LITIGATION NEXT…!

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Today, George Orwell may write, "All taxes are stupid. Some taxes are more stupid than others", and undoubtedly, he would refer to, none other than the Service Tax. Service tax has slowly but steadily getting the coveted reputation of the "Most Loosely Worded Law on this Planet", inheriting all possible legal flaws, *inter alia,* arbitrariness, inequity, disharmonious construction, etc… This piece is an attempt to identify another bombshell, which would be deadlier than the "Little Boy" dropped over Hiroshima.

"Construction Services" came under the Service tax net with effect from 10/9/2004, which was defined under clause (30a) of Section 65 of the Finance Act, 1994. Originally, under the levy, only the "Commercial/Industrial Constructions" were taxed. With effect from 16/6/2005, the "Construction Services" had been bifurcated into "Commercial / Industrial Constructions" and "Construction of Complexes", whereby, the "Construction of Residential complexes" are also brought under the levy. Apart from the above, from 16/6/2005, there was another significant amendment to the scope and definition of the levy. While redefining the Commercial/Industrial construction services and introducing the "Construction of Residential Complexes, the law makers has specifically included a separate sub section, under both the services, so as to include the "completion and finishing services", which reads as:

> *"completion and finishing services such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services, in relation to building or civil structure"*

Notification 15/2004-ST is an exemption Notification under the erstwhile "Construction services". It provided for an exemption to an extent of 67% from the

gross value, thus making only 33% of the gross value as taxable value, for the payment of Service tax, in respect of the "Construction Services". However, this notification excluded two categories of service providers, from availing the benefit of this 67% abatement, namely,

1. Where the CENVAT Credit on inputs and capital goods has been availed, or
2. Where the service provider avails the benefit of the Notification 12/2003-ST.

The reasoning behind this abatement notification, appears to be two fold, viz,

1. As in the construction service, there is a huge involvement of materials used in the provision of service (such as Cement, Steel, Glass etc), the abatement percentage may be arrived based on an average estimate that, out of the total value, two thirds shall represent the value of the materials portion and only one third represent the service portion and
2. The Service Provider may not be able to get proper documents to avail the Cenvat credit on the materials used, as they are generally purchased from unregistered sources.

The above logical reasoning is vivid from the exclusions provided in the Notification 15/2004-ST, whereby, the benefit of the abatement was denied to the service providers who have either availed the Cenvat credit on inputs/capital goods or who have availed the benefit of Notification 12/2003-ST (whereby the goods are sold during the provision of service). The above conclusion is further fortified by Notification 4/2005-ST, by which an Explanation was inserted to the Notification 15/2004-ST, which reads as:

> *"For the purposes of this notification, 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."*

From the above Explanation, it is crystal clear that, to qualify for the abatement, on one hand, the service provider has to include the value of the materials used in the provision of service and on the other hand, he shall not avail either Cenvat credit on inputs/capital goods or Notification 12/2003-ST.

So far so good. But the arrival of Notification 19/2005-ST for the Commercial / Industrial constructions (and Notification 18/2005-ST for Construction of Residential complexes) is the "Little Boy" referred above. This Notification brought an important amendment to the Notification 15/2004, whereby, the benefit of the abatement of 67% from the gross value is not available to the service providers, who provide **ONLY** the finishing / completion services. In other words, such service providers who provide only the finishing/completion services are required to pay service tax on the entire value of such finishing/completion services. Similar embargo is also cast for the services in respect of Construction of Residential Complexes, vide Notification 18/2005-ST.

As extracted earlier, the finishing/completion services are services which would inevitably contemplate utilization of materials. Can there be a painting without paints, carpentry without wood, flooring without tiles or a false ceiling without gypsum? In fact, the involvement of materials in the provision of such finishing/completion services is enormous and could be no less when compared to the rest of the construction. It is also true that these finishing/completion service providers would be relatively tiny operators compared to the mega service contractors and procuring the materials from the source with proper documents to avail Cenvat credit, would be practically impossible to them! In such a case, the embargo is definitely cruel and crucifying! No sane brain would admit that it could be the legislative intention!

Unless the Board reacts immediately to remedy this malady, calamity is a surety!