Management, Maintenance & Repair- ST

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In this article we shall take a close look at the taxability of maintenance and repair services under service tax as well as specified exclusions from the same apart from recent developments. The aspects of Cenvat credit and remote service have been addressed. The relevant case laws along with comments and practical issues one comes across in the normal course are discussed with possible solutions.

The immovable and movable properties one acquires It is quite common to find assessees who provide services in relation to maintenance and repair of goods on a one off basis or under a contract for a year or more. High value capital goods could come with a long warranty which is serviced by third parties. The assessees who do so may either be manufacturers who are registered under the Central Excise Act or pure service providers who may also be providing a wide variety of services. Though this category of service was introduced with effect from 01.07.2003, it is not uncommon to come across cases where assessees happen to provide services classifiable under this category but are ignorant of their liability under service tax with regard to their earnings from the same. In quite a few cases, the assessees have also been found to be under the mistaken notion that their service is classifiable under the category of Business Auxilliary Service while in reality the same was classifiable under the category of maintenance, management or repair services. This has resulted in such assessees wrongly claiming the benefit of exemption notification 8/2005 ST and ending up with a demand from the department. The category has not remained the same since its introduction and has undergone modifications and additions in scope over the years.

What does "management, maintenance or repair" cover?

As per Section 65(64) of Chapter V of Finance Act 1994 as amended from time to time, "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*;

For the purpose of clause (c) above, "goods" *includes* computer software. The word "properties" is defined to include information technology software.

"Goods" has the meaning assigned to it in Section 2(7) of Sale of Goods Act 1930 as per section 65(50).

The terms "management", "reconditioning" and "restoration" have not been defined under service tax and we would have to refer a Standard English Dictionary for their meaning. The term "management" has been defined in the Webster's Unabridged Dictionary as the act or manner of managing, handling, direction or control. The term "restoration" has been defined to mean - a return of something to a former, original, normal, or unimpaired condition. "Reconditioning" means to restore to a good or satisfactory condition. The term "maintenance" has been defined in the Webster's Unabridged Dictionary as - means of upkeep, support or subsistence.

It would also be interesting to see the meaning of the term "agreement" as an arrangement that is accepted by all parties to a transaction. "Contract" means an agreement that is enforceable by law.

What would the taxable service be?

As per Section 65(105)(zzg), taxable service means any service provided or to be provided to any person by any person in relation to management, maintenance or repair.

What is sought to be taxed under this category is the maintenance or repair service in relation to movable or immovable property. Maintenance or repair activities are generally carried out under a contract or an agreement and these would be covered. The contract or agreement may or may not be in written form as the definition is silent in this regard. They can also be carried out by manufacturers of goods by way of after sales service and even this would be covered. In case of after sales service though, the question of taxing the same would arise if the service is a paid service and not free service. Where service is free, for instance, during warranty period, the same in our view cannot be taxed as there would be no consideration for the same.

The assessee would however have to be careful to watch the processes undertaken on goods. This is because where the process amounts to manufacture as defined under Central Excise Act 1944, the liability would be under Central Excise. This can happen when the repair process involves substantial reconditioning or reconstruction of the damaged goods such as to bring about a change in the name, character and usage of the items put into process.

Is maintenance or service or repair of software taxable?

Yes. The definition of "goods" has also been clarified to include software for the purposes of this category and hence maintenance or service of software would be covered under this category. This has also been clarified by the departmental Master Circular on technical issues 96/7/2007 ST dated 23.08.07.

Liability for the earlier period

There has been some confusion in the past regarding taxability of the maintenance of software under service tax. The Supreme Court in Tata Consultancy Services Vs State of Andhra Pradesh (2008 -TMI - 4143 - Supreme Court)had held that software sold in canned form was goods. But the department had earlier issued a Circular 70/19/2003 ST dated 17.12.2003 which had exempted maintenance or repair of software from service tax which was withdrawn only on 10.05.07 through Circular 93/4/2007 ST. In the meantime, as a fallout of the Supreme Court judgement in Tata Consultancy Services case, the department had issued another Circular 81/02/2005 ST dated 07.10.05 which had held maintenance or servicing or repair of software as liable to service tax. The assessees who have followed this Circular would be on the safer side of the law.

Is sub-contractor to principal/prime contractor who provides the service liable to service tax?

Yes. In view of the clarification by Master Circular 96/7/2007 ST dated 23.08.07, even sub-contractors who provide the taxable service under this category to a principal contractor who falls under this category, would be liable to service tax. The principal contractor would however be eligible to input service credits on the service tax paid on such service from the sub-contractor. As far as taxability in the prior period is concerned, where sub contractors provided service to prime contractor, the taxability was only in the hands of the prime contractor and not the sub contractor which was also reiterated in M/s BBR (India) Ltd Vs CCE Bangalore III [2006 (9) TMI 9 - CESTAT, BANGALORE].

Whether the sub-contractor and prime contractor relationship existed at all was something to be determined on the facts and circumstances of each case. In M/s Indfos Industries Ltd Vs CCE Noida, the contractor appointed by a development and procurement agency was held not to be a sub-contractor to a principal contractor as the transaction was one on principal to principal basis and hence the decision of Tribunal in M/s BBR (India) Ltd. was held not to be applicable in this case.

Where there is transfer of property in goods during the provision of service, would the

service be taxable under this heading or under the category of works contract?

Service providers may note that the category of works contract under service tax includes only the services which are specified for the purpose and which would not include services in relation to maintenance or management or repair of properties (whether immovable or not). Therefore, the said activity of maintenance/repair or management would be taxed under this heading. However, there can be cases where a comprehensive works contract agreement may also include certain maintenance or repair or restoration work especially in cases of commercial or industrial construction related services in which case, the works contract would not be vivisected to tax the maintenance, repair activities separately.

What is the value to be adopted for charging service tax where during the course of providing service, there is transfer of property in goods?

Where during the course of providing taxable service of maintenance or management or repair of properties (whether or not immovable), there is transfer of property in goods from the service provider to the service receiver, the service provider can examine the option of going in benefit of notification 12/2003 ST dated 20.06.03 which provides a deduction for the value of goods and materials sold provided there is documentary evidence for the same. The service provider would however not be eligible to claim cenvat credit of the duties on such goods and materials sold. Where he desires to claim credit of the duty of excise on goods and materials, he would have to charge service tax on the gross amount for the service which would include the value of such goods and materials sold.

Where the maintenance or repair services are provided by an association to its members where would the service be classified?

Services provided by associations are taxed under the separate category of club or association's services. For maintenance/repair, contractors can be appointed by the association who would bill the association for their services. If the association pays the contractor and gets the amounts reimbursed by the members, the same can be taxed in the hands of the association unless the association can be said to have incurred the expenditure as a pure agent of the service receiver (member) in which case the amounts reimbursed may be excluded. Thus if the association collects subscription amount and the same is factored to include charges towards maintenance activities, the same would be taxed under the category club or association's service in the absence of any clause in the agreement with members which makes a mention of the association acting as a pure agent of the member in carrying out maintenance work.

Where processing of goods is undertaken by the job worker, can the same be classified here?

Here the service provider should ask himself whether the processing amounts to repair of goods. If it amounts to repair, then the service would have to be classified under this category following the principle laid down by the High Court of Punjab and Haryana in Dr Lal Pathlabs (P) Ltd Vs CCE Ludhiana (2007 -TMI - 2104 - HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH). But where the processing does not amount to repair the service would have to be classified under the category Business Auxiliary Service. Many of the assessees have been found to get the classification wrong in this area. Assessees who wrongly classify the repair service under BAS run the risk of inviting a SCN and subsequent demand from the department as they invariably claim the benefit of notification 8/2005 ST.

Whether the credits of the service tax on services falling under this category received by the taxable service provider are eligible fully?

Yes. The credits of the service tax on services falling under this category would be available fully (100%) to a taxable service provider who also happens to provide exempted services. This is because the service is covered under the 16 specified services which enjoy relaxation under Rule 6 of Cenvat Credit Rules 2004. Credits can however be denied where the maintenance or repair service received is used wholly for exempted services or for manufacturing exempted final product.

Whether remote maintenance on goods abroad or remote maintenance received on goods in India qualifies as export or import of service?

Yes. Where the service is provided electronically, there can be a question as to whether the service is taken as having been exported or where received from abroad, whether the service received is to be taken as imported and taxed in the hands of the service receiver considering the fact that performance is the basis. Where the maintenance happens electronically or through internet on goods located outside India at the time of provision of service, the same can be said to have been exported out of India and where the maintenance happens on goods in India, the same can be treated as having been received in India. This is by virtue of the amendment in Rule 3 ofExport of Service Rules 2005.

Relevant case laws

Pure repair services prior to 16.06.05

In Bhiwadi Cylinders (P) Ltd Vs CCE Jaipur (2008 -TMI - 4573 - CESTAT, NEW DELHI), repair services alone without a maintenance contract were held not be liable prior to 16.06.05 when this category saw an amendment in terms of the nature of contract covered. This was because the definition as laid down in 2003 had specifically talked about the contract being a maintenance

contract.

Operating and maintenance agreements

Can a works contract be vivisected to tax the component pertaining to operation and maintenance?

No. In CMS (India) Operations & Maintenance Company (P) Ltd Vs CCE Pondicherry (2008 -TMI - 4329 - CESTAT, CHENNAI), the contention of the department regarding breaking up of a operation and maintenance contract for operating and maintaining a facility for generating and supplying electricity to TNEB was discarded by the Tribunal which held the said contract to be a works contract for manufacture of goods viz., electricity.

Whenever there is an agreement for management of immovable property, the same would have to be analysed to see whether it is a pure maintenance/management agreement in which case the same could be taxed under this category. However, where the management is part of a comprehensive arrangement for construction of the plant as well as managing the same, the decision of the Tribunal regarding vivisection of works contract would hold good.

Can the activity of painting of building taxed under this category?

No. In SP Sharma Vs CCE Ludhiana (2009 -TMI - 34350 - CESTAT, New Delhi), the job of painting of premises of State Electricity Board under works contract was held not to be liable under this category.

What is the category under which this heading falls for determining whether the service is exported out ofIndia or received in India from abroad?

The taxable service being discussed here falls under the performance based criterion for determining whether the said service is said to have been received in India from abroad or Exported out of India.

The article provides the basic understanding of the service as also some of the issues possible with the solutions. It does not propose to be comprehensive. Article for members provided to KSCAA.