

CBEC – Central Board of Eternal Confusion.

(S. Jaikumar and G. Natarajan, swamy associates)

The Queen was away from the King for quite some time and stricken by her loving memories, the King was wearing the Queen's sari and seeing himself in a mirror. The Minister came and stroked on the King's back. To the bewildered King, the terrified Minister clarified, "Sorry Maharaj. I thought it was the Queen!". And the moral of the story is, "Often clarifications can be more awful than the clarified" and now the "stroke" came in the form of TRU's letter F.No.332/35/2006 Dt. 01.08.2006.

Ever since the introduction of the levy of service tax on commercial construction (10.9.2004) and residential construction (16.06.2005), the Board has chosen to maintain a stoic silence, though the confusions over the levy were ever compounding and demolishing the hopes of any guidance from the CBEC. Earlier, a feeble attempt was made in F.No.B 1/ 6/2005 Dated 27.07.2005, which is nothing but a reproduction of the statutory provisions.

The present clarification has raised more questions than what it seeks to answer and it portrays nothing but absolute lack of appreciation of the field realities of the construction industry. When, even a single flat purchaser could understand the nuances of the construction industry, it is pathetic that none in the Board could understand the same.

Let us now attempt a brick to brick analysis of the purported clarifications.

Point 1 of the Circular and the clarification is reproduced below, for ready reference.

1. Is service tax applicable on Builder, Promoter or Developer who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one F/Y?	In a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder / promoter / developer under 'construction of complex' service falling under section 65(105)(zzzh) of the Finance Act, 1994. If no other person is engaged for construction work and the builder / promoter / developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient
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		<p>relationship, the question of providing taxable service to any person by any other person does not arise.</p> <p>Service tax exemption for small service providers upto an aggregate value of taxable services of Rs. 4 lakh provided in any financial year vide notification No. 6/2005-Service Tax dated 01.03.05 is applicable for 'construction of complex' service also.</p>
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In the situation envisaged in the question, a basic fact, which is essential to determine the applicability of the levy, is totally ignored. It is not known, whether the builder / promoter / developer has already identified the buyers of the flats. Normally, upon identification of buyers, the undivided portion of the land would be sold to them and a separate construction agreement would also be entered into. In such cases, the builder / promoter / developer would be rendering the construction service to the individual flat purchasers. In another mode of transaction, the builder / promoter / developer would be constructing the flats by themselves and sell only the complete flat. In such cases, there would only be a sale of flat and there would be no service. But, the clarification issued by the CBEC does not take any cognizance of these field realities and has come to a conclusion that if a builder / promoter / developer, builds the flat by using his own manpower, there would be no service provider and service recipient relationship. How can it be, when the flats are sold before the construction stage itself and a separate construction agreement is entered into with the flat buyer? Moreover, when a builder / promoter / developer is building a residential complex, the same would not at all satisfy the definition of "personal use" as these flats are meant to be sold.

Point 3 of the Circular and the clarification is reproduced below, for ready reference.

3.	Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	Clarified vide F. No. B1/6/2005-TRU dated 27.07.05, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.
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The question is as simple as the route for Chennai to Bangalore. The answer reads like.... Go from Chennai to Mumbai, Mumbai to Delhi, Delhi to Kolkatta, Kolkatta to Hyderabad and finally from Hyderabad to Bangalore. It has been clarified that construction of an individual house / bungalow would not attract service tax, as they are for personal use, as clarified in an earlier Circular. But, would it not be simple to say that such individual house / bungalow are not at all "residential complexes" as only a complex containing of more than 12 residential units are covered by the levy. It would have been appropriate, if it was sought to be clarified as to what would be

the situation when more than 12 such individual houses / bungalows are built in the form of a township.

Point 4 of the Circular and the clarification is reproduced below, for ready reference.

4. Is payment of service tax a responsibility of service provider or of whom the service is provided?	As per section 68 of the said Act, in case of 'construction of complex' service falling under section 65(105)(zzzh) and 'commercial or industrial construction' service falling under section 65(105)(zzq) of the said Act, every person providing taxable service to any person shall be liable to pay service tax. As per section 66A of the said Act, if the service is provided from outside India to a person in India, then in such cases service tax is required to be paid by the recipient of such service.
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It has been clarified that, service tax is payable only by the service provider and not by the service receiver, except where the service is provided from outside India. It is pathetic that even after 12 years of the levy, such basic issues have to be clarified. This shows only the utter failure of the Government to properly market the concept of service tax among its citizens.

Point 5 of the Circular and the clarification is reproduced below, for ready reference.

5. If it is applicable on the Real Estate Developers, a detailed guideline of tax calculation and date from which it will be applicable. If it is from retrospective effect, and the service provider has left the work and no payment is due for him, who will pay?	Notification No. 1/2006-Service Tax dated 01.03.06 provides for levy of service tax on 33% of the gross amount charged for the services provided or to be provided, subject to fulfillment of the conditions specified in the said notification. Service tax is leviable on,-(i) 'commercial or industrial construction' service falling under section 65(105)(zzq) with effect from 10.09.04, and(ii) 'construction of complex' service falling under section 65(105)(zzzh) with effect from 16.06.05.
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This clarification gives the roofing finish to the tower of confusion. No prudent person would vouch that the clarification even attempts answer to the situation foreseen in the query. We sincerely request that a clarification to this clarification may kindly be issued at the earliest, so as to clarify as to what is sought to be clarified in this clarification.

More serious questions are nagging in the minds of all concerned such as,

- How the sale value of the land has to be treated?
- The relevance of the value for which the land was registered and the value agreed to between the parties.
- Service tax liability in the case of Joint development by land owner and builder.
- Sale of constructed flats as such / semi-finished flats and separate construction agreement and the applicability of service tax in such cases?
- Scope of "Personal Use". Whether Government quarters can be considered as being for the "personal use" of the Government?
- What is the service tax liability in case of the construction that spreads over the period prior to and after the introduction of the levy?
- What if a compound wall is now built to an existing commercial establishment? Can the compound wall be considered as being used for any commercial activity?
- Classification of composite services such as site formation, construction, erection, commissioning and installation, etc.
- Treatment of the deposits received for corpus fund, Government deposits, etc.
- Service tax liability on sub contractors.
- The rationale behind the prohibition of input service credit, if abatements are claimed.
- Treatment of mobilization advances received.
- What if a hostel is built inside a factory premises? Is it commercial construction or residential construction?
- The rationale behind denial of abatement for finishing service providers?
- If finishing services are provided to one flat, in a complex containing more than 12 flats, is the same liable to service tax?
- Whether the value of the materials supplied by the client shall also be included in the gross amount, while claiming abatement?
- Service tax liability, if the finishing services are rendered not to finish a new construction, but to an existing building.
- And the list goes on and on and on.....

Before parting.....

A fervent prayer to CBEC. For heaven's sake, please do not try to clarify the above doubts. The pond is already murky. Do not throw boulders into the murky pond. Only time is capable of purifying it, with the help of logical and judicious approach of the Tribunal and the Courts. This clarification of the CBEC further demonstrates the fact that such clarifications are issued only from an ivory tower, which is far away from the ground realities.

F. No. 332/35/2006 – TRU
Government of India
Ministry of Finance
Department of Revenue
Tax Research Unit

Dated : August 1, 2006



Subject: Clarification on applicability of service tax on real estate developers / builders – Regarding.

Please refer to your letter dated 21.06.06 on the above subject.

2. I have been directed to state the following relating to levy of service tax on "construction of complex" service falling under section 65(105)(zzzh) and "commercial or industrial construction" service falling under section 65(105)(zzq) of the Finance Act, 1994:

Sr. No.	Issue	Legal Position
1.	Is service tax applicable on Builder, Promoter or Developer who builds a residential complex with the services of his own staff and employing direct labour or petty labour contractors whose total bill does not increase 4.0 lacs in one F/Y?	<p>In a case where the builder, promoter or developer builds a residential complex, having more than 12 residential units, by engaging a contractor for construction of such residential complex, the contractor shall be liable to pay service tax on the gross amount charged for the construction services provided, to the builder / promoter / developer under 'construction of complex' service falling under section 65(105)(zzzh) of the Finance Act, 1994.</p> <p>If no other person is engaged for construction work and the builder / promoter / developer undertakes construction work on his own without engaging the services of any other person, then in such cases in the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise.</p> <p>Service tax exemption for small</p>

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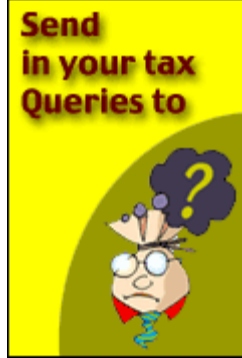
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		service providers upto an aggregate value of taxable services of Rs. 4 lakh provided in any financial year vide notification No. 6/2005-Service Tax dated 01.03.05 is applicable for 'construction of complex' service also.
2.	Again will service tax be applicable on the same, in case he constructs commercial complex for himself for putting it on rent or sale?	Commercial complex does not fall within the scope of "residential complex intended for personal use". Hence, service provided for construction of commercial complex is leviable to service tax.
3.	Will the construction of an individual house or a bungalow meant for residence of an individual fall in purview of service tax, is so, whose responsibility is there for payment?	Clarified vide F. No. B1/6/2005-TRU dated 27.07.05, that residential complex constructed by an individual, intended for personal use as residence and constructed by directly availing services of a construction service provider, is not liable to service tax.
4.	Is payment of service tax a responsibility of service provider or of whom the service is provided?	As per section 68 of the said Act, in case of 'construction of complex' service falling under section 65(105)(zzzh) and 'commercial or industrial construction' service falling under section 65(105)(zzq) of the said Act, every person providing taxable service to any person shall be liable to pay service tax. As per section 66A of the said Act, if the service is provided from outside India to a person in India, then in such cases service tax is required to be paid by the recipient of such service.
5.	If it is applicable on the Real Estate Developers, a detailed guideline of tax calculation and date from which it will be applicable. If it is from retrospective effect, and the service provider has left the work and no payment is due for	Notification No. 1/2006-Service Tax dated 01.03.06 provides for levy of service tax on 33% of the gross amount charged for the services provided or to be provided, subject to fulfillment of the conditions specified in the said notification. Service tax is leviable on,-(i) 'commercial or



	him, who will pay?	industrial construction' service falling under section 65(105)(zzq) with effect from 10.09.04, and(ii) 'construction of complex' service falling under section 65(105)(zzzh) with effect from 16.06.05.
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3. For any further clarifications, you may contact the jurisdictional officers with relevant facts, for appropriate guidance.

(G.G. Pai)
Under Secretary (TRU)