



SERVICE TAX ON BUYING AGENT

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Background:-

Under service tax law, there was on-going litigation about the applicability of service tax levy on commission agency services by Indian service providers to foreign principals. The argument was that all services were provided by way of marketing/sales promotion to customers in India, consequently taxable in India. The issue was more or less settled over period of 2006-2014 that services were exports. A reversal in the entire concept has been made whereby Indian commission agents earning valuable foreign exchange would be taxed wef 1.10.14. Therefore those who provided services to exporters abroad and in India were made taxable even if they earned valuable foreign exchange.

Who is intermediary?

From 01.07.2012 till 01.10.2014

As per Rule 2 (f) of POPS Rules "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.;

Generally, an "intermediary" is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing.

However as per the definition specifically it is covering only intermediary for provision of service and is not covering an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker).

Intermediary services were covered in Rule 3 of POPS as per which place of provision of service is location of service receiver outside India. Further if all conditions to treat as export of service are fulfilled as given below, then could avail eligible credit related to such exported services. Alternately go for refund.

Post 1.10.14

Intermediary means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the main service) or a supply of goods, between two or more persons but does not include a person who provides the main service or supplies the goods on his account.

Service tax implication for commission agent vs buying agent When the essential character of service provided by service provider is that of commission agent for enabling sale of goods such as garments outside India. Then such services to be treated as intermediary services being commission agent for goods covered in Rule 9. As per which post 1.10.14, place of provision of service is location of service provider, in India. Such commission is liable to service tax in hands of service provider post 1.10.14.

However when the buying agents are doing presale activities of nature of recommending suitable suppliers, maintain supplier list, and post order activities such as supplier order status, guidance to manufacturers on trends/developments, communicate deviation in quality and delivery schedule, advise on international norms and standards covered in support services. Such services could be covered in Section 65B(51) at limb operational, administrative, comprising functions that entities carry out in ordinary course of operations but could be outsourced to others. Therefore such support services could be covered in Rule 3 of POPS. Further if all the conditions set out in Rule 6A of ST Rules as extracted below was fulfilled by service provider. Therefore even during such period post 1.10.14 such service provider can avail eligible credits related to such exported services. Alternately go for refund.

Export of Services After 01.07.2012:

If the activity is non-taxable as the same is intended to be provided outside taxable territory. However in such cases the service tax rules read with CENVAT Credit Rules, 2004 is so framed that if conditions given below are fulfilled, the said non-taxable services shall not be treated as exempted services but exported services and benefit of CENVAT Credit if eligible can be availed. Rule 6A says that services will be considered as export of service when the following conditions are fulfilled:

- I. The provider of service is located in the taxable territory- it is fulfilled-the provider of service is located in the taxable territory of India
- II. The recipient of service is located outside India- It is fulfilled – The recipient of service is located outside India
- III. The service is not specified under the negative list of services- it is fulfilled -The service is not specified under the negative list of services

- IV. The place of provision of services is outside India-it is fulfilled- For commission agent services: till 30.9.14: The place of provision of service is location of service receiver outside
- V. It is not fulfilled- For commission agent services: post 1.10.2014: The place of provision of service as per Rule 9 is location of service provider in India.
- VI. The place of provision of services is outside India-For business support services done by buying agents: It is fulfilled as the place of provision of service as per Rule 3 is location of
- VII. The payment for such service has been received by the provider of service in convertible foreign exchange- it is fulfilled - The payment for such service is said to be received by service provider in convertible foreign exchange and
- VIII. The provider and the recipient of service are two distinct establishments and not merely establishments of the same person- it is fulfilled –provider of service and service receiver outside India are two different companies. It is not merely establishments of the same person.

Tax implications on Various models

The service providers need to see that the real and actual functions are captured in the agreements. Mere change in agreement would lead to more difficulty and demands. Single agreement for providing both services namely support service + intermediary service:

ONLY IF there is clear cut segregation of the support services and a consideration for same, the pre-sale activities could be covered in Rule 3 of POPS and place of provision of service is location of service receiver foreign principal of buying agent. Further if all conditions of export of services given are satisfied such services could be treated as exports.

Separate agreements for providing support service and intermediary service:

There could be a separate agreement for provision of intermediary service. The services of procurement, purchase of apparel and merchandise and its allied activities done to the foreign clients could be said to be facilitating the supply of goods to buying agents clients and considered as intermediary to that extent. Such Services are covered in Rule 9 of POPS. As per which the place of provision of service is location of service provider buying agent in India. The consideration for same could be liable to service tax post 1.10.14. The support service agreement if not bundled is not liable to ST . Further if all conditions of export of services given are satisfied such services could be treated as exports.

Conclusion

In this article the implication of the change in intermediary service on persons who are providing pre-sale, technical and analytical services as well as marketing services has been examined. It may be ensured that the agreements set out the correct nature of activities carried out by the buying agent to ensure there is no unnecessary tax paid on services which are treated as exported services even post 1.10.14. If liable then it is advisable to pay till or if this unfair rule is changed.