POST-BUDGET MEMORANDUM, 2012

INDIRECT TAXES

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA

NEW DELHI

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CONTENTS

I. INTRODUCTION

1.0 The Council of the Institute of Chartered Accountants of India considers it a privilege to submit this Post-Budget Memorandum to the Government.

1.1 This Memorandum contains suggestions on issues arising out of budget proposals relating to service tax. We believe that addressing the said issues would make tax laws simple, fair and transparent and avoid litigation.

1.2 Further, we have also included some suggestions made by us in our Pre-Budget Memorandum, 2012 which have not been considered in the Finance Bill, 2012. We feel that the same are very relevant and necessary, for smooth functioning of the trade and compliance in law.

II. EXECUTIVE SUMMARY

Suggestions arising out of amendments proposed vide Finance Bill, 2012

1. Amendments in Service Tax Rules and Point of Taxation Rules, which are effective from 01.04.2012

(a) Facility to pay service tax on receipt basis withdrawn in case of professionals

It is suggested to continue the due date for payment of service tax for specified professionals on receipt basis.

In the alternative, where the assessees are accounting on cash basis for the purpose of their income tax, the service tax rules should give them an option to pay service tax also on receipt basis. It is understood that this practice is also followed in GST regimes of other countries e.g. Australia.

(b) Payment of tax in cases of new services

Service providers whose service is taxed for the first time may also be permitted to raise their invoice within 30 days from the date of completion of service, at par with the scenario present for existing service providers.

(c) Rise in money changing rates by 20%

Clause (4)(c)(i) of the Notification No. 3/2012-ST dated 17.03.2012 be rectified as follows:

"for the figures and words "550 and 0.01 per cent.", the figures and words "660 and *0.012* per cent." shall be substituted;"

(d) Payment on receipt basis for individuals and firms

(i) An Explanation be added after fourth proviso in the Rule 6 of S.T. Rules, 1994 to clarify that in this rule, individual includes HUF and proprietary concerns.

(ii) The following Explanation be added to Rule 5B of Service Tax Rules, 1994 –

"For the services specified in Rule 7(b) of Point of Taxation Rules, 2011, where the services were provided or amounts received prior to 1st of April 2012, the applicable rate of tax shall be the rate prevailing on the date of invoice to the extent covered by such invoices."

Alternatively, an exemption Notification be issued w.e.f. 1st April 2012, exempting the service to the extent of 2% along with cesses on the same, for the services set out in Rule 7(b) of Point of Taxation Rules, 2011 on the services provided or amounts received and invoice was also raised prior to 1st of April 2012.

(iii) Payment on quarterly basis and payment on receipt basis be extended to un-incorporated bodies as these bodies are generally non-business entities and cannot monitor payments etc.

2. Amendments in Statutory provisions which will be effective from the enactment of Finance Bill, 2012.

(a) Time limit for issue of statement under Section 73(1A) of Finance Act, 1994

It is suggested that the time limit for issuance of notice as set out in Section 73(1) of Finance Act, 1994 be also made applicable to deemed notice issued under sub-section (1A).

Further, appropriate amendment be made to apply other sub-sections of 73 to sub-section (1A).

(b) Practical difficulty in complying with Section 80(2) of Finance Act, 1994

It is suggested to exclude the period till the matters are disposed off by the High Courts from the time limit available under proposed section 80(2) and to reduce the payment liability to the extent already made by the tenants as per the direction of Hon'ble Supreme Court.

(c) Applicability of Section 35EE to Service Tax

Instead of applying the revision provisions available under section 35EE of the CE Act to Service Tax, the Central Excise Law along with Customs law be amended to remove such mechanism under Central Excise Law and make it appealable to CESTAT.

Further, also though the provisions of Section 35EE are being made applicable, corresponding amendment has not been made in section 86 of Finance Act, 1994 directing the application to be made to Central Government.

(d) Time limit for condonation of delay by Commissioner (Appeals) may be deleted

It is suggested to remove the time limit for such condonation of delay or add additional mechanism of

either approaching Chief Commissioner or Board for condonation of delay in such cases.

3. Amendments in Section 65B – Interpretations – effective along with negative list based taxation.

(a) Clause (4) – Agricultural Extension

The agriculture extension may also include the operations carried on by other persons, on any produce of agriculture, which are generally undertaken by the cultivator or producer, but would not cover the operations which transforms the goods beyond agricultural produce.

Alternatively, the same may be included in the exemption Notification No. 12/2012-ST.

(b) Clause (5) – Agricultural Produce

The present definition of agriculture be continued in place of proposed definition of agriculture.

(c) Clause (26) – Goods Transport Agency

The definition be amended to include the following words:

"but does not include person undertaking transport of goods under a contract directly with customer as truck owner or operator and does not require to issue consignment note in the normal course of business".

4. Amendments in the Section 66D – Negative List of services – effective along with negative list based taxation.

(a) Clause (e) – Trading of Goods

The same need not be covered under 'negative list of services'.

(b) Clause (g) - selling of space or time slots for advertisements other than advertisements broadcast by radio or television

It may be required that for the period prior to this amendment, amounts collected be refunded as it was without authority of law. Amendment to this effect may be incorporated.

(c) Clause (l) – Education

It is suggested to add a new sub-clause (iv) to clause (l) of Section 66D which may read as follows:

"(iv) Continued professional educational activities undertaken by professional bodies recognised by any law for the time being in force."

5. Changes in the Section 66E – Declared services – effective along with negative list based taxation.

(a) Clause (c) - temporary transfer or permitting the use or enjoyment of any intellectual property right

To avoid confusion as to right of taxation of software licenses, information technology software be also included in the above clause.

(b) Composite contracts

A new clause be added or the existing clause be amended to provide that 'Service portion in an activity other than works contract, which involves transfer of property in goods in the course of such activity, which is leviable to VAT or Sales Tax'

6. Changes in the Section 66F – Principles of interpretation – effective along with negative list based taxation.

There is a need to clarify as to when the sub-contractor does the same activity as that of main contractor, whether they would be eligible for exemption or coverage under negative list.

7. Changes in Service Tax (Determination of Value) Rules, 2006 – effective along with negative list based taxation

(a) Rule 2A – Amendment in the mode of determining value of taxable services involved in the execution of a works contract

(i) Clause (II) of Explanation 1 to proposed rule 2A be redrafted as under:

(II) "total amount" means the sum total of gross amount and the value of all goods and services supplied free of cost for use in or in relation to the execution of works contract, under the same contract or any other contract, excluding the value added tax, if any, levied on the same.

(ii) In explanation (a) 'value added tax or sales tax' is used, whereas in other places in the said Rule, only 'value added tax is used'. The rule may be amended to include 'or sales tax' in all such places.

(b) Double taxation in case of services recognised as works contract under various State VAT laws

(i) To avoid such double taxation, a new Rule 2D may be inserted as follows:

"2D. Determination of value of taxable services involving transfer of property in goods. - Subject to the provisions of section 67 and subject to Rule 2A of these rules, in

any taxable service, if any property is transferred in the course of providing such taxable services, which is liable to Value Added Tax or Sales Tax, the value of taxable services shall be equivalent to the gross amount charged for such service less the value of transfer of property in goods involved in providing the said taxable service.

Explanation.- For the purposes of this rule,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in providing the taxable service;

(b) Where value added tax or Sales Tax has been paid on the actual value of transfer of property in goods involved in the said taxable service, then, such value adopted for the purposes of payment of value added tax or Sales Tax, shall be taken as the value of transfer of property in goods involved in providing the said taxable services for determining the value of such taxable services under this rules.

(c) Where value added tax or sales tax has not be paid as mentioned at clause (b) or the goods are exempted from payment of Value added tax or sales tax, the value of goods shall be determined by the service provider with sufficient documentary evidence establishing the value of property in goods transferred in providing the services."

(ii) Also corresponding amendment be made in Section 66E to include the following among the declared services:

'Service portion in an activity other than works contract, which involves transfer of property in goods in the course of such activity, which is leviable to VAT or Sales Tax'.

(c) Double taxation in case of information technology software

A new Rule 2E be inserted to bring clarity in such cases and avoid double taxation. The new rule will read as under:

"2E. Determination of value of taxable services in case of Information Technology Software Service. – (1) Subject to the provisions of section 67, the value of taxable service provided for the services of 'development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software' or 'licensing of software', the value of taxable services shall be equivalent to the gross amount charged for such service less the value of transfer of property in goods involved in providing the said service.

(2) If the value of service and transfer of property in goods is not ascertainable for any reason, ...percent of value of the gross amount charged for the service shall be considered as value of taxable service."

8. Services earlier exempted which are now not covered under exemption/negative list

The earlier exemptions given vide Notification Nos.29/2004, 12/2007, 34/2007, 14/2008, 1/2009, 32/2009, 39/2009, 17/2010, 41/2010 and 53/2010 be added to the mega exemption notification.

9. Mega Exemption Notification – 12/2012 – ST – effective along with negative list based taxation

(i) Sl. No. 4. – The language gives scope to interpret that all services provided by charitable institution registered under Section 12AA of Income-tax Act, 1961 would be exempt. Therefore, clarity is required as to whether all the services provided by such institution would be exempt or only such activity which are in the charitable nature as defined in the notification would be exempt.

(ii) Sl. No. 6. – Chartered Accountants/Company Secretaries /Cost Accountants in practice be also included in the Clause 6 along with Advocates as the professionals stand in same footing and also the services provided by them are similar.

(iii) Sl. No. 8. – the entry be changed as "Services by way of training or coaching in arts, culture or sports" since the words 'recreational activities relating to' would add to lot of confusion and may be difficult to establish whether that training was for recreation or not.

(iv) Sl. No. 13(b). – The exemption under this clause be extended to buildings used for education and healthcare purposes.

(v) Sl. No. 13(d). – The exemption given to electric crematorium be extended to all types of crematoriums.

(vi) The definition of charitable activity at Sl. No. (9) to include 'relief to poor' to bring in line with the definition under Income Tax and not tax such services.

(vii) Sl No.28(c) - An explanation be added to provide that the said amount of Rs. 5000/- shall not include Municipal Taxes, electricity and water charges.

10. EST Registration Form

(i) Sr. No. 9: Mentioning of census code should not be made compulsory.

(ii) Sr. No. 12: Reference to clause (105) of section 65 of Finance Act, 1994 may be removed. This is because when new provisions will become effective, the earlier provisions will only remain relevant in respect of services provided earlier.

11. EST Return

<u>After Sl.No.7:</u> The summary of account current be added in the following manner to give complete information about the discharge of excise duty liability.

Opening Balance…

Amount deposited….

Amount debited….

Closing Balance…..

12. Abatement Notification no.13/2012

(i) The abatement could be given at a uniform rate of 75 % (indicative), with set off of eligible CENVAT credits on all

input services and capital goods used for providing the taxable service. No credit on inputs need be provided.

(ii) To avoid unnecessary litigations of very large numbers, the abatement to Construction Services (in which land value is not/cannot be offered for Service Tax purpose) at 67% may be continued.

13. Notification no.15/2012-ST

(i) The proposal needs to be revisited.

(ii) Alternatively, in Sl. no.7(a), phrase on abated value be deleted and S No.9 related to works contract be also deleted.

14. CENVAT Credit Rules

(a) CENVAT credit on Insurance services on motor vehicles - Clause (BA) sought to be inserted in rule 2(l) of the CENVAT Credit Rules, 2004 be amended as follows:

"(BA) specified in sub-clauses (d) and (zo) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle, except when used by —

(i) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by him; or

(ii) a provider of output service as specified in sub-clause (d) of clause (105) of section 65 of the Finance Act, in respect of a motor vehicle insured or reinsured by him; or"

(b) Condition of receipt of inputs and capital goods in the premises of the output service provider relaxed –

The condition of receipt of capital goods in the premises of the output service provider should be dispensed with in Rule 3(1) of CENVAT Credit Rules 2004 also.

(c) CENVAT Credit on Inputs/Input Services used for Export of Services – Credit to be allowed for utilization against domestic services also.

Rule 5 of the CENVAT Credit Rules, 2004 be amended suitably to allow the facility of utilizing the credit taken on inputs or input services that are used by a manufacturer for manufacture and clearance of final goods for export, or a service provider who provides an exported service against the service tax payable on domestic output services/goods cleared for home consumption and the surplus, if any, would be refunded in accordance with certain notified procedures.

(d) Input Service Distributor

(i) The credits should be allowed to be distributed based on the overall eligibility of CENVAT credits in relation to taxable activities carried on by the manufacturer of final products or the provider of output service.

(ii) The turnover criteria should not be used to restrict the distribution of CENVAT credits.

(iii) The CENVAT credit scheme is a beneficial scheme the benefit of which should not be restricted for technical reasons.

15. Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 - Scheme

The amendment made by Notification No. 10/2012-ST dated 17.3.2012 and Notification No.11/2012-ST dated 17.3.2012 needs to be revisited considering the effective rate of tax intended to be levied by the revenue authorities is 7.42%.

However, the assessee will have option to pay tax under composition scheme @4.8%.

16. Service Tax Audit

Service tax audit be made compulsory for the service tax assessees having a gross turnover of more than Rs 1 Crore. A separate Service Tax Audit Report format on the line of Income Tax audit reports be also prescribed. The audit could be made compulsory for the following reasons:

(i) This would ensure audit of statutory and procedural compliances of service tax law, divergences or non-compliances and quantification of the implications thereof.

(ii) The non-compliances could be regularised by the assessees on a voluntary basis.

(iii) This enables the assessees to comply with law in an easy manner based on the guidance received at the time of such audits.

(iv) There would be a lesser chance of litigation when all the exceptions/issues are pointed out at time of Service Tax Audit.

Other Suggestions

1. Annual Maintenance Contracts

It is suggested that appropriate abatement (70%) be provided in case of annual maintenance contracts to take care of value of parts, consumables, accessories etc. included in the value of services.

To expand the scope of works contract services by borrowing the definition and mechanism of works contract as defined under VAT laws and incorporating the same under Service Tax

laws, so that the tax laws under VAT and Service tax are in parity and enable practical compliance and avoid hassle free litigation.

2. **Service Tax on Renting of Immovable Property**

   It is suggested that in order to avoid multiplicity of levy and reduce the tax burden, appropriate abatement be granted in determining taxable value in relation to this category of service.

3. **Works contract service**

   All types of contracts which are taxed as works contracts under VAT be brought under the category of "works contract service". Alternatively, benefit of composition scheme be made available to all works contracts classified as such under VAT laws irrespective of its classification under service tax law.

4. **Reimbursable expenditure /common expenses**

   The definition of pure agent be simplified and modified to exclude the lines pertaining to "title of goods" and similar other requirements which are difficult to satisfy in practice.

   Appropriate mechanism be worked out/clarification be provided so that the benefit of input tax credit is not lost when the service provider seeks reimbursement of expenses incurred on account of the service recipient.

5. **Registration as a service receiver, even for single transaction**

   The concept of casual registration on the lines of VAT laws at State level be introduced in service tax law.

   Such causal service provider for such one of transaction is granted exemption from procedural compliances and harass penal consequences.

6. Revision of returns

The time limit for revision of returns may be extended to 7 months from the end of the financial year as accounts under the Companies Act are required to be audited and finalized within 6 months from the end of the year and period of additional one month would thus be available for revision of returns.

7. Issue of show cause notice for recovery of service tax

It is suggested that a minimum limit of Rs.1,00,000 for service tax escaping assessment be prescribed for the purpose of proviso to section 73(1).

8. Time limit for adjudication

Time limit for completion of adjudication be prescribed in the provisions of section 73.

Handling of adjudication by a different Official than the one who has issued the SCN would ensure fairness and independence in the adjudication process

9. Recording of statement

As far as possible, recording of statements should be avoided and assesses should be asked to submit specific responses to the specific questions of the Department.

In case, the statement is required to be recorded, a copy of the same, duly signed by both the tax payer and the Officer recording the statement, may be provided to the tax payer immediately after the recording the statement. Very often, the statements are written in hand and then typed. The use of computer systems can speed up the process. The statement recorded can be immediately printed, signed and handed over to the assessee.

10. Search of premises

It is suggested that in order to avoid vexatious searches, the reasons for conducting the search may be recorded in writing. This will also be in line with income-tax provisions.

11. Stay by CESTAT

Though CESTAT has power to extend the stay again, it is a cumbersome and taxing process, on part of the assessee as the department presses for recovery. Further, the delay may not be due to the fault of assessee. Hence the limitation period either be removed or extended looking into the current pendenancy list of CESTAT.

12. Powers under section 14 of the Central Excise Act, 1944

It is suggested that Section 14 be suitably amended to stop the misuse of the powers provided therein establishment of simplified procedure will reduce undue harassment and cost to assessees and will at the same time meet the needs of the department to obtain requisite information. This will also avoid high handedness of some officers in dealing with the tax payers and will create a more cordial attitude/approach.

13. Tax Audit Report in service tax

In order to streamline the process with all VAT laws, it is suggested that the submission of audit report be made mandatory in service tax also along with audited annual accounts.

14. Prosecution

Prosecution provisions ought to apply only in exceptional cases and must include mens rea as also have a minimum threshold over which only such proceedings would be taken.

Also, provisions for compounding as is available under other laws be introduced.

Power to issue search warrant under section 82 may be given to Joint Commissioner with the prior approval of Commissioner/Chief Commissioner with the reasons in writing.

15. **Interest on delayed payment of tax**

    Rate of interest may be reduced and brought in line with the income-tax provisions.

16. **Disparity between interest payable by assessee and Department under central excise, service tax and customs**

    Interest rates at both the ends may be made uniform.

17. **Chartered Accountancy Professionals in tax policy making body**

    Tax policy making body include a few professionals drawn from the Chartered Accountancy profession. Their contribution would be extremely useful when GST is implemented in India.

18. **Training of Departmental Personnel**

    A comprehensive training covering all the substantive and procedural aspects of the law be scheduled for the officers at all levels.

19. **De-linking of tax policymaking and tax administration**

    There is a urgent need to ensure that there is a clear divide between the tax policy making and the tax administration

20. **Retrospective amendments**

    Retrospective amendments rectifying past drafting errors or adverse judicial decisions be avoided.

21. **Accountability of tax collectors**

In order to project a sense of even-handedness in dealing with tax payers, provisions relating to accountability need to introduced and not be formulated independently.

22. **Appeals to High Court**

The practice of going on appeal to the High Court quite routinely requires a review

23. **Supplies to SEZ**

It is suggested that this time limit may be enhanced to at least 60 days.

24. **Online E-filing of weekly information by major duty paying units**

The Trade and Industry is of the firm opinion that furnishing product wise information i.e. CETSH wise weekly information is consuming a lot of time and there is a cost involved in collecting information every week.

25. **Audit Procedures**

It is suggested that such demands be not made from the assessees. The audit parties be instructed to verify the data at the assessee's premises and seek hard copies of only very relevant data which is required for their records.

26. **Benefit of Notification No. 108/95 CE and 6/2006 CE to sub contractors**

It is suggested that in order to avoid ambiguity in law and divergent practices being followed, it is suggested that the benefit of notification be provided to the subcontractors as well.

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III. DETAILED SUGGESTIONS

1. Amendments in Service Tax Rules and Point of Taxation Rules, which are effective from 01.04.2012

(a) Facility to pay service tax on receipt basis withdrawn in case of professionals

The amendment in Service Tax Rules, along with Point of Taxation Rules, 2011 wherein the facility for payment of tax by professionals (having taxable services of more than Rs. 50 lakh) on receipt basis is being withdrawn would create a lot of hardship for the reasons explained below.

Reasons:

(i) The services of specified professionals (such as CAs/ Lawyers, etc.) are not only intangible but many a times not uniformly measurable due to its personalised and diverse nature. There is no uniform tariff or MRP as akin to goods. Further, the value perceived by each client would be different. Hence, invariably a professional like a lawyer or a chartered accountant does not recover the entire amount he has billed and when he is paid less he would have already paid the service tax on the amount which he does not receive. Further, in many cases the said specified professionals would have to pay service tax on invoices issued but the monies for the service would not be received. Thus he would have to pay service tax even on monies not received. In both the above cases, the payment would be out

of his own pocket. There are no provisions relating to **bad debt adjustment** or reduction in the invoices in case monies are not received or monies are received less as compared to the invoice amount.

(ii) The above predicament has to be appreciated from the standpoint that the said professionals do not have any recourse to recovery. As per their Code of Conduct they cannot file a suit for recovery. Thus, there would be double jeopardy –

- they do not get their monies for their services;
- but they would have already paid service tax on the monies not received.

(iii) CAs/Lawyers do not have a lien on the service unlike in case of goods. There are no documents of title to services which can be put through the bank and hence the recoverability is uncertain. The rights of an unpaid seller of goods [Sections 45 to 54 of Sales of Goods Act, 1930] are well guarded and recognized in law as against the rights of an unpaid service provider.

(iv) Most of the CAs / Lawyers maintain their books of accounts on the basis of cash system of accounting which is also recognized and accepted by the Income Tax law [Section 145 of the Income Tax Act]. Since they maintain their books of accounts on cash system of accounting, obligating them to pay service tax on any basis other than receipt basis would cause undue accounting and administrative hardship and also not provide any verifiable basis of assessment for the Department.

(v) Services are intangible unlike goods where the sale / clearance of a product are verifiable physically by delivery challans, transport documents, etc. In case of services the delivery of a service cannot be verified or ascertained always. Out of the three events – (i) completion of services; (ii) issue of invoice and (iii) receipt of payment, the last event viz., receipt of payment is historically and factually verifiable by the department with a greater degree of certainty.

Suggestion

It is suggested to continue the due date for payment of service tax for specified professionals on receipt basis.

In the alternative, where the assessees are accounting on cash basis for the purpose of their income tax, the service tax rules should give them an option to pay service tax also on receipt basis. It is understood that this practice is also followed in GST regimes of other countries e.g. Australia.

(b) Payment of tax in cases of new services

As per amended Rule 5 of POT Rules, where a service is taxed for the first time, then, no tax is payable if the payment has been received before the service becomes taxable and invoice has been issued within fourteen days of the date when the service is taxed for the first time."

Rule 4 A of the Service Tax Rules 2012 has been amended by the Budget 2012 so as to increase the time to issue an invoice from 14 days to 30 days from the date of completion of service. Therefore, there seems no justification to reduce the same to service providers (for the purpose of Rule 5 (b) of POT Rules), whose service get taxed

for the first time. There is no rationale to start the count from the day one of taxing for the first time too.

Suggestion

Service providers whose service is taxed for the first time may also be permitted to raise their invoice within 30 days from the date of completion of service, at par with the scenario present for existing service providers.

(c) Rise in money changing rates by 20%

As per clause (4)(c)(i) of the Notification No. 3/2012-ST dated 17.03.2012 "for the figures and words "550 and 0.01 per cent.", the figures and words "660 and **0.12 per cent**." shall be substituted;"

Suggestion

The above seems to be a typing error and needs to be rectified as follows:

"for the figures and words "550 and 0.01 per cent.", the figures and words "660 and 0.012 per cent." shall be substituted;"

Reason: seems to be Typing mistake

(d) Payment on receipt basis for individuals and firms

At present, HUFs are paying tax on monthly basis. HUFs, being the small service providers should be given the benefit of paying tax on quarterly basis.

Further, as per the Proviso to Rule 6(1) (proposed to be inserted through Finance Bill, 2012,) the benefit to pay tax on receipt basis is available to individuals and partnership firms (including LLP) up

to a turnover of Rs 50 lakh in a financial year provided the taxable turnover did not exceed this limit in the previous financial year. This should be extended to HUF also.

Further, it may be noted that the terms individuals and partnership firm exclude Proprietary Concerns. The issue had been a subject of big round of litigation a decade ago, which had decisions to differentiate individuals from Proprietary concerns. This may lead to confusion.

Furthermore, as per the present scenario, the point of taxation for eight specified services is date of receipt. As per Rule 5B of S.T.R, 1994, the rate prevailing on the date of point of taxation would be the applicable rate. This would lead to an anomalous situation where bills are raised before April 1, 2012 by applying rate of tax @ 10% and payment for the same is received after that date with the applicable rate of tax @ 12%. This will lead to difficulties in convincing the service recipients to pay the balance 2% and increase the administrative problems of the service provider by requiring issue of debit notes or supplementary invoices for the difference of 2% without which the said recipients will not be able to avail of CENVAT credit of such tax paid.

Suggestions

(i) An Explanation be added after fourth proviso in the Rule 6 of S.T. Rules, 1994 to clarify that in this rule, individual includes HUF and proprietary concerns.

(ii) The following Explanation be added to Rule 5B of Service Tax Rules, 1994 –

"For the services specified in Rule 7(b) of Point of Taxation Rules, 2011, where the services were provided

or amounts received prior to 1st of April 2012, the applicable rate of tax shall be the rate prevailing on the date of invoice to the extent covered by such invoices."

Alternatively, an exemption Notification be issued w.e.f. 1st April 2012, exempting the service to the extent of 2% along with cesses on the same, for the services set out in Rule 7(b) of Point of Taxation Rules, 2011 on the services provided or amounts received and invoice was also raised prior to 1st of April 2012.

(iii) Payment on quarterly basis and payment on receipt basis be extended to un-incorporated bodies as these bodies are generally non-business entities and cannot monitor payments etc.

2. Amendments in Statutory provisions which will be effective from the enactment of Finance Bill, 2012.

(a) Time limit for issue of statement under Section 73(1A) of Finance Act, 1994

The time limit for issuance of deemed notices under sub-section (1A) have not been specified. The time limit as mentioned under Section 73(1) is not applicable since sub-section (1A) begins with a non-obstante clause providing independent functionality to clause (1A). Therefore, the limits mentioned under sub-section (1) of eighteen months are not applicable for the deemed notices issued under sub-section (1A) of Section 73.

Further, sub-section 2 of section 73 has provided for the determination of service tax liability by the Central Excise Officer for the notices served under sub-section (1) of Section 73. Again,

sub-section (1A) as proposed to be introduced vide Finance Bill, 2012 is not covered under sub-section (2) of Section 73. Hence, the Central Excise Officer does not appear to be legally authorized under any of the provisions to determine the service tax liability of the person on whom such deemed notices are served under Section 73(1A) ibid. Similarly, other sub-sections of Section 73 are not applicable on the deemed notices issued under sub-section (1A) of Section 73 wherever reference of sub-section (1) has only been taken.

Suggestion

It is suggested that the time limit for issuance of notice as set out in Section 73(1) of Finance Act, 1994 be also made applicable to deemed notice issued under sub-section (1A).

Further, appropriate amendment be made to apply other sub-sections of 73 to sub-section (1A).

(b) Practical difficulty in complying with Section 80(2) of Finance Act, 1994

The Finance Bill, 2012 has proposed the insertion of Section 80(2), wherein the penalty would be waived if the payment of service tax along with interest is made within six months from the date of the receipt of assent of the President to the Finance Bill, 2012. However, it is known fact that in most of the cases the tenants had filed writ and further appeal and the matter is pending before Hon'ble Supreme Court. Further as per the direction of Hon'ble Supreme Court, the tenants have deposited certain amounts (either in their own account or on account of tenant). Further in some cases the matters are still pending before High Courts.

Suggestion

It is suggested to exclude the period till the matters are disposed off by the High Courts and to reduce the payment liability to the extent already made by the tenants as per the direction of Hon'ble Supreme Court.

(c) Applicability of Section 35EE to Service Tax

In the amendment proposed in Section 83 of Finance Act, 1994, the provisions of Section 35EE Central Excise Act, 1944 i.e., instead of appealing to CESTAT, approaching revisionary authority, Government of India, in certain cases like rebate of duty paid on goods exported, return of goods etc., are made applicable to Service Tax law.

But as it is, under the Central Excise Law the said mechanism is adding additional burden as well as cost since, the assesses has to move their application to Delhi and appear for hearing before the said authority to present case etc., Further also no appeal mechanism is set out for appeal against such orders.

Suggestion

Instead of applying the said provisions to Service Tax, the Central Excise Law along with Customs law be amended to remove such mechanism under Central Excise Law and make it appealable to CESTAT.

Further, also though the provisions of Section 35EE are being made applicable, corresponding amendment has not been made in section 86 of Finance Act, 1994 directing the application to be made to Central Government.

(d) Time limit for condonation of delay by Commissioner (Appeals) may be deleted

There is no time limit for condonation of delay in filing appeals by CESTAT or High Court or Supreme Court. However, such a time limit has been provided in case of Commissioner Appeals under section 85(3A). Therefore, justice would be defeated in genuine cases where the appeal was delayed beyond the period of 30 days/1 month after the due date for filing appeal as there is no mechanism for going in appeal in such cases.

Suggestion

It is suggested to remove the time limit for such condonation of delay or add additional mechanism of either approaching Chief Commissioner or Board for condonation of delay in such cases.

3. Amendments in Section 65B – Interpretations – effective along with negative list based taxation.

(a) Clause (4) – Agricultural Extension

With modernisation of agriculture, basic operations like paddy hulling to rice, cleaning of wheat, etc., may not all the time undertaken by the farmers within the farm, they may get it done outside. If tax is collected on the same, the basic food costs would go up and would affect the common public, including the poor.

Suggestion

The agriculture extension may also include the operations carried on by other persons, on any produce of agriculture, which are generally undertaken by the cultivator or

producer, but would not cover the operations which transforms the goods beyond agricultural produce.

Alternatively the same may be included in the exemption Notification No. 12/2012-ST.

(b) Clause (5) – Agricultural Produce

The present definition of agriculture ***means*** *"any produce resulting from cultivation or plantation, on which either no further processing is done or such processing is done by the cultivator like tending, pruning, cutting, harvesting, drying which does not alter its essential characteristics but make it only marketable and includes all cereals, pulses, fruits, nuts and vegetables, spices, copra, sugar cane, jaggery, raw vegetable fibres such as cotton, flax, jute, etc., indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and tea but does not include manufactured products such as sugar, edible oils, processed food, processed tobacco."*

Many items in the existing definition like, cereals, pulses, copra, jaggery etc., would not fit into the proposed definition of agricultural produce, whereas those goods are all considered as so, in common parlance as well as under state laws. Further, these goods are essential commodities for common public including people below poverty line as well. With the proposed amendment, the cost of these goods would go up resulting in increase in cost of these essential commodities.

Suggestion

The present definition of agriculture be continued in place of proposed definition of agriculture.

(c) Clause (26) – Goods Transport Agency

To bring in the clarity as to difference between the truck owner/operator and Goods Transport Agency, the definition of goods transport agency be modified. This suggestion is in line with the recommendation made by the committee formed to study and suggest the implementation of tax on GTA services in 2004-05.

Suggestion

The definition be amended to include the following words:

"but does not include person undertaking transport of goods under a contract directly with customer as truck owner or operator and does not require to issue consignment note in the normal course of business".

4. Amendments in the Section 66D – Negative List of services – effective along with negative list based taxation.

(a) Clause (e) – Trading of Goods

Trading of goods is already excluded in the definition of service as 'merely transfer of title to goods'.

Suggestion

The same need not be covered under 'negative list of services'.

(b) Clause (g) - Selling of space or time slots for advertisements other than advertisements broadcast by radio or television

This exclusion is understood to be for the reason that this activity falls within the states' powers to levy and collect taxes.

Suggestion

That being a case, it may be required that for the period prior to this amendment, amounts collected be refunded as it was without authority of law. Amendment to this effect may be incorporated.

(c) Clause (l) – Education

Various professional bodies like ICAI, ICSI, ICWAI (ICAI), IMA etc., who are recognised under the law do undertake education, training, coaching, seminars, knowledge updating programs for keeping the professionals updated and at standards to perform their professional work. These continued professional education programs, are essential to provide quality services to the country.

Suggestion

It is suggested to add a new sub-clause (iv) to clause (l) of Section 66D which may read as follows:

"(iv) Continued professional educational activities undertaken by professional bodies recognised by any law for the time being in force."

5. Changes in the Section 66E – Declared services – effective along with negative list based taxation.

(a) Clause (c) - temporary transfer or permitting the use or enjoyment of any intellectual property right

Suggestion

To avoid confusion as to right of taxation of software licenses, information technology software be also included in the above clause.

(b) Composite contracts

At present there is lot of confusion as to right of taxation of service element in works contracts as per the state law which are not covered under the definition of works contract under service tax law.

Suggestion

A new clause be added or the existing clause be amended to provide that 'Service portion in an activity other than works contract, which involves transfer of property in goods in the course of such activity, which is leviable to VAT or Sales Tax'

6. Changes in the Section 66F – Principles of interpretation – effective along with negative list based taxation.

As per Section 66F(1), reference to the main services shall not include, unless otherwise specified, services used for providing main service. More clarity is required in this regard. For example, education services covered by negative list if provided by some other person on behalf of institution, can exclusion be claimed under negative list.

Suggestion

There is a need to clarify as to when the sub-contractor does the same activity as that of main contractor, whether they would be eligible for exemption or coverage under negative list.

7. Changes in Service Tax (Determination of Value) Rules, 2006 – effective along with negative list based taxation

(a) Rule 2A – Amendment in the mode of determining value of taxable services involved in the execution of a works contract

(i) Clause (II) of Explanation 1 to the proposed new rule 2A provides as follows:

(II) "total amount" means the sum total of gross amount and the value of all goods**, excluding the value added tax, if any, levied on goods** and services supplied free of cost for use in or in relation to the execution of works contract, under the same contract or any other contract:

There seems to be an unintended drafting error as the clause does not give appropriate meaning.

Suggestion

The clause may be redrafted as under:

(II) "total amount" means the sum total of gross amount and the value of all goods and services supplied free of cost for use in or in relation to the execution of works contract, under the same contract or any other contract, excluding the value added tax, if any, levied on the same.

(ii) In explanation (a) 'value added tax or sales tax' is used, whereas in other places in the said Rule, only 'value added tax is used'.

Suggestion

The rule may be amended to include 'or sales tax' in all such places.

(b) Double taxation in case of services recognised as works contract under various State VAT laws

There are many services which are considered as works contract under Sales Tax Law on which VAT is being paid but which are not so defined under Service Tax law e.g. Annual Maintenance Contract, Repair, Job work etc. In such cases instances of double taxation arise and give rise to issues relating to constitutionality of taxing the value of goods transferred in such services.

Suggestion

(i) To avoid such double taxation, a new Rule 2D may be inserted as follows:

"2D. Determination of value of taxable services involving transfer of property in goods. Subject to the provisions of section 67 and subject to Rule 2A of these rules, in any taxable service, if any property is transferred in the course of providing such taxable services, which is liable to Value Added Tax or Sales Tax, the value of taxable services shall be equivalent to the gross amount charged for such service less the value of transfer of property in goods involved in providing the said taxable service.

Explanation.- For the purposes of this rule,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in providing the taxable service;

(b) Where value added tax or Sales Tax has been paid on the actual value of transfer of property in goods involved in the said taxable service, then, such value adopted for the purposes of payment of value added tax or Sales Tax, shall be taken as the value of transfer of property in goods involved in providing the said taxable services for determining the value of such taxable services under this rules.

(c) Where value added tax or sales tax has not be paid as mentioned at clause (b) or the goods are exempted from payment of Value added tax or sales tax, the value of goods shall be determined by the service provider with sufficient documentary evidence establishing the value of property in goods transferred in providing the services."

(ii) Also corresponding amendment be made in Section 66E to include the following among the declared services:

'Service portion in an activity other than works contract, which involves transfer of property in goods in the course of such activity, which is leviable to VAT or Sales Tax'.

(c) Double taxation in case of information technology software

Presently, there is lot of confusion in case of taxation of information technology software and same value is being taxed for both Service Tax as well as VAT/Sales Tax.

Suggestion

A new Rule 2E be inserted to bring clarity in such cases and avoid double taxation. The new rule will read as under:

"2E. Determination of value of taxable services in case of Information Technology Software Service. – (1) Subject to the provisions of section 67, the value of taxable service provided for the services of 'development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software' or 'licensing of software', the value of taxable services shall be equivalent to the gross amount charged for such service less the value of transfer of property in goods involved in providing the said service.

(2) If the value of service and transfer of property in goods is not ascertainable for any reason, ...percent of value of the gross amount charged for the service shall be considered as value of taxable service."

8. Services earlier exempted which are now not covered under exemption/negative list

i. **Notification no. 29/2004**- Certain banking and other financial services

ii. **Notification no. 12/2007**- Services provided by a person who has right to authorize any person to exhibit cinematography film

iii. **Notification no. 34/2007**- Telecommunication roaming service provided to an international inbound roaming subscriber

iv. **Notification no. 14/2008**- Exemption to hotel accommodation booking by and for non-resident

v. **Notification no. 1/2009** – Exemption to specified taxable services provided to GoodsTransport Agency for use in transport of goods by road

vi. **Notification no. 32/2009**- Business auxiliary service exemption to taxable service provided in relation to manufacture of specified goods charged to excise duty under M & TP (ED) Act, 1955

vii. **Notification no. 39/2009** - Business Auxiliary Services — Exemption to value of inputs used for providing taxable service during manufacture/processing of alcoholic beverages

viii. **Notification no. 17/2010**-Exemption from service tax of canned software

ix. **Notification no. 41/2010-**Exemption from certain services provided wholly within the port or other port or Airport

x. **Notification no. 53/2010**- Conditional exemption for canned software

Suggestion

All the above exemptions could be added to the mega exemption notification.

9. Mega Exemption Notification – 12/2012 – ST – effective along with negative list based taxation

Suggestions

(i) Sl. No. 4 – The language gives scope to interpret that all services provided by charitable institution registered

under Section 12AA of Income-tax Act, 1961 would be exempt. Therefore, clarity is required as to whether all the services provided by such institution would be exempt or only such activity which are in the charitable nature as defined in the notification would be exempt.

(ii) Sl. No. 6 – Chartered Accountants/Company Secretaries /Cost Accountants in practice be also included in the Clause 6 along with Advocates as the professionals stand in same footing and also the services provided by them are similar.

(iii) Sl. No. 8 – The entry be changed as "Services by way of training or coaching in arts, culture or sports" since the words 'recreational activities relating to' would add to lot of confusion and may be difficult to establish whether that training was for recreation or not.

(iv) Sl. No. 13(b) – The exemption under this clause be extended to buildings used for education and healthcare purposes.

(v) Sl. No. 13(d) – The exemption given to electric crematorium be extended to all types of crematoriums.

(vi) The definition of charitable activity at Sl. No. (9) to include 'relief to poor' to bring in line with the definition under Income Tax and not tax such services.

(vii) Sl. No.28(c) – An Explanation be added to provide that the said amount of Rs.5000/- shall not include Municipal Taxes, electricity and water charges.

10. EST Registration Form

A common simplified registration format for Central Excise and Service Tax is being proposed.

Suggestions

(i) Sr. Nos. 9: Mentioning of census code should not be made compulsory.

(ii) Sr. No. 12: Reference to clause (105) of section 65 of Finance Act, 1994 may be removed. This is because when new provisions will become effective, the earlier provisions will only remain relevant in respect of services provided earlier.

11. EST Return

A new simplified one page common return with Central Excise: to be called Excise & Service Tax Return (EST for short) is being introduced.

Suggestion

<u>After Sl.No.7:</u> The summary of account current be added in the following manner to give complete information about the discharge of excise duty liability.

Opening Balance...

Amount deposited....

Amount debited....

Closing Balance.....

12. Abatement Notification no.13/2012

There is a reformulation of the abatement scheme, by allowing the specified service providers different abatement rates on different taxable services, allowing/not allowing CENVAT credits on specified inputs, input services, capital goods to different service providers. This could lead to a lot of confusions in minds of the service providers for the following reasons:

(i) Differing abatement rates for same activity of supply of food or drink, depending whether served in a restaurant or in a place where a function is organised. Example: Service portion in supply of food or any other article of human consumption or a drink at a restaurant-proposed taxable portion 40%(vide rule 2C of Service Tax (Determination of Value) Rules. Supply of food or any other article of human consumption or any drink, in a premises, including hotel, convention center, club, pandal, shamiana or any place specially arranged for organizing a function-proposed taxable portion 70%.

(ii) CENVAT credits available differently depending on taxable services being provided. Example: Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes, the CENVAT credits on input services is available. In case of supply of food or any other article of human consumption or any drink, in a premises, including hotel, convention center, club, pandal, shamiana or any place specially arranged for organizing a function, all CENVAT credits on inputs, input services and capital goods, used for providing taxable service

can be taken, other than goods classifiable under chapter 1 to 22 of the Central Excise Tariff Act, 1985.

(iii) Even though CENVAT credits are allowed to be taken on the inputs, in addition to input services and capital goods, in case of taxable services where abatement portion is small, such as supply of food or any other article of human consumption or any drink, in a premises, such as club, pandal, shamiana where a function is organised, it should be noted there are very few eligible input credits especially in relation to food and drink.

(iv) Difficulty in capturing eligible CENVAT credits, maintaining CENVAT credit records, collating and validating the information on eligible CENVAT credits.

(v) There is a severe strain on the small service providers who may not have the requisite financial and human resources to track eligibility of CENVAT credits.

(vi) There are seven different abatement rates prescribed in the single notification.

(vii) The abatements have been fixed based on the content of goods, reason for non taxability of the gross due to it being subjected to State taxes etc. and therefore a restriction on input services credit may not be reasonable.

(viii) The FM has also indicated that the effect of cascading would be substantially reduced.

(ix) **Specific issue in case of construction services -** Construction Services will be taxed at 25% calculated on the specified value (land value + total construction value including that for materials) or by identifying the value of service by excluding value of materials as per VAT records or

(if VAT records are not proving the material value) by material value proved by the assessee.

Not less than in 4/5th of States of our country, developers have the practice of doing construction service without purchasing the land directly in their name.

As they are not the land owners (and are Power of Attorney Holders vide Agreement with land owners), naturally they do not collect the land value from flat buyers. The existing statute allows abatement of 67% vide Notification No 1/2006 in these cases.

Further, in all the States Compound Levy of VAT is in practice, which is not identifying the material portion in the total value of contract separately. In the absence of such identification, the material value claimed by the assessee will unnecessarily bring in litigations only.

Since the Valuation of Material consumed in this industry is highly subjective, the number of litigations will unmanageably in big number. Revenue collection will be disturbed due to large number of cases with disputes.

Suggestions

(i) The abatement could be given at a uniform rate of 75% (indicative), with set off of eligible CENVAT credits on all input services and capital goods used for providing the taxable service. No credit on inputs need be provided.

(ii) To avoid unnecessary litigations of very large numbers, the abatement to Construction Services

(in which land value is not/cannot be offered for Service Tax purpose) at 67% may be continued.

13. Notification no.15/2012-ST

The specified persons are made liable to pay service tax at notified rates in respect of notified services. In the said notification the extent of service tax to be borne by the service provider and service recipient is clearly mentioned. This could create a lot of hardships as mentioned below:

The service provider is being made liable when possibly a good revenue augmentation measure suffers from the following defects/ consequences:

(i) It is against the basic principles of indirect taxation of tax being a tax on value addition. For example: where the service recipient is made liable to pay a certain portion of tax liability in relation to service provided by service provider, he has to bear service tax even when the service recipient is not doing any value addition.

(ii) It could result in cascading effect as the credits of service provider would not be set off.

(iii) It would result into inequitable treatment. Illustration: An individual Cost Accountant or Chartered Accountant or Company Secretary providing/agreeing to provide services vis-a-vis an advocate where the service recipient is made liable to service tax.

(iv) In Sl. no.7, 8 and 9, the service provider as well as service receiver being made liable is a retrograde step as it would result in more confusion and making the law complicated, by enforcing compliance by a service recipient. For example:

with respect to works contract services provided by an individual to a company or a business entity.

(v) This could lead to issues where the service provider and service recipient adopt different methods of valuation.

Suggestions

(ii) The proposal needs to be revisited.

(iii) Alternatively, in Sl. no.7(a), phrase on abated value be deleted and S No.9 related to works contract be also deleted.

14. CENVAT Credit Rules:

(a) CENVAT credit on Insurance services on motor vehicles

The CENVAT credit on motor vehicle insurance is restrictively sought to be allowed to motor insurance companies (as re-insurance and third party insurance) and manufacturers (as in-transit insurance).The clause (BA) which is sought to be inserted in rule 2(l) to allow this credit seems to have inadvertently omitted the words 'in respect of a motor vehicle' (as shown below) thereby resulting in a complete ban on CENVAT credit on insurance services except to the extent of insurance on motor vehicles to insurance companies and manufacturers.

Suggestion

Clause (BA) sought to be inserted in rule 2(l) of the CENVAT Credit Rules, 2004 be amended as follows:

"(BA) specified in sub-clauses (d) and (zo) of clause (105) of section 65 of the Finance Act, in so far as they relate to a motor vehicle, except when used by —

(i) a manufacturer of a motor vehicle in respect of a motor vehicle manufactured by him; or

(ii) a provider of output service as specified in sub-clause (d) of clause (105) of section 65 of the Finance Act, in respect of a motor vehicle insured or reinsured by him; or"

(b) Condition of receipt of inputs and capital goods in the premises of the output service provider relaxed – Rule 3(1) to be amended -

Rule 4(1) and 4(2) of the CENVAT Credit Rules, 2004 have been amended to allow a service provider to take credit of inputs or capital goods whenever the goods are delivered to him without bringing them into his premises so long as there is proper documentation regarding the delivery and location.

This enables the service providers in construction industry etc to take CENVAT credits without physical receipt of inputs/capital goods in the premises of the service provider.

However, Rule 3(1) of the CENVAT Credit Rules, 2004, still provides that credit can be taken in respect of capital goods only after the receipt of the goods in the premises of the output service provider.

Suggestion

The condition of receipt of capital goods in the premises of the output service provider should be dispensed with in Rule 3(1) of CENVAT Credit Rules 2004 also.

(c) CENVAT Credit on Inputs/Input Services used for Export of Services – Credit to be allowed for utilization against domestic services also.

Rule 5 of the CENVAT Credit Rules, 2004 allowed the CENVAT credits to be taken in respect of inputs or input services that are used for exports and utilise the credit against the tax/duty payable on domestic output services/goods cleared for home consumption and thereafter if there is any credit still left, refund of the unutilised credit in accordance with certain notified procedures can be claimed.

The substituted rule 5 allows refund of credit but does not seem to allow credit taken in respect of inputs or input services that are used for exports to be utilised against the service tax/duty payable on domestic output services/goods cleared for home consumption.

Suggestion

Rule 5 of the CENVAT Credit Rules, 2004 be amended suitably to allow the facility of utilizing the credit taken on inputs or input services that are used by a manufacturer for manufacture and clearance of final goods for export, or a service provider who provides an exported service against the service tax payable on domestic output services/goods cleared for home consumption and the surplus, if any, would be refunded in accordance with certain notified procedures.

(d) Input Service Distributor

Changes are being made in Rule 7 relating to distribution of credits of input services by an input service distributer (ISD) to ensure their scientific allocation to only such units where they have been

put to use and proportionate to turnover. But this could lead to a lot of hardship as explained below:

(i) Scientific allocation of CENVAT credits is defeating the very purpose of Input Service Distributor concept.

(ii) The purpose is to ensure that the CENVAT credits on the input services invoices which are received by the office of the manufacturer of final products or the provider of output service, which could be distributed to set off against liability at other offices of the manufacturer of final products or the provider of output service.

(iv) But if the credits are to be distributed based on one to one correlation of credits to exempted activities, or taxable activities and allowing and disallowing CENVAT credits on such a basis could result into large amounts of credits being treated as ineligible and hence not available for set off.

(iv) Further there is a constraint of recording and distributing credits based on multiple criteria such as the nature of activities carried on by a particular unit of the manufacturer or service provider.

Suggestions

(i) The credits should be allowed to be distributed based on the overall eligibility of CENVAT credits in relation to taxable activities carried on by the manufacturer of final products or the provider of output service.

(ii) The turnover criteria should not be used to restrict the distribution of CENVAT credits.

(iii) The CENVAT credit scheme is a beneficial scheme the benefit of which should not be restricted for technical reasons.

15. Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 - Scheme

Vide notification no. 10/2012-ST dated 17.03.2012 (Applicable w.e.f. 01.04.2012), the rate of service tax payable under Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 has been increased from 4 percent to 4.8 percent.

Further, vide Notification no. 11/2012-ST dated 17.03.2012 (Applicable w.e.f. such date on which section 66B of the Finance Act, 1994 comes into effect), Service Tax (Determination of Value) Rules, 2012 have been amended. Rule 2A of such rules has also been substituted.

In case value of goods cannot be determined, gross value for service tax purpose would be:-

(a) **In case of original work** (all new constructions and all types of additions and alterations to abandoned or damaged structures to make them workable):- 40% of total amount,

(b) **Otherwise:- 60% of total amount,**

(c) For contracts involving construction of complex or building for sale where any part of the consideration is received before the completion of the building: 25% of the total amount.

In case of other works contract, the service tax shall be payable on 60% of the gross amount charged. Therefore, the effective rate of tax intended to be levied by the revenue authorities is 7.42%. If the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 is not abandoned, then the assessee will pay service

tax in this case under the Composition scheme @ 4.8%. Hence, the intention to levy service tax @ 7.42% is not practically applicable.

Suggestion

The amendment needs to be revisited.

16. Service Tax Audit

Suggestion

Service tax audit be made compulsory for the service tax assessees having a gross turnover of more than Rs 1 Crore. A separate Service Tax Audit Report format on the line of Income Tax audit reports be also prescribed. The audit could be made compulsory for the following reasons:

(i) This would ensure audit of statutory and procedural compliances of service tax law, divergences or non-compliances and quantification of the implications thereof.

(ii) The non-compliances could be regularised by the assessees on a voluntary basis.

(iii) This enables the assessees to comply with law in an easy manner based on the guidance received at the time of such audits.

(iv) There would be a lesser chance of litigation when all the exceptions/issues are pointed out at time of Service Tax Audit.

Other Suggestions

The following are the pre-budget points, which were not considered in the Finance Bill 2012, however we feel the same are very relevant and necessary, for smooth functioning of the trade and compliance in law.

1. Annual Maintenance Contracts

Issue

In respect of annual maintenance contracts, deduction is not allowed of any amount from the gross amount charged for rendering such services. Service tax is charged on the amount billed by the provider of the service. Such amount includes value of parts, accessories, consumables etc. which are invariably used in providing such services.

Suggestions

It is suggested that appropriate abatement (70%) be provided in case of annual maintenance contracts to take care of value of parts, consumables, accessories etc. included in the value of services.

Suggestions

To expand the scope of works contract services by borrowing the definition and mechanism of works contract as defined under VAT laws and incorporating the same under Service Tax laws, so that the tax laws under VAT and Service tax are in parity and enable practical compliance and avoid hassle free litigation.

Justification

Imposing tax on entire amount charged by the service provider for annual maintenance contracts puts huge burden on the entities

using outsourced services. As appropriate abatement may be provided.

2. Service Tax on Renting of Immovable Property

Issue:

The amendment made in Finance Act, 2010 aims to provide clarity and certainty in the tax liability. Rental charges also include various statutory levies and the agreement attracts stamp duty. Also, the construction of property involves service tax which is not available as input tax credit as per the clarification provided by the Ministry and the same is also clear as per the new definition of input service.

Suggestion:

It is suggested that in order to avoid multiplicity of levy and reduce the tax burden, appropriate abatement be granted in determining taxable value in relation to this category of service.

Justification:

There is need for clarity as to exclusion of statutory levies to avoid double taxation. Similarly, non taxability of immovable property under Excise law, by itself, leads to breaking of chain of taxation leading to cascading effect. This needs to be removed by grant of appropriate abatement.

3. Works contract service

Issue:

Works contract service has been defined to include the following services:

(a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or

(b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or

(c) construction of a new residential complex or a part thereof; or

(d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or

(e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;

However, there are other types of works contracts which continue to be taxed under different categories and do not get the benefit of composition scheme e.g. repairs and maintenance service etc.

Suggestion:

All types of contracts which are taxed as works contracts under VAT be brought under the category of "works contract service". Alternatively, benefit of composition scheme be made available to all works contracts classified as such under VAT laws irrespective of its classification under service tax law.

Justification:

As we are moving towards GST regime, definition of works contract under VAT laws be adopted under service tax also. This kind of parity in law would create ease practical compliance with the law and avoid unnecessary litigation.

4. Reimbursable expenditure /common expenses

Issue

Valuation Rules are extremely difficult to apply in practice, especially in those cases where there is clear reimbursement of expenses. Also, there is no provision for passing on the benefit of CENVAT credit where a party seeks reimbursement. Field formations take very narrow view and do not allow CENVAT credit in respect of various services (e.g. air travel) for which reimbursement is claimed since in such cases, the invoice is in the name of the person seeking reimbursement.

Suggestion:

The definition of pure agent be simplified and modified to exclude the lines pertaining to "title of goods" and similar other requirements which are difficult to satisfy in practice. Appropriate mechanism be worked out/clarification be provided so that the benefit of input tax credit is not lost when the service provider seeks reimbursement of expenses incurred on account of the service recipient.

Justification:

These amendments/clarifications and procedures are required to avoid double taxation as not allowing input tax credit when service provider incurs expenditure for and on account of the recipient, leads to double taxation and also cascading of taxes.

Often, in the absence of clarity, the service provider also charges service tax on the whole bill of the service provider, whose services it uses on account of the service recipient, which also includes service tax. The proposal will lead to avoidance of double taxation and cascading.

5. Registration as a service receiver, even for single transaction

Issue:

Rule 2(1)(d) of the Service Tax Rules, read with Notification 35/2004 stipulates that if the consignor or consignee falls under the specified seven categories (Ltd., Pvt. Ltd, factory…), then the person making payment of freight is liable to pay tax. Hence, if a person in Indore purchases furniture from Godrej, New Delhi and makes payment of freight, he is liable to register itself for this one off transaction and has to comply with procedures like regular filing of returns, etc. Similar situations also arise when a person is liable to pay tax under reverse charge mechanism for overseas service provider payments.

Also, the procedure for de-registration is quite cumbersome and take lot of time as the department is very hesitant to deregister any assessee.

Suggestion:

The concept of casual registration on the lines of VAT laws at State level be introduced in service tax law.

Such causal service provider for such one of transaction is granted exemption from procedural compliances and harass penal consequences.

Justification:

This proposal will reduce the burden of compliance for tax payers and also ease the burden of monitoring for tax department. It will lead to simplification too and reduce the number of taxpayers on government's register who have one off transactions.

6. Revision of returns

Issue:

The time limit for revision of return provided in Rule 7B is little short, as often issues come up when the accounts are finalized for the purpose of Companies Act and audit is carried out.

Suggestion:

The time limit for revision of returns may be extended to 7 months from the end of the financial year as accounts under the Companies Act are required to be audited and finalized within 6 months from the end of the year and period of additional one month would thus be available for revision of returns.

Justification:

The suggestion seeks to facilitate self compliance by the tax payers as they can correct any errors which are noticed during audit. This will lead to better compliance.

7. Issue of show cause notice for recovery of service tax

Issue:

The show cause notice under proviso to section 73(1) can be issued by a central excise officer up to five years where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of—

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax.

No minimum limit of the service tax escaping assessment has been prescribed for the purpose of issuance of show cause notice under proviso to section 73(1). It is often seen in practice that this extended period is applied routinely in all cases even where the tax payer has, on its own, paid tax on noticing error.

Suggestion:

It is suggested that a minimum limit of Rs.1,00,000 for service tax escaping assessment be prescribed for the purpose of proviso to section 73(1).

Justification:

Providing for minimum tax amount limit will reduce the litigation costs and administrative burden for the tax payer and department in case of proceedings not involving significant revenue.

8. Time limit for adjudication

Issue:

Under Section 73(2) of the Act, the Central Excise Officer shall after considering the representation, if any, made by a person on whom a show cause notice is served for recovery of service tax not levied/paid or short levied/paid or erroneously refunded determine the amount of service tax due from such person and thereupon the person shall pay the amount so determined. It is to note here that

the sub-section does not categorically provide for passing of an order nor does it provide for time limit within which such determination of the amount to be recovered from the noticee is to be made.

Suggestions:

Time limit for completion of adjudication be prescribed in the provisions of section 73.

Handling of adjudication by a different Official than the one who has issued the SCN would ensure fairness and independence in the adjudication process

Justification:

Specifying time limit brings in discipline and certainty as also clarity – such limits do exist under other laws.

9. Recording of statement

Issue:

It has been practically experienced that whenever the Officers record statements, a copy of the same is not provided to the person whose statement is recorded. Further, very often, statements are recorded in respect of routine matters for which a declaration or even a signed statement could be provided by the concerned person.

Suggestion:

As far as possible, recording of statements should be avoided and assesses should be asked to submit specific responses to the specific questions of the Department.

Suggestion:

In case, the statement is required to be recorded, a copy of the same, duly signed by both the tax payer and the Officer

recording the statement, may be provided to the tax payer immediately after the recording the statement. Very often, the statements are written in hand and then typed. The use of computer systems can speed up the process. The statement recorded can be immediately printed, signed and handed over to the assessee.

Justification:

This will simplify the processes and will bring about greater discipline and reduce the anxiety of all concerned.

10. Search of premises

The Commissioner of Central Excise may, if he has reason to believe that any documents or books or things which in his opinion will be useful for or relevant to any proceeding under the Act, are secreted in any place, may authorise the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise as the case may be, to search for or seize or himself search for or seize such documents or books or things. Section 82 provides for search when there is reason to believe.

It is suggested that in order to avoid vexatious searches, the reasons for conducting the search may be recorded in writing. This will also be in line with income-tax provisions.

The suggestion seeks bring about greater transparency in the processes and will enable the tax payer to effectively respond to the queries of the tax department. It will also bring about discipline within the department.

11. Stay by CESTAT

Issue:

Stay granted by CESTAT under section 35C of Central Excise Act, 1944 is automatically vacated after a period of 180 days if appeal is not decided during that period.

Suggestion:

Though CESTAT has power to extend the stay again, it is a cumbersome and taxing process, on part of the assessee as the department presses for recovery. Further, the delay may not be due to the fault of assessee. Hence the limitation period either be removed or extended looking into the current pendenancy list of CESTAT.

Justification:

This suggestion seeks to remove the avoidable cost and burden on the CESTAT as also need to meet technicalities, as it is found, in practice, that given the current burden of work, it is difficult for CESTAT to decide the matter in 180 days, though, that would be an ideal situation.

12. Powers under section 14 of the Central Excise Act, 1944

Issue:

Section 14 of the Central Excise Act is applicable in case of service tax matters also. According to this section powers have been given to Central Excise Officers to issue summons to the assessee to give evidence and produce documents in enquiries conducted under the Act. These provisions are often misused as under:

(i) Notices are issued to Managing Director/Director/Chairman despite the fact that they are not concerned with routine functioning of business.

(ii) Notices are issued even for seeking that information what can be obtained by ordinary letters.

(iii) The time mentioned in the notice is not rigidly followed. As a result, plenty of precious time of the assessee is wasted.

(iv) Copy of the recorded statement is not provided immediately to the concerned assessee.

(v) Summons are issued even in those cases where question of law is involved.

Suggestions and Justification:

It is suggested that Section 14 be suitably amended to stop the misuse of the powers provided therein establishment of simplified procedure will reduce undue harassment and cost to assessees and will at the same time meet the needs of the department to obtain requisite information. This will also avoid high handedness of some officers in dealing with the tax payers and will create a more cordial attitude/approach.

13. Tax Audit Report in service tax

Issue:

Service tax liability cannot be calculated readily from the final accounts of the service providers. Adjustment and reconciliations are must in order to comply with the provisions of service tax. It is an admitted fact that administering authorities are not accounting experts and have been dealing with stock records and physical goods in the past to administer excise and custom laws. Whereas services are intangible in nature and service tax liability can be calculated with reference to financial records only.

Tax audit report is one document which is required by income tax department as well as many VAT departments in various states.

Certain states have prescribed specific audit by CA over a specified turnover. However, under service tax, no such audited balance sheet is submitted by large number of tax payers, especially the smaller service providers and same is called for only at the time of EA audit.

Suggestion:

In order to streamline the process with all VAT laws, it is suggested that the submission of audit report be made mandatory in service tax also along with audited annual accounts.

Justification:

This measure will assist the department as it is difficult for the department to take up each and every case for full scrutiny. Tax audit would ensure that the financial statements and the accounts on the basis of which return is prepared is in accordance with the applicable accounting principles and they are duly scrutinized by a person specially trained for that purpose and who is also subjected to strict disciplinary mechanism. Chartered accountants also have to keep them updated and have to go through continuing education programs.

14. Prosecution

Issue:

Joint Commissioner is empowered to issue search warrant under section 82 and the same is executed by the Superintendent. Provisions relating to prosecution contained in section 89 have been re-introduced by the Finance Act, 2011 to apply in the following situations:

(i) Provision of service without issue of invoice;

(ii) Availment and utilization of CENVAT credit without actual receipt of inputs or input services;

(iii) Maintaining false books of accounts or failure to supply any information or submitting false information;

(iv) Non-payment of amount collected as service tax for a period of more than six months.

Suggestion:

Prosecution provisions ought to apply only in exceptional cases and must include mens rea as also have a minimum threshold over which only such proceedings would be taken. Also, provisions for compounding as is available under other laws be introduced.

Power to issue search warrant under section 82 may be given to Joint Commissioner with the prior approval of Commissioner/ Chief Commissioner with the reasons in writing.

As there is no mention of mens rea, proceedings may be initiated even in case of genuine and honest or inadvertent errors.

Issuance of SCN with prior approval of Joint Commissioner will ensure application of mind to the issue at a higher level.

15. Interest on delayed payment of tax

Issue:

Interest on delayed payment of tax has been increased to 18% in Finance Act 2011.

Suggestion:

Rate of interest may be reduced and brought in line with the income-tax provisions.

Justification:

Interest is always considered compensatory and compensation should be based on the market rates.

16. Disparity between interest payable by assessee and Department under central excise, service tax and customs

Issue:

At present, interest @ 18% is payable by the assessee when duty is short levied /short paid or not levied /not paid. However, in case of delayed refunds, the Department is liable to pay interest @ 6%. Thus, there is a significant gap, between the rate of interest payable by the assessee and the Department. In fact, the disparity has become more than 50% after the interest on delayed payment of tax/duty was increased from 13% to 18% this year.

Suggestion:

Interest rates at both the ends may be made uniform.

Justification:

There is need for fairness and equity in the rates at which interest is paid by the department and that is charged from tax payer and this suggestion seeks to achieve that.

17. Chartered Accountancy Professionals in tax policy making body

Issues:

Every year new services are being introduced in the service tax net and scope of existing services are increased. Further, on account of changing business models and advancement of technology, the department is frequently faced with many issues arising in the substantive and procedural part of the law. Chartered accountants

have knowledge of business and undergo practical training for three years before qualifying. They will add significant value if they are part of the policy body.

Suggestions:

Tax policy making body include a few professionals drawn from the Chartered Accountancy profession. Their contribution would be extremely useful when GST is implemented in India.

Justification:

There are many persons from legal and other professional background in policymaking body but, few, almost negligible from chartered accountancy profession. Chartered Accountants have been and will add significant value to the process of policy making due to their training, experience and exposure.

18. Training of Departmental Personnel

Issues:

It has been observed that the understanding of this central law across the country is not the same. Different Commissionerates have different views on variety of issues particularly in case of real estate sector. This causes difficulties for both the assessee and the Department.

Suggestions:

A comprehensive training covering all the substantive and procedural aspects of the law be scheduled for the officers at all levels.

Justification:

Departmental officers of undergo training but, there is need for more comprehensive and interactive sessions where they can discuss and debate issues with their peers duly facilitated by experienced professionals. This will go a long way in enhancing quality of services of the Department.

19. De-linking of tax policymaking and tax administration

Issues:

It has been observed that over a period of time the thin line between the tax policy making and tax administration has ceased to exist in indirect tax legislation of the country.

Suggestions:

There is a urgent need to ensure that there is a clear divide between the tax policy making and the tax administration

Justification:

In an efficient tax system, there is a clear divide between the tax policy making and tax administration. However, the same has collapsed in case of indirect tax system in India. The division of the policy making and administration would go a long way when GST is implemented.

20. Retrospective amendments

Issues:

In the recent past, the practice of amending the law with retrospective effect has gained momentum. Good tax laws always have built in principle of anteriority, thus not requiring any retrospective amendment.

Suggestion:

Retrospective amendments rectifying past drafting errors or adverse judicial decisions be avoided.

Justification:

Retrospective amendment leads to confusion and uncertainty amongst the tax payers. These amendments also shake the tax payers' confidence in the law making body. Therefore, there is an urgent need of avoiding retrospective amendments.

21. Accountability of tax collectors

Issue:

In the present tax laws, there is no accountability on the part of tax collectors. This leads to the misuse of powers vested in them vide the respective legislations.

Suggestions:

In order to project a sense of even-handedness in dealing with tax payers, provisions relating to accountability need to introduced and not be formulated independently.

Justification:

For proper discharge of responsibilities, accountability is a necessary counter-balance and is very essential for effective discharge of the authority vested in a person

22. Appeals to High Court

Issue:

It has been observed that practically all cases decided by the Tribunal end up being appealed against in the High Court and the matter decided by the Tribunal does not attain finality.

Suggestions:

The practice of going on appeal to the High Court quite routinely requires a review

Justification:

The matters decided at the Tribunal level need to attain finality, unless they involve substantial question of law.

23. Supplies to SEZ

Issue:

The assessee is required to get the confirmation of receipt of goods by SEZ from the concerned authority within 45 days. It takes several weeks for the goods to reach the project site which is about 1500 km to 2500 km away from the factory of the manufacturer. In some States, goods are allowed to move only after considerable delay by the local VAT authorities.

Suggestions:

It is suggested that this time limit may be enhanced to at least 60 days.

Justification:

This proposal is being made to obviate the practical difficulties faced by the assessees while complying with the procedures set out in the SEZ rules.

24. Online E-filing of weekly information by major duty paying units

Issue: Central Excise Department has issued Trade Notices for online e-filing of weekly and monthly returns. All the major duty paying units are required to opt for online e-filing and submit product wise i.e. CETSH-wise weekly information about

production, clearance, value duty etc. within three days after end of the preceding week.

Suggestions and justification:

The Trade and Industry is of the firm opinion that furnishing product wise information i.e. CETSH wise weekly information is consuming a lot of time and there is a cost involved in collecting information every week.

When the assessees are submitting monthly return regularly, filing weekly information does not serve any purpose and has no duty implications. Many times the assessees are compelled to establish a separate department for this purpose at a cost. It is suggested that such a system be done away with.

This suggestion is made with a view to avoid duplicity/multiplicity of information that is sought from the tax payers and reduce cost of compliance.

25. Audit Procedures

Issue:

The audit parties while examining documents insist that the assessee gives them the entire tally back up/ soft copy of its accounts.

Suggestion:

It is suggested that such demands be not made from the assessees. The audit parties be instructed to verify the data at the assessee's premises and seek hard copies of only very relevant data which is required for their records.

Justification:

Taking entire data of assessees is not appropriate and often leads to confidentiality issues. The officers of the department be trained

in use of software so that they can verify the data at the tax payers premises rather than seeking copies of the entire accounts

26. Benefit of Notification No. 108/95 CE and 6/2006 CE to sub contractors

Issue:

The above two notifications exempt the main contractor from payment of excise duty in case of huge power projects as well as huge projects funded by International Organizations.

Though there is no problem for the main contractors in availing the excise duty exemption, exemption is being denied to sub contractors. The Bangalore Tribunal's decision in the case of CST Limited is in favor of assessee where as Delhi Tribunal's decision in the case of Bird Machines is against the assessee.

Suggestion:

It is suggested that in order to avoid ambiguity in law and divergent practices being followed, it is suggested that the benefit of notification be provided to the subcontractors as well.

Justification:

Considering the intension of the notification, the exemption should also be extended to the sub-contractors.

Huge project cannot be executed without the support of sub-contractors and if the exemption is given only to the main contractor, it would result in very limited availment of the benefit of Notification, which does not seem to be the intention of the Government.