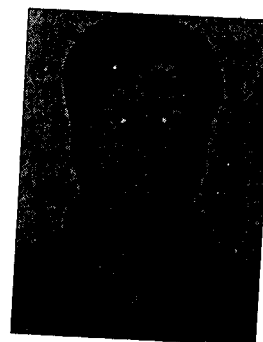


## ABATEMENT V. CENVAT CREDIT

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A specific exemption under Service tax called as abatement on specified services is available under Notification No. 1/2006-S.T., dated 1-3-2006. The said notification also covers two services namely :-

(a) Commercial or Industrial Construction Service	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. But it shall not apply in such cases where the taxable services 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, 1994.
(b) Erection Commissioning & Installation Service	Erection, commissioning or installation, under a contract for supplying a plant, machinery or equipment or structures and erection, commissioning or installation of such plant, machinery or equipment or structures.

The basic aim of the legislature to provide abatement facility on the respective service is that in cases where supply of material is also involved in a contract, Service tax is not to be charged on supply portion. Therefore the abatement is allowed and tax is to be calculated on the 33% of gross amount and whereas gross amount charged shall include the value of goods and materials supplied or provided or used by the provider and it will be deemed that rest 67% of gross amount is the cost of material or goods supplied for said contract.

But it is not so easy as to apply the abatement facility in Commercial or Industrial Construction service or Erection, Commissioning & Installation Service, as two more conditions have to be fulfilled. As per Notification No. 1/2006-S.T., dated 1-3-2006 this notification shall not apply in cases where if :-

- (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;
- (ii) the service provider has availed the benefit under the Notification No. 12/2003-S.T., dated the 20-6-2003.

But in a case where Commercial or Industrial Construction or Erection, Commissioning & Installation service provider has been awarded two different contracts such as :-

- (1) First contract is for providing pure service without supplying any material.

- (2) Second is where service and supply of material are inclusive in a work order.

In first contract the service provider wishes to avail Cenvat credit on input service used in providing the said output service (i.e. Commercial or Industrial Construction Service or Erection, Commissioning & Installation Service). In second contract the service provider may wish to avail abatement facility as per Notification No. 1/2006-S.T., dated 1-3-2006 as the contract is inclusive of supply and service both.

Notification No. 1/2006-S.T., dated 1-3-2006 shall not apply in cases where 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 while the service provider is wishing to avail Cenvat credit on pure service contract.

Is it correct that utilizing Cenvat credit on pure service work order for availing abatement under Notification No. 1/2006-S.T., dated 1-3-2006? Is it correct that by availing abatement under Notification No. 1/2006-S.T., dated 1-3-2006 restricts the first contract so as not to utilize Cenvat credit?

The answer is clear that legislature does not want to charge Service tax on sale of goods therefore tax is to be charged on the 33% of the gross value and 67% of the gross value should be deemed as sale value. Therefore input duty or duty on capital goods or input service used should not be utilized as all credits are deemed to be already being availed in the said abatement. But on input service or capital goods used for providing such output service which are accounted separately credit should be allowed in said pure service contract.

Therefore separate contracts have individual or separate identity for establishing nature of service. Each and every contract of Commercial or Industrial Construction or Erection Commissioning & Installation Service provided by the Service provider has to be examined for the purpose of extending the facility in terms of Notification No. 1/2006-S.T. This issue has been recently clarified in the case of *M/s. SMP Constructions (P) Ltd. v. Commissioner of Central Excise, Vadodara-II - 2009 (16) S.T.R. 763 (Tri. - Ahmd.)*, in which Ld. Counsel of the appellant had submitted that, the tax is on the services being provided by the appellant and not on the person providing such services. As such, each and every contract has to be taken as independent service being provided by the appellant and if he satisfies all the conditions of that particular contract for providing Cenvat credit, the benefit can be extended to him. **Merely because the conditions were not satisfied** in respect of some other contract with different buyers, by itself does not mean that benefit cannot be claimed in respect of contracts where such conditions stand satisfied. In response to said submissions of appellant Hon'ble Tribunal had given following finding in favour of appellant :

"wherever such service is being provided by the appellant, that the raw material of their buyers, the claim of abatement and wherever the raw material is required to be used by them, as per contract, they are availing the Modvat credit. We, *prima facie*, agree with the learned advocate that the construction services provided to the customer 'A' can be extended the benefit of Notification if the conditions are satisfied, even if such conditions are not satisfied, in respect of the service provided to another buyer 'B'."

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transfer of property in goods involved in the execution of such contract for construction of residential complex is leviable to tax as sale of goods, then the service falls aptly under 'works contract'. In simple words, construction as per the design approved by the customer, upto handing over of key has to be classified under (zzzza), since sub-section (2) to Section 65A reminds that the sub-clause which provides the most specific description shall be preferred to sub-clauses providing a more general description.

In the case of *K. Raheja Development Corporation v. State of Karnataka* reported in 2006 (3) S.T.R. 337 (S.C.), the Hon'ble Supreme Court upheld the activity of construction/development for the prospective purchasers that involves transfer of property and under an agreement made before completion of construction as works contract. In this case, the appellant entered into development agreements with owners of lands. Before construction of the residential apartments, they entered into agreements of sale with intended purchasers. The agreement would provide that on completion of the construction, the residential apartments would be handed over to the purchasers who would get an undivided interest in the land also. The owners of the land would then transfer the ownership.

So, following the footsteps of Hon'ble Apex Court, it is arguable that each contract executed with prospective purchasers for an apartment in the complex has the existence as separate work contract; and that the apartment is intended for his personal use. Thus saves tax. A judgment in favour of State Government under an Act may hinder the means of Union Government.

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That in Erection, Commissioning & Installation Service this has been already clarified in the Notification No. 1/2006-S.T., dated 1-3-2006 itself, "that 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" as per the description of service mentioned in the said notification, therefore condition that notification shall not apply if 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 will only apply in contracts in which abatement is being claimed and not on the contracts in which pure service is being provided by the service provider.

Therefore it is good tax planning for Commercial or Industrial Construction or Erection Commissioning & Installation Service provider to maintain separate accounts for pure service contract and for contract availing abatement so that Cenvat Credit can be utilized on pure service contract without conflicting with the contract availing abatement.