



## Inside this edition

- The Taxi Trauma!! Service tax widens the ambit yet again.
- Revised interest rates – a walkthrough
- CENVAT credit on overseas export commission.

& more...

## THE TAXI TRAUMA!!



**BEING** residents of the modern urban India most of us are used to the agony one goes through in a normal taxi ride.

The best recourse available is the radio taxis. But Budget 2014 has indeed been a dampener of sorts for people like us on this front. As per the existing provisions of the Finance Act, 1994 ('Act') services by way of transportation of passengers with or without accompanied belongings by metered cabs, radio taxis or auto rickshaws are a part of the negative list of services given under section 66D of the Act. On the contrary, the services of renting of motor vehicles designed to carry passengers are subject to service tax.

The Union Budget 2014 has proposed to levy service tax on services provided by way of transportation of passengers by radio taxis or radio cabs whether or not air conditioned. The service tax on radio taxis will come into effect from a date to be notified later, after the Finance Bill (No.2) receives the Presidential assent. A definition of 'radio taxi' has been added by way of amendment to the mega exemption notification 25/2012-ST dated 20/06/2012 vide notification no.06/2014-ST dated 11/07/2014.

### Radio Taxi - the definition

The definition of radio taxi reads as under:

*"radio taxi means a taxi including a radio cab, by whatever name called, which is in two-way radio communication with a central control office and is enabled for tracking using Global Positioning System (GPS) or General Packet Radio Service (GPRS)"*

Further, section 65B(32) of the Act is proposed to be amended to exclude radio taxis from the scope of metered cabs.

### Abatement and Reverse charge

Abatement presently available to rent-a-cab service would be made available to the services of radio taxis also. This may have been done with intent to bring the two services at par with each other. Further, the provisions of reverse charge will be made applicable to the said services.

Service tax will be on 40% of value as per Sr No. 9A of notification No.26/2012-ST dated 20-6-2012 as amended vide notification no. 08/2014-ST dated 11/07/2014.

### Confusions galore

As noted in the definition of radio taxis above, the taxability of the service would depend on whether the taxi has a GPS / GPRS and is in two-way radio communication with a central control room. Now this is paving way for litigation. There will be scope of dispute based on classification. Also many operators may not want to now keep GPS enabled just to forgo the levy of service tax.

Adding to this is the additional compliance burden on body corporates under the reverse charge mechanism.

Considering that the metered cabs are not subject to the levy of service tax, this may prove to be a bane for the radio taxis. All in all, this proposed levy will definitely adversely impact the overall viability of the industry.

## INTEREST RATES ON DELAYED PAYMENT OF SERVICE TAX – A WALKTHROUGH



Rate of interest, on delayed payment of service tax, payable by the service provider under direct charge/ recipient of service under reverse charge, from inception of Service Tax provisions in Finance Act, 1994 to recent change in Budget 2014-15 is given in

table below.

**Table**

Sr. No.	Period	Rate of interest #	Remarks
1.	01.07.1994 to 15.07.2001	18% pa	
2.	16.07.2001 to 15.08.2002	24% pa	
3.	16.08.2002 to 09.09.2004	15% pa	
4.	10.09.2004 to 31.03.2011	13% pa	

5.	01.04.2011 to 30.09.2014	18% pa	
6(i)	From 01.10.2014 till date of payment of service tax.	18% pa up to six months	w.e.f. 01.10.2014
6(ii)	From 01.10.2014 till date of payment of service tax.	24% pa if delay beyond six months up to one year.	w.e.f. 01.10.2014
6(iii)	From 01.10.2014 till date of payment of service tax	30% pa if delay beyond one year	w.e.f. 01.10.2014

[# - Section 75 of Finance Act, 1994, read with relevant notifications issued from time to time.]

A question may arise in the mind of assessee as to how the changed rate of interest would be applicable for delayed payment of service tax?

It can be seen from the above table that Central Government has declared different rate of interest for different period. Therefore, while calculating interest amount, assessee has to refer rate of interest given in above table for the period starting from due date of payment of service tax till actual date of payment of service tax. To understand in better way illustration is given below.

For example Service Tax Department issues a Show Cause Notice on 01.07.2014 to M/s. ABC Ltd demanding service tax of Rs.10,00,000/-, which was to be paid to the Government treasury on 31.03.2010 (due date for payment of service tax).

If, M/s. ABC Ltd will pay demand of Rs.10,00,000/- on 31.12.2015 (actual date of payment of service tax) to the Government treasury, interest liability will be as under-

Amount of ST (Rs.)	Period	No. of days delay	Rate of Interest	Interest Amount	Remarks
10,00,000	01.04.10 to 31.03.11	365	13%	1,30,000	refer Sr. No. 4 of above table
	01.04.11 to 30.09.14	1279	18%	6,30,739	refer Sr. No.5 of above table
	01.10.14 to 31.03.15	182	18%	89,753	refer Sr. No.6(i) of above table
	01.04.15 to 30.09.15	183	24%	1,20,329	refer Sr. No.6(ii) of above table
	01.10.15 to 31.12.15	92	30%	75,616	refer Sr. No.6.(iii) of above table
	<b>Total interest amount</b>			<b>10,46,438</b>	

Therefore, for calculating interest on delayed payment of service tax, date of issue of demand is not relevant. The important criteria are due date of payment of service tax, actual date of payment of service tax and rate of interest prevailing during the period.

## CENVAT CREDIT ON OVERSEAS EXPORT COMMISSION

### An Overview



In para 2.48.3 of the Annual Supplement for the year 2006-07 to Foreign Trade Policy 2004-09 it was mentioned as – *"For all goods and services exported from India, services received/rendered abroad, where ever possible, shall be exempted from service tax"*. It also stated that *"Government has enunciated the principle that we should only export goods and not the taxes and duties thereon. In line with this, services rendered abroad and charged on exports from India would be exempted from Service Tax"*.

In the Foreign Trade Policy of 2009-14 also it was stated that *"The long term policy objective for the Government is to double India's share in global trade by 2020. In order to meet these objectives, the Government would follow a mix of policy measures including full refund of all indirect taxes and levies"*

With the above laudable objectives, as a preliminary step, Not 40/2007 dated 17th Sept, 2007 was issued by Ministry of Finance granting exemption by way of refund in respect of Service Tax paid on Port Services and Container Transports service etc. used for export. More

services were added to the list by way of subsequent Notifications viz, 41/07, 42/07, 3/08, 17/08, 24/08 etc.

Exemption to services provided by a commission agent, located outside India, and engaged under a contract or agreement or any other document by the exporter in India, to act on behalf of the exporter, to cause sale of goods exported was brought in by virtue of Notification No 17/08 dated 1st April, 2008. Later Not 17/09 dated 7th July, 2009 was issued consolidating various 16 services which were notified for exemption by way of refund except for services of commission agent and GTA for which Not 18/09 dated 7th July, 2009 provided exemption by way of filing half yearly Return under EXP-2 so as to avoid the requirement of paying Service Tax first and then claiming subsequent refund. The subject Notification was amended by Not 42/2012 dated 29.06.12 and the so called EXP-2 Return was renamed as EXP-4.

Claiming exemption is subject to the condition that no CENVAT credit of Service Tax paid on the specified service used for export of said goods had been taken under the CENVAT Credit Rules, 2004. Hence, being a conditional Notification, it is discretionary for assessee either to avail exemption or to avail Cenvat credit as held in *Plus Paper Food Pac Ltd Vs CCE, Thane* (2013-TIOL-297-CESTAT-MUM).

CBCE vide their Circular No 943/04/2011-CX, dated April 29, 2011 also clarified that credit of Business Auxiliary Service (BAS) on account of sales commission is admissible since activity of sales promotion is specifically allowed and on many occasions the remuneration for the same is linked to actual sale.

Circulars are always binding on the Govt and it is a cardinal principle that Govt cannot approbate and reprobate. Despite this, tax demands running into several crores and heavy penalties were imposed on assessee who have taken Cenvat credit on sales commission based on the Circular on pan India basis. Appeal filed by *M/s. Cadila Healthcare Ltd* against Hon Guj HC (2013-TIOL-12-HC-AHM-ST) before Hon Supreme Court is admitted and is pending for disposal.

### A bright future ahead

It was aspired that the Union Budget will bring better days ahead. Aspirations didn't go wrong, but it was half done and to that extent it was well done.

Notn No 14/2014 dated 10th July, 2014 was issued to amend Place of Provision of Services Rules so as to include agent or broker who arranges or facilitates provision of supply of goods in the definition of 'intermediary'. Consequent to this, commission agent/consignment agent who assists in sales promotion and causes sale of goods in overseas market will be an intermediary and hence the place of provision of service will be the location of service provider, ie. outside India and hence Service Tax is not payable under reverse charge mechanism. Perhaps, Notification No 42/2012 dated 29.06.12 which provides for exemption of Service Tax by filing EXP-4 Returns on a half yearly basis for the services of commission agent situated overseas will be rescinded with effect from 1st Oct, 2014 when the amended Rule comes into play.

In view of the above, going forward, there are very little chances of litigation with regard to Cenvat credit on overseas sales commission



and hence no parting with 7.50% or 10% of the demanded tax and/or penalty by way of pre-deposit for filing Appeals. But what about the credit already taken and demand notices of tax and penalties pending with various Commissionerates for adjudication?

### 'Intelligible Differentia'

The much avowed policy of Govt was and is not to burden export with taxes. Hon PM asserted the need for India to become a place for doing business with ease and not to terrorise tax payers with retrograde taxation laws. In the States of Punjab & Haryana, Cenvat credit on export/sales commission was held to be eligible by Hon P&H HC in *Ambika Overseas* case (**2011-TIOL-951-HC-P&H-ST**), whereas Hon Guj HC has held this to be inadmissible in *Cadila Healthcare* case. Adjudication fora in Punjab & Haryana are bound by jurisdictional HC decision as a matter of judicial discipline, whereas in the State of Gujarat, it is bound by decisions in *Cadila* and also of *Astik Dyestuff* (2014-TIOL-237-HC-AHM-ST).

It is a constitutional right that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. In view of this, all persons and things similarly circumstanced shall be treated alike both in respect of privileges conferred and liabilities imposed as held by Hon Guj HC in *Gujarat Paraffins P Ltd Vs Union of India* (2012-TIOL-375-HC-AHM-CX).

But unfortunately, same class of persons at different States are put to differential tax treatment and is detrimental to certain class of people especially because of conflicting decisions of different Courts. There is

no '*Intelligible Differentia*' in respect of exporters in Punjab and in Gujarat or rest of India. Such differential treatment not being based on '*Intelligible Differentia*' is a violation of the equality before the law or equal protection of laws within the territory of India as per Article 14 of the Constitution.

Hon'ble Supreme Court introduced '*Intelligible Differentia*' theory in the case of *State of West Bengal vs. Anwar Ali Sarkar* [AIR 1952 (S.C.) 75]. The differential treatment theory is based on twin tests of reasonable classification

The Hon'ble Supreme Court in *Sunil Jaitley vs. State of Haryana* [(1984) 4 (S.C.C.) 296], held that the state is not permitted to make a facile distinction between two classes of persons where there is no intelligible differentia.

Rule of law which permeates the entire fabric of the Indian Constitution excludes arbitrariness or inequality. Wherever arbitrariness or unreasonableness is found, there is denial of rule of law.

It is a settled legal proposition that if initial action is not in consonance with law, subsequent proceedings would not sanctify the same. In such a situation, the legal maxim *sublato fundamento cadit opus* is applicable, meaning thereby, in case of foundation is removed, the superstructure falls. Action to disallow credit on sales commission is against the foreign trade policy and provisions of Cenvat Credit Rules inasmuch as sales promotion is included in the definition of input service and sales promotion becomes otiose without the payment of consideration in the form of sales commission.

Hon CESTAT, Mumbai in the case of *Cummins India Ltd Vs CCE, Pune* (2012-TIOL-500-CESTAT-MUM) held that:

*"Purpose of drawback is to relieve the burden of taxes on the export goods and to make our exports competitive in the international market - If this policy objective is to be achieved then the Department has to interpret and implement the rules in a meaningful way so that the exporter gets the maximum benefit eligible as prescribed under the law."*

Similarly Hon SC in the case of *UOI Vs Suksha International & Nutan Gems* (2002-TIOL-660-SC-EXIM) held that:

*"Interpretation of Statute - Beneficial provision - Interpretation unduly restricting the scope of a beneficial provision to be avoided so that it may not take away with one hand what the policy gives with the other."*

Newly formed government got a huge mandate from the people of this country on the basis of their promise that 'good days are coming' and has done lot of things to curb unwarranted disputes and to plug anomalies in rules and regulations. It should further remove anomalies and arbitrariness in rule of law as otherwise Govt's function would be that of a monarch. Hon SC in Maneka Gandhi case observed that *"Equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch."*

It should also do away the damages caused/likely to be caused to innumerable assesseees who had availed Cenvat credit on sales

commission based on lucidly defined input service definition which contains 'sales promotion' and on reliance of CBEC Circular and other exemption notifications.

If the '**Modified** Rules and policies of the new Government really intend to promote growth and investment, to improve the present '**Ease of Doing Business**' rank which is worse than Pakistan, not to burden exports with taxes, not to go for frivolous litigations and so on, exporters shall not be penalized for having availed Cenvat credit for sales commission. CBEC should uphold the earlier clarificatory Circular and desist from confirming or serving tax demands for sales commission forthwith and till Hon SC decides the case in Cadila, pending cases shall be kept in abeyance. Till such time ill-fated assesseees will be "*cabined, cribbed, confined and bound in to saucy doubts and fears*", as lamented by Macbeth.

### Conclusion:

*"The people who walked in darkness have seen a great light; a light has dawned on those living in the land of darkness".*

Let the light glow and shine so as to make '**India Shining**' again.

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