Mean, By all means

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The CBEC came out with two Master Circulars, consolidating all instructions / clarifications relating to service tax vide its Circulars 96 & 97 /7/2007 Dated 23.08.2007. At the dawn of 2008, certain additional clarifications have been issued vide Circular No. 98/1/2008 ST Dated 04.01.2008, as a new year gift, not for the service providers, but for the revenue brigade.

Service tax has been imposed on "renting of immovable property service". It is a layman knowledge that, for renting out any immovable property, there should be, first of all, an "immovable property". In constructing such immovable property, various input services would have been availed by the owner of the immovable property, most important of them being, "construction of a commercial complex service or works contract service". It is a common understanding that the service tax paid on these input services, "construction of a commercial complex service or works contract service" could be availed as Cenvat credit by the owner of the immovable property and used by him for payment of service tax on the "renting of immovable property service" rendered by him.

The present clarification says that, by availing the above input services, i.e. construction service / works contract service, the "output" of "immovable property" comes into picture and since the said "immovable property" is neither "goods" attracting excise duty nor a "service" attracting service tax, Cenvat credit of service tax paid on the above input services cannot be availed.

The clarification has lost sight of the basic fact that only by using such "immovable property", the taxable service of "renting of immovable property" is being rendered. The definition of the term "input service" refer to ***"services used in relation to setting up, modernization, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises"***. In other words, if a manufacturer builds a factory (which is nothing but an immovable property), and avails the above input services, he is entitled to take Cenvat credit of the service tax paid on such input services, notwithstanding the fact that no excise duty is paid on the "factory" as such. Similarly, if any other service provider builds his premises, he is very much entitled for taking Cenvat credit of these input services, notwithstanding the fact that his premises is neither "goods" nor "services". Hence, the above clarification defies logic. If it is held that these input services are consumed only in bringing the "output, viz., immovable property" neither any manufacturer nor any service provider would be entitled to avail Cenvat credit on these services.

Another clarification is to the effect that consequent to the introduction of "works contract service" with effect from 01.06.2007, whether ongoing activities, which were taxed under various other categories of taxable services (Erection / Commissioning / Installation, commercial / industrial construction or construction of residential complex) prior to 01.06.2007, can be reclassified into "Works Contract Service" and whether service tax can be paid on composition method, wherein the answer lies in negative. Time and again, this issue has been elaborately dealt with in TIOL, and everytime it has been emphatically reiterated that the benefit of reclassification and composition is available for ongoing contracts also. The reasoning (!) given in the present clarification is, since the service has been classified under a category, the classification cannot be changed subsequently. It is observed that classification of service is done based on the nature of service provided whereas liability to pay service tax is related to receipt of consideration and vivisecting a single composite service and classifying the same under two different taxable services **depending upon the time of receipt of the consideration** is not legally sustainable.

Service tax is payable, upon realization of consideration. At the time of paying service tax upon realization, the service has to be classified accordingly. Drawing analogy from excise levy, while rendering of service can be equated to manufacture, realization can be equated to clearance. If the tariff headings of certain goods are amended, can it be said that the goods manufactured prior to such amendment shall continue to be classified only as per the unamended tariff? At the time of payment of duty of excise (at the time of clearance), the goods have to be classified only under the tariff heading which is prevalent on the date of removal. Similarly, classification of taxable service is a continuous process and has to be done at each and every time of payment of service tax, i.e upon every receipt of consideration. If a more specific category of taxable service is introduced subsequently, the services rendered after such new levy shall be classified only under the new category of taxable service, whenever service tax is payable on the said service, in respect of the payments received after the introduction of the new levy.

The present circular demonstrates only the mean mindset of the revenue bureaucrats in curtailing all legitimate benefits to an assessee, by all means.