule (1) of rule 3. For example, under Architect service (a Category I service [Rule 3(1)(i)]), even if an Indian architect prepares a design sitting in India for a property located in U.K. and hands it over to the owner of such property having his business and residence in India, it would have to be presumed that service has been used outside India. Similarly, if an Indian event manager (a Category II service [Rule 3(1)(ii)]) arranges a seminar for an Indian company in U.K. the service has to be treated to have been used outside India because the place of performance is U.K. even though the benefit of such a seminar may flow back to the employees serving the company in India. For the services that fall under Category III [Rule 3(1)(iii)], the relevant factor is the location of the service receiver and not the place of performance. In this context, the phrase 'used outside India' is to be interpreted to mean that the benefit of the service should accrue outside India. Thus, for Category III services [Rule 3(1)(iii)], it is possible that export of service may take place even when all the relevant activities take place in India so long as the **benefits of these services accrue outside India**. In all the illustrations mentioned in the opening paragraph, what is accruing outside India is the benefit in terms of promotion of business of a foreign company. Similar would be the treatment for other Category III [Rule 3(1)(iii)] services as well.

4. All pending cases may be disposed of accordingly. In case any difficulty is faced in implementing these instructions, the same may be brought to the notice of the undersigned.

Yours faithfully,

(Gautam Bhattacharya)
Commissioner (Service Tax)
Tel: 23093027
