# INDIRECT TAXES UPDATE -34

## SERVICE TAX

### The expression *"used outside India"* in rule 3(2)(a) of the Export of Services Rules, 2005 existing before 28th February, 2010 clarified further

The expression *"used outside India"* in Rule 3(2)(a) of the Export of Service Rules, 2005 (omitted w.e.f. 27.12.2010 vide *Notification 06/2010-ST dated 27 Feb 2010)* clarified initially vide *Circular No.111/05/2009-ST* dated 24.02.2009 has been clarified further. The clarification is in respect of the issue, whether for the period prior to 28.2.2010 the requirement that the service should be "used outside India" invariably means the location of the recipient?

2. In the stated Circular it was *inter-alia*, clarified that the words, "used outside India" should be interpreted to mean that "the benefit of the service should accrue outside India". It is well known that services, being largely intangibles, are capable of being paid from one place and actually used at another place. For example, it is possible to obtain a consultancy report from a service provider in India, which may be used either at the location of the customer or in any other place outside India or even in India. In a situation where the consultancy, though paid by a client located outside India, is actually used in respect of a project or an activity in India the service cannot be said to be used outside India.

3. It may be noted that the words "accrual of benefit" as mentioned in *Circular No.111/05/2009-ST* are not restricted to mere impact on the bottom-line of the person who pays for the service. These words may be interpreted in the context where the effective use and enjoyment of the service has been obtained. For example, effective use of advertising services shall be the place where the advertising material is disseminated to the audience though actually the benefit may finally accrue to the buyer who is located at another place.

4. This, however should not apply to services which are merely performed from India and where the accrual of benefit and their use out side India are not in conflict with each other. The relation between the parties may also be relevant in certain circumstances, for example in case of passive holding/ subsidiary companies or associated enterprises. In order to establish that the services have not been used outside India the facts available should inter-alia, clearly indicate that only the payment has been received from abroad and the service has been used in India. It has already been clarified that in case of call centers and similar businesses which serve the customers located outside India for their clients who are also located outside India, the service is used outside India.

5. Besides above, to attain the status of export, a number of conditions need to be satisfied which are specified in Rule 3(1) and Rule 3(2) of Export of Services Rules 2005.

*Circular No.111/05/2009-ST* explained the expression "used outside India" only and the other conjunct conditions, as applicable from time to time, also need to be independently satisfied for availing the benefit of an export.

*[Circular No. 141/10/2011 TRU dated 13.05.2011]*

**Important aspects of the prosecution provision s introduced by the Finance Act, 2011 explained by the Board**

The following aspects relating to newly inserted provisions of prosecution (Section 89 of the Finance Act, 1994) have been explained in a clarification issued by the Board:

1. The emphasis under clause (a) of section 89(1) in the prosecution provision is on the non-issuance of invoice within the prescribed period rath er than non-mention of the technical details in the invoice that have no bearing on the determination of tax liability.

2. The service receiver, liable to pay tax on reverse charge basis is required to ensure that the invoice is available at the time the p ayment is made or at least received within 14 days thereafter and in the case of associated enterprises, invoice should be available with the service receiver at the time of credit in the books of accounts or the date of payment towards the service receive d.

3. Further, invoice mentioned in section 89(1) will include a bill or as the case may be a challan, in accordance with the Service Tax Rules, 1994. Invoice, bill, or as the case may be, challan, shall also include "any document" specified in respect of certain taxable services, in the provisos to Rule 4A and Rule 4B of Service Tax Rules, 1994.

4. In order to constitute an offence under clause (b) of section 89(1) of Finance Act, 1994, the taxpayer must both avail as well as utilize the credit without ha ving actually received the goods or the service. The clause is not meant to apply to situations where an invoice has been issued for a service yet to be provided on which due tax has been paid. It is only meant for such invoices that are typically know n as "fake" where the tax has not been paid at the so called service provider's end or where the provider stated in the invoice is non-existent. It will also cover situations where the value of the service stated in the invoice and/or tax thereon have be en altered with a view to avail Cenvat credit in excess of the amount originally stated. While calculating the monetary limit for the purpose of launching prosecution, the value shall be the amount availed as credit in excess of the amount originally stat ed in the invoice.

5. Clause (c) of section 89(1) of Finance Act, 1994, is based on similar provision in the central excise law. It should be noted that the offence in relation to maintenance of false books of accounts or failure to supply the required in formation or supplying of false information, should be in material particulars have a bearing on the tax liability. Mere expression of opinions shall not be covered by the said clause. Supplying false information, in response to summons, will also be cover ed under this provision.

6. Clause (d) of section 89(1) of Finance Act, 1994, will apply only when the amount has been collected as service tax. It is not meant to apply to mere non-payment of service tax when due. This provision would be attracted when the amount was

reflected in the invoices as service tax, service receiver has already made the payment and the period of six months has elapsed from the date on which the service provider was required to pay the tax to the Central Government. Where the service receiver has made part payment, the service provider will be punishable to the extent he has failed to deposit the tax due to the Government.

7. Certain sections of the Central Excise Act, 1944, have been made applicable to service tax by section 83 of Finance Act, 1994. Section 9AA of the Central Excise Act provides that where an offence has been committed by a company, in addition to the company, every person who was in charge of the company and responsible for conduct of the business, at the time when offence was committed, can be deemed guilty of an offence and can be proceeded against. A person so charged, however has an option to establish that offence was committed without his knowledge or he had exercised all due diligence to prevent the commission of offence.

8. Section 9C of Central Excise Act, 1944, which is made applicable to Finance Act, 1994, provides that in any prosecution for an offence, existence of culpable mental state shall be presumed by the court. Therefore each offence described in section 89(1) of the Finance Act, 1994, has an inherent *mens rea*. Delinquency by the defaulter of service tax itself establishes his 'guilt'. If the accused claims that he did not have guilty mind, it is for him to prove the same beyond reasonable doubt. Thus "burden of proof regarding non existence of 'mens rea' is on the accused".

9. It may be noted that in terms of section 89(3) of Finance Act, 1994, the following grounds are not considered special and adequate reasons for awarding reduced imprisonment:

(i) the fact that the accused has been convicted for the first time for an offence under Finance Act, 1994;

(ii) the fact that in any proceeding under the said Act, other than prosecution, the accused has been ordered to pay a penalty or any other action has been taken against him for the same act which constitutes the offence;

(iii) the fact that the accused was not the principal offender and was acting merely as a secondary party in the commission of offence;

(iv) the age of the accused.

On the above grounds, sanctioning authority cannot refrain from launching prosecution against an offender.

10. Sanction for prosecution has to be accorded by the Chief Commissioner of Central Excise, in terms of the section 89(4) of the Finance Act, 1 994. In accordance with *Notification 3/2004-ST dated 11th March 2004*, Director General of Central Excise Intelligence (DGCEI), can exercise the power of Chief Commissioner of Central Excise, throughout India.

11. Board has decided that monetary limit for prosecution will be Rs.10,00,000 in the case of offences specified in section 89(1) of Finance Act, 1994, to ensure better

utilization of manpower, time and resources of the field formations. Therefore, where an offence specified in section 89(1), involves an amount of less than Rs.10,00,000, such case need not be considered for launching prosecution. However the monetary limit will not apply in the case of repeat offence.

12. Provisions relating to prosecution are to be exercised with due diligence, cauti on and responsibility after carefully weighing all the facts on record. Prosecution should not be launched merely on matters of technicalities. Evidence regarding the specified offence should be beyond reasonable doubt, to obtain conviction. The sanction ing authority should record detailed reasons for its decision to sanction or not to sanction prosecution, on file.

13. Prosecution proceedings in a court of law are to be generally initiated after departmental adjudication of an offence has been completed, although there is no legal bar against launch of prosecution before adjudication. Generally, the adjudicator should indicate whether a case is fit for prosecution, though this is not a necessary pre - condition. To launch prosecution against top management of the company, sufficient and clear evidence to show their direct involvement in the offence is required. Once prosecution is sanctioned, complaint should be filed in the appropriate court immediately. If the complaint could not be filed for any reason, t he matter should be immediately reported to the authority that sanctioned the prosecution.

14. Instructions and guidelines issued by the Central Board of Excise and Customs (CBEC) from time to time, regarding prosecution under Central Excise law, will also be applicable to service tax, to the extent they are harmonious with the provisions of Finance Act, 1994 and instructions contained in this Circular for carrying out prosecution under service tax law.

*[Circular No. 140/09/2011 – ST dated 12.05.2011]*

*The complete text of the above circular s are available at www.cbec.gov.in.*

## Disclaimer



### Feedback

The Indirect Taxes Update is an endeavour of the Indirect Taxes Committee to apprise the readers about the amendments made in various central indirect tax laws vide significant notifications, circulars etc. We welcome your feedback on the Update and its contents.

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You can also write to:

Secretary

Indirect Taxes Committee
The Institute of Chartered Accountants of India
ICAI Bhawan A-29, Sector -62, NOIDA (U.P.)India
Telephone Direct - +91 120 3045 906Telephone Board - +91 120 3045900 Ext. 906