

COMMISSION AGENT SITUATED ABROAD:  
SERVICE TAX IMPLICATIONS

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INTRODUCTION

A new category of taxable service known as “business auxiliary service” was provided for w.e.f. 19/09/2004. What is the ambit of this category? It includes any service in relation to promotion, marketing or sale of goods and services produced by or belonging to the client. Two issues arise in this regard:

- i) does it include the services provided by a commission agent?
- ii) if yes, what is the service tax implication in a situation where the commission agent is situated abroad?

FACTS

ABC Pvt. Ltd. (hereinafter, ‘ABC’) is engaged in the business of manufacturing/exporting of industrial products and spare parts for machinery. ABC had entered into an agreement dated July 25, 2006 with XYZ Inc. based in Chicago, USA (hereafter, ‘XYZ’) whereby ABC had appointed XYZ as their selling agent for their above-mentioned products exported to Canada and the United States. The agreement specifically mentions that XYZ will receive 10% commission on all orders/business through them. The orders are subject to confirmation by ABC. Thus, XYZ would be the service provider in this situation, whereas ABC would be the service recipient. Further, the position of XYZ vis-à-vis ABC would be that of a commission agent.

## QUERY

Whether there is any service tax liability on ABC in respect of the services provide by XYZ to ABC?

## ISSUE UNDER CONSIDERATION

From the facts furnished it is seen that ABC has appointed XYZ as their selling agent for the goods manufactured and/or exported by the former and for the services rendered by the latter a commission of 10% is to be paid. Thus, the service rendered by ZYX is in the nature of a commission agent's service or a service whereby the sales of the goods of ABC will be promoted in the region for which XYZ is appointed for the purpose in question. The liability towards 'service tax' will arise only if the service rendered in this case falls in any of the category of taxable services specified in the Service Tax statute.

### *Finance Act, 2004: New taxable Service*

From a study of the relevant provisions it is seen that Section 65(19) of the Finance Act, 1994, as substituted by the Finance Act, 2004, with effect from 10.09.2004 contains a category of taxable service called "business auxiliary service". The 'business auxiliary service' is defined therein as follows:

‘ “ *business auxiliary service*” means in relation to-

i) *promotion or marketing or sale* of goods produced or provided by or belonging to the client; or

ii) to (vi) .....

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.

*Explanation-* For removal of doubts, it is hereby declared that for the purposes of this clause-

a) “commission agent” means any person who acts on behalf of another person and causes sale or purchase of goods, or provision or receipt of services, for a consideration, and includes any person who, while acting on behalf of another person-

i) deals with goods or services or documents of title to such goods or services; or

ii) collects payment of sale price of such goods or services; or

iii) guarantees for collection or payment for such goods or services; or

iv) undertakes any activity relating to such sale or purchase of such goods or services;’

Further, Section 65(105) of the Finance Act, 1994 lists the categories of “taxable services”. Sub-clause (zzb) of the section defines the taxable service as “any service provided or to be provided to a client, by any person in relation to business auxiliary service”.

*Finance Act, 2006: Service Provider Outside India*

Since in this case the service is provided not in India but in a country outside India, the provisions of Section 66A will also come into play. Section 66A, inserted by the Finance Act, 2006, contains provisions regarding service tax liability where 'service' is provided by a service provider who is based outside India to a service recipient who is based in India. The relevant provisions of the section are as hereunder:

*“ Charge of service tax on services received from outside India.*

(1) Where any service specified in clause (105) of section 65 is-

- a) provided or to be provided by a person who has established a business or has a fixed establishment from which the service is provided or to be provided or has his permanent address or usual place of residence, in a country other than India, and
- b) received by a person (hereinafter referred to as the recipient) who has his place of business, fixed establishment, permanent address or usual place of residence, in India,

such service shall, for the purposes of this section, be the taxable service, and such taxable service shall be treated as if the recipient had himself provided the service in India, and accordingly all the provisions of this Chapter shall apply.”

The above provisions have to be read with the provisions of Rule 2(1)(d)(iv) of the Service Tax Rules, 1994, which states that in relation to any taxable service provided or to be provided by any person from a country other than India and received by any person in India under Section 66A of the Act, the recipient of such services shall discharge service tax liability.

### *Valuation of Services Rendered*

Further, Section 67(1)(i) of the Finance Act, 1994 contains provisions for the valuation of services rendered and determination of the service tax liability. These provisions are as follows:

“In a case where the provision of service is for a consideration in money, the value shall be the *gross amount charged* by the service provider for such service provided or to be provided by him.”

It is seen that the Agreement entered into by ABC with XYZ shows that the services which are to be provided by XYZ will be of the nature of a “commission agent”. From the statutory provisions briefly recapitulated above it will be seen that the service provided by a commission agent is chargeable to service tax under Section 65(19), which specifically includes service provided by a “commission agent” in the definition of ‘business auxiliary service’. Section 65(105)(zzb) includes the broad category of business auxiliary service as a taxable category. As per Section 66A of the Finance Act, 1994 read with Rule 2(1)(iv) of the Service Tax Rules, 1994, it is the service recipient ABC who will be liable to pay the service tax in such a situation. This liability towards ‘service tax’ will be as per the valuation of the services rendered u/s. 67(1)(i), which is the gross amount charged by the service provider XYZ for providing the service. In this case, gross amount charged would be the 10% commission which XYZ is to receive on all orders/business as per clause 2 of the Agreement between ABC and XYZ.

### *Exemption: Relevant Amendments*

Like in the case of Central Excise duty there is an exemption for small scale manufacturers, so also in the case of 'service tax' there is an exemption where the service tax for the services provided by a person does not exceed Rs. 8 lakh in a financial year. Earlier, this exemption was limited to a case where the service tax in a financial year did not exceed Rs. 4 Lakh vide Notification No. 6/2005-S.T., dated 01.03.2005. From 01.04.2007 onwards, this threshold exemption has been increased to Rs. 8 lakhs vide Notification No. 4/2007-S.T., dated 01.03.2007. However, it is to be noted that clause (ii) of the proviso to paragraph 1 of this notification mentions the situations where this exemption will not apply. The relevant provisions of the notification are as under:

*'Provided that nothing contained in this notification shall apply to-*

(i).....

(ii) such value of taxable services in respect of which service tax shall be paid by such person and in such manner as specified under sub-section (2) of section 68 of the said Finance Act read with Service Tax Rules, 1994.'

The above-mentioned proviso stipulates that the exemption does not apply in situations covered under Section 68(2) of the Finance Act, 1994. The relevant provisions of Section 68(2) are as follows:

*"Payment of service tax-*

(1) .....

(2) Notwithstanding anything contained in sub-section (1), in respect of any taxable service notified by the Central Government in the Official Gazette, the service tax thereon shall be paid by such person and in such manner as may be prescribed at the rate specified in Section 66 and all the provisions of this Chapter shall apply to such person as if he is the person liable for paying the service tax in relation to such service.'

The proviso (ii) of paragraph (1) of Notification No. 6/2005-S.T., dated 01.03.2005 also mentions that the provisions of Section 68(2) have to be read along with the Service Tax Rules, 1994. Under Section 68(2) of the Finance Act, 1994, the Central Government has been empowered to notify such person (other than the service providers) in respect of any taxable service who will be liable to discharge the liability for payment of service tax. The Central Government has chosen to exercise this option in cases covered under the provisions of Section 66A and thereby bring such cases within the ambit of Section 68(2). In exercise of this power, the Central Government has in Rule 2(1)(d)(iv) of the Service Tax Rules, 1994 specified that in relation to any taxable service provided or to be provided by any person from a country outside India and received by any person in India under Section 66A, it will be the recipient of such service who shall discharge the service tax liability. Therefore, it follows that since in this case it will be the service recipient (ABC), and not the service provider (XYZ) who will be liable to pay duty on service provided. Not only that, the benefit of the threshold exemption will not be available to ABC, as the bar of clause (ii) of the proviso to paragraph 1 of the above exemption Notification will come in their way. Hence, they are liable to pay the full amount of service tax payable on the gross amount charged as provided for u/s. 67(1)(i) of the Finance Act, 1994.

As mentioned above, this particular agreement between ABC and XYZ will fall within the ambit of a commission agent as envisaged under the Explanation to the amended Section 65(19) of the Finance Act, 1994. In this connection, it will be useful to refer to another exemption Notification No. 13/2003-S.T., dated 20.06.2003 which is specifically applicable in the case of 'service' coming within the ambit of 'commission agent's service'. The provisions of this Notification are as follows:

'In exercise of the powers conferred by section 93 of the Finance Act, 1994, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a *commission agent from the service tax leviable thereon under sub-section (2) of section 66 of the said Act.*'

However, this position only lasted till 08.07.2004 only. From that date onwards, the benefit of exemption to the service provided by a commission agent has been confined to the service of 'commission agent' provided in relation to sale or purchase of agricultural produce alone. The relevant provisions of the amendment Notification No. 8/2004-S.T., dated 09.07.2004, which brought about this change are as follows:

'In exercise of the powers conferred by section 93 of the Finance Act, 1994, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the business auxiliary services provided by a *commission agent in relation to sale or purchase of agricultural produce from the service tax leviable thereon under section 66 of the said Act.*'

Thus, the effective position is that subsequent to the issue of the afore-mentioned amendment notification, i.e., from 09.07.2004 onwards, the services provided by commission agents which are not in relation to sale or purchase of *agricultural produce* would not be exempt from payment of service tax under the said exemption Notification. Consequently, the 'service' provided by the American party XYZ to ABC as commission agent in terms of the agreement between them would not be eligible to the benefit of the above exemption.

CONCLUSION

Services provided by a commission agent are included in the category of taxable service termed as “business auxiliary service”, which is provided for by the Finance Act, 2004. where ‘service’ is provided by a service provider who is based outside India to a service recipient who is based in India, Section 66A, inserted by the Finance Act, 2006 read with the Service Tax Rules, 1994 mandate that service tax liability is to be discharged by the service recipient. The upshot of the above analysis is that ABC is liable to pay the ‘service tax’ in the instant case on the gross value of the amount of commission paid by ABC to XYZ.