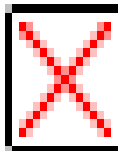


Why 'over-burdened' Railway should pay Service Tax?

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By P G James



THE moot question raised by Railway Minister, Shri Suresh Prabhu was in news recently:

"Why should the Railway pay dividend to Finance Ministry when it is 'over-burdened' with about Rs 60,000 crore worth of public service obligation and increased wage bill due to the latest pay commission report?"

Presumably to get a relief from the so called 'over burden', they have issued a [Circular No TC-I/2012/214/2Pt.I dated 15th December 2016](#) as Corrigendum No 7 to Rate Circular No [29 of 2012](#)

so as to escape the Service Tax liability cast upon them out of the collection towards 'Demurrage and Wharfage charges'.

It is stated that in supersession of para 4(ix) of Rates Circular No [29 of 2012](#)

, there is no liability on the part of Railways to collect Service Tax on Demurrage and Wharfage charges. Demand Note/Receipt etc. for collection of Demurrage and Wharfage charges shall however, clearly specify that

"customer shall solely be liable for paying applicable Service Tax directly under Reverse Charge Mechanism".

It is further stated that this issues with the concurrence of Accounts and Finance Directorates of Ministry of Railways.

On reading of the above, the primordial question that arises is - Do 'Accounts and Finance Directorates of Ministry of Railways' have any statutory authority to prescribe any changes or modalities in the existing Service Tax Rules or Cenvat Credit Rules?

The answer could be a big emphatic 'No'; but the bitter experience of the past shows otherwise. Though Service Tax on transport of goods by rail was introduced in 2009, it was not collected till September 2012 and due to the persistent pressure tactics adopted by the then Railway Minister, Finance Ministry waived it, same was nicknamed 'Didi exemption'.

Another controversial stand taken by Railway in this regard was that they will not issue Invoice as prescribed under Rule 4 A of Service Tax Rules for collecting Service Tax nor they will give original or extra copy of Railway Receipt. In the Circular bearing No [29 of 2012](#) dated 28.09.12 (No TCR/1078/2011/2) it has been clarified by the Deputy Director of Railway Board that customers can get credit of Service Tax based on the consolidated Certificate issued by an authorised Officer of Railway and this can be used by the customers for getting Cenvat credit of Service Tax.

Since Consolidated Certificate issued by Railway is not a specified document as per Rule 9(1)(f) of the Cenvat Credit Rules, 2004, such Cenvat credit of crores of rupees is being denied pan India and is still facing litigation at many places

. Finance Ministry was and is a silent spectator on this and never objected the move of Railways in prescribing a document in Cenvat Credit Rules, 2004.

In this regard, RTI request was made to CBEC on the following questions:

++ Whether CBEC is aware of the Circular authorising the customers to take Cenvat credit of Service Tax collected by Railway?

++ Whether Circular is issued after consultation with CBEC?

++ If the Circular is issued without consultation with CBEC and CBEC is aware of the Circular, was any correspondence made with Railway or any instructions or notice given to the field formations or trade to disallow the credit /not to claim such credit?

It was replied by CPIO of CX-8 Wing of CBEC that the information is not available with them and is scattered with other public authorities CX-9 Wing, Service Tax Wing and transferred the request to other Wings. This request travelled many kilometers but in vain. And the ultimate result is that no answer was given. It was also replied that Notn [26/2014-CE\(NT\)](#)

dated 27.08.14 was issued after detailed discussions including meeting of Member (CE), Member (Traffic) Railway Board. But nothing fructified to redress the tyranny of those who took Cenvat credit based on the Certificate issued by Railway authorities who simply preferred to gloss over the provisions applicable to a Service Tax registrant.

Owing to the wide spread protests and representations, Cenvat Credit Rules were amended vide Notn. No [26/2014-CE \(NT\)](#) dated 27.08.14 without mentioning anything about the retrospective applicability of this amendment and thereby prolonging unwanted litigation. Kindly also see DDT [2021](#) & [2425](#) .

Coming back to the present controversy of the Service Tax liability on demurrage and wharfage charges which are levied for detention of rolling stock after the expiry of free time and on goods not removed from the premises after the free time respectively, hitherto Railways had been duly discharging Service Tax on such levies.

As per Section 30 (2) of the Railway Act, 1989, Central Government may fix rates of any other charges incidental to or connected with such carriage including demurrage and wharfage. The expression 'incidental to or connected with such carriage' unambiguously makes it clear that demurrage or wharfage charges are directly in relation to the 'carriage' i.e. transport of goods by rail.

As per Section 66 F(3)(a) of Finance Act, 1994, if various elements of a service are naturally bundled in the ordinary course of business, it shall be treated as provision of the single service which gives such bundle its essential character. Explanation to this Section also clarifies that the expression 'bundled service' means a bundle of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. None can deny the fact that there cannot be any levy of demurrage or wharfage unless goods are transported through rail. Hence it is unequivocally evident that the main service is 'transport of goods by rail' and the incidental charges of demurrage and wharfage are emanating therefrom.

At this juncture, it is pertinent to bear in mind the clarification issued by CBEC vide Circular No. [186/5/2015-ST](#) dated October 05, 2015 with regard to the incidental charges incurred by Goods Transport Agency, the relevant extract of which is reproduced below:

" The service provided is a composite service which may include various ancillary services such as loading/unloading, packing/unpacking, transshipment, temporary storage etc., which are provided in the course of transportation of goods by road. These ancillary services may be provided by GTA himself or may be sub-contracted by the GTA. In either case, for the service provided, GTA issues a consignment note and the invoice issued by the GTA for providing the said service includes the value of ancillary services provided in the course of transportation of goods by road. These services are not provided as independent activities but are the means for successful provision of the principal service, namely, the transportation of goods by road.

4. A single composite service need not be broken into its components and considered as constituting separate services, if it is provided as such in the ordinary course of business.

Thus, a composite service, even if it consists of more than one service, should be treated as a single service based on the main or principal service

.. Thus, if ancillary services are provided in the course of transportation of goods by road and the charges for such services are included in the invoice issued by the GTA, and not by any other person, such services would form part of GTA service and, therefore, the abatement of 70%, presently applicable to GTA service, would be available on it."

The above clarification of the legal principle in the levy of Service Tax is applicable to all and Railway is not exclusion.

Even presuming that this is a service rendered by 'Government' so as to attract reverse charge liability under Rule 2 (1)(d)(i)E of Service Tax Rules, 1994, this will not help them inasmuch as they are paying Service Tax for the main service, viz. Transportation of Goods by Rail and hence concomitant services of demurrage /wharfage cannot be isolated merely for the purpose of reverse charge.

There cannot be and should not be separate rules of interpretation of service for Railways and their unilateral decision not to pay Service Tax cannot be viewed lightly. Incapability of Finance Ministry to tame Railway Ministry in enforcing its rules and regulations shall not cast an illegitimate burden on the recipient of service under reverse charge mechanism.

Let us hope and pray that CBEC will not amend its Rules, as done in the past, so as to relieve Railway from their forward charge liability and add to the woes of the service recipient with reverse charge liability .

Getting Consolidated Service Tax Certificate from Railway itself is an onerous task and if reverse charge is also extended as per the Railway Circular, it is nothing but making worse, the worst and amount to double jeopardy.

"Nemo debet bis vexari pro una et eadem causa" meaning "No one ought to be twice troubled or harassed"

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