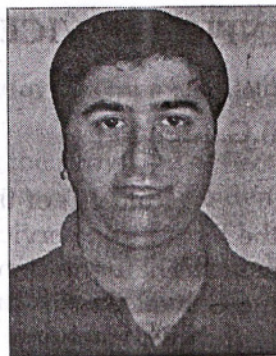


SERVICE TAX ON FABRICATION AT CLIENT SITE

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Fabrication is a word which is self explanatory and it means manufacture or production. It further means manufacture of new article emerging out with a distinct name and marketability. This covers all the ingredients of definition of fabrication under definition of manufacturing as per Section 2(f) of the Central Excise Act, 1944.

The definition of Erection, Commissioning & Installation Service under Service tax does not cover fabrication job work. The definition of Erection, Commissioning & Installation Service as amended time to time covers only following services and defines the term 'erection, commissioning or installation' as follows:-

1. From 10-9-2004 to 15-6-2005

"Erection, commissioning or installation" means any service provided by a commissioning and installation agency in relation to erection, commissioning or installation of plant, machinery or equipment;

2. From 16-6-2005

"erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to,-

- (a) erection commissioning or installation of plant, machinery or equipment; or
- (b) Installation of-
 - electrical and electronic devices including wiring or fittings thereof; or
 - plumbing, drain laying or other installations for transport of fluids; or
 - heating, ventilation or air-conditioning including related pipe, duct work and sheet metal work; or
 - thermal insulation, sound insulation, fire proofing or water proofing; or
 - lift and escalator, fire escape staircases or travelators; or
 - such other similar services;";

3. From 1-5-2006

"erection, commissioning or installation" means any service provided by a commissioning and installation agency, in relation to,-

- (a) erection, commissioning or installation of plant, machinery, equipment or structures, *whether prefabricated or otherwise*; or
- (b) installation of-
 - (a) electrical and electronic devices, including wirings or fittings thereof; or
 - (b) plumbing, drain laying or other installations for transport of fluids; or

- (c) heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work; or
- (d) thermal insulation, sound insulation, fire proofing or water proofing; or
- (a) lift and escalator, fire escape staircases or travelators; or
- (b) such other similar services;"

Therefore all the above work do not cover fabrication job work under erection, commissioning or installation services but the fabrication job work can be covered by Business Auxiliary Service.

Business Auxiliary Service means any service in relation to, —

- (i) promotion or marketing or sale of goods produced or provided by or belonging to the client; or
- (ii) promotion or marketing of service provided by the client; or
- (iii) any customer care service provided on behalf of the client; or
- (iv) procurement of goods or services, which are inputs for the client; or

Explanation.— For the removal of doubts, it is hereby declared that for the purposes of this sub-clause, "inputs" means all goods or services intended for use by the client;

(v) *production or processing of goods for, or on behalf of the client; or*

(vi) provision of service on behalf of the client; or

(vii) a service incidental or auxiliary to any activity specified in sub-clauses (i) to (vi), such as billing, issue or collection or recovery of cheques, payments, maintenance of accounts and remittance, inventory management, evaluation or development of prospective customer or vendor, public relation services, management or supervision, and includes services as a commission agent, but does not include any information technology service and *any activity that amounts to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944).*

Full exemption has been granted to the taxable service of production or processing of goods for, or of goods on behalf of, the clients for the service provided i.e. job worker subject to following conditions :-

- (a) The goods must be produced or processed using raw materials or semi finished goods supplied by the client.
- (b) The goods produced or processed by the job worker are returned back to the said client.
- (c) The goods so produced or processed by job worker must be used in or in relation to manufacture of the final product classifiable under First Schedule to the Central Excise Tariff Act. The appropriate amount of excise duty must also be payable at the time of clearance of good. It is specifically provided that 'appropriate duty of excise' shall not include nil rate of duty or whole exempt from duty of excise.

As per judgment of *M/s. Sangameshwar Pipe & Steel Traders v. Commissioner* - 2002 (141) E.L.T. 252 (Tri.-Del.) fabricated steel structures are classifiable under sub-heading 7308.90 of the Central Excise Tariff Act, 1985 and are excisable if found marketable. It means when new distinct article emerges out after manufacturing and which is also marketable can be said as manufacture under Central Excise.

Service tax vastly covers the work done by the job worker which does not amount to manufacture under Business Auxiliary Services and when a job worker does such job of fabrication in his factory and distinct article emerges out after manufacturing, which is also marketable then it is said to be manufacture under Section 2(f) of the Central Excise. No liability of Service tax arises on said service. As per Notification No. 8/2005-S.T., dated 1-3-2005 it is clarified by the C.B.E. & C. that exemption shall apply only in cases where such goods are produced using raw materials or semi-finished goods supplied by the client and goods so produced are returned back to the said client for use in or in relation to manufacture of any other goods falling under the First Schedule to the Central Excise Tariff, on which appropriate duty of excise is payable.

Explanation is provided that for the purposes of said notification, -

- (i) the expression "production of goods" means working upon raw materials or semi-finished goods so as to complete part or whole of production, subject to the condition that such production does not amount to "manufacture" within the meaning of clause (f) of Section 2 of the Central Excise Act, 1944 (1 of 1944);
- (ii) "Appropriate duty of excise" shall not include 'Nil' rate of duty or duty of excise wholly exempt.

It can also be said that duty under Central Excise Tariff should not show Nil or exempt in the rate of duty column. Therefore if said conditions are fulfilled by the job worker, the levy of Service tax under Business Auxiliary Service does not apply. It is also explained with a chart as follows:-

Particulars	Applicability of manufacture U/s 2(f) of the Central Excise Act	Is Central Excise duty payable	Applicability of Service tax under Business Auxiliary Services
Small Scale Manufacturer within Exemption	Yes	No	Not Applicable
Small Scale Manufacturer exceeding Exemption Limit	Yes	Yes	Not Applicable
Manufacturer availing whole duty Exemption under notification	Yes	No	Not Applicable
Manufacturer availing partial duty Exemption under notification	Yes	Yes	Not Applicable
Any processor or job worker whose final product is exempt or Nil duty under Central Excise Tariff	No	No	Service tax Payable
Any processor or job worker	No	No	Service tax Payable

Vide Order No. 58/1/2002-CX, dated 15-1-2002 the C.B.E. & C. had clarified that if the goods are manufactured by job worker at the site of the his client with raw material supplied by the principal and items assembled or erected at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, then the items would not be considered as moveable and will, therefore, not be excisable goods. If the said job work is done at job worker workshop or factory and the goods are

moved after final manufacture then duty is payable. A good example in this connection is where huge tank is made with raw material like sheets etc. is supplied by the principal on its site to the job worker to manufacturing said huge tank for storing purpose. In said case it is manufactured at site and attached by foundation to earth cannot be dismantled without substantial damage to its components and thus cannot be reassembled, so it not dutiable in said case but if it is being prepared in the factory and can be moved with help of crane out of factory then it attracts duty. An explanation is also given in Order No. 58/1/2002-CX, dated 15-1-2002 that huge tanks made of metal for storage of petroleum products in oil refineries or installations, though not embedded in the earth, are erected at site, stage by stage, and after completion they cannot be physically moved. On sale/disposal they have necessarily to be dismantled and sold as metal sheets/scrap. It is not possible to assemble the tank all over again. Such tanks are, therefore, not moveable and cannot be considered as excisable goods.

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3. Regarding the other services it says, that the services are used in business.

The first two criteria are fair and reasonable. The third criterion creates problem. "Used in business" is too broad a term to define anything. Many a time no definition is better than the definition. To say that the services have been received in India, there must be tangible relationship between service provided or performed and territory of India. The relationship must relate to consumption of service⁴ - where the service is consumed. In the first criterion the service is consumed in India through a movable property situated in India. In the second criterion, the service is consumed in India through its performance in India. The third criterion creates confusion. There is nothing in that criterion which makes consumption in India a relevant factor of definition of "received in India".

Rule 3(iii) of the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 covers a vast area for which no satisfactory definition of "received in India" is there. It covers manpower recruitment service - say a business person visits a foreign country and hires security guards for his safety. Does it become taxable in India as the service recipient is an Indian businessman? It covers transport of goods through pipeline - say an exporter uses some pipeline in a foreign country for transport of his goods - does it become taxable in India? It covers Share Transfer agent service - if you transact in some shares in Nasdaq - is it service received in India? Then it covers Business Auxiliary Services - if you send some goods for job work outside India, job work becomes taxable in India? It covers hiring of tangible goods service you hire a crane or bus outside India and pay Service tax in India! Rule 3(iii) does not define anything, it creates more confusion.

It is therefore suggested that definition of the term "received in India" should be clarified so that unnecessary disputes in this area can be avoided.

4. Consumption of service is important as it is in goods. Customs duty can only be imposed if the goods are imported into India (i.e. consumed in India). If a resident of India consumes some goods outside India, no customs duty is payable. Thus, when a service is consumed outside India, it cannot be regarded as import of service. Consumption by a resident of India is irrelevant.