

2015

Post Budget 2015 Memorandum

Key concerns on Union Budget 2015, presented as on
February 28, 2015



ISSUES FOR AMENDMENTS OR CLARIFICATION BY THE CBEC – UNION BUDGET 2015

Amidst huge expectations, the Hon'ble Finance Minister Shri. Arun Jaitley presented the first full-year Union Budget of the Hon'ble Prime Minister Shri. Narendra Modi's Government on February 28, 2015, Saturday in the backdrop of easing inflation and interest rates but continued growth challenges which the Government needs to address.

While considering Goods and Service Tax ("GST") as a 'game changing reform', Shri. Arun Jaitley said that 'GST will put in place a state-of-the-art indirect tax system by 1st April, 2016'.

We are discussing herewith some of the key concerns on Union Budget 2015, which needs to be addressed/ clarified by the Central Board of Excise and Customs ("the CBEC or "the Board"):

1. Withdrawal of Education Cess ("EC") and Secondary and Higher Education Cess ("SHEC") [collectively referred to as "Cess"] – A Double-Edged Sword

With the underlying theme of setting the stage for Goods and Services Tax ("GST"), the Union Budget, 2015 has proposed to do away with the Cess. While withdrawal of Cess on Excise duty has been made effective from March 1, 2015, as a parallel change, Cess on Service tax has also been proposed to be withdrawn from the date to be notified after enactment of the Finance Bill, 2015. It is worthwhile here to note that there is no proposal to do away with the Cess on Customs duty and hence Cess on Customs duty will continue to be levied.

Key Concerns: The said amendment brings many unaddressed issues presenting the Industry at large with a bouquet of concerns.

The provisions of Rule 3(7)(b) of the Cenvat Credit Rules, 2004 ("the Credit Rules") permit utilisation of Cenvat credit of Excise duty/ Service tax for payment of Cess but not vice versa:

"Provided that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services:

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services....."

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In the light of the stated provisions under Rule 3(7)(b) of the Credit Rules, following questions are left unanswered:

- a) **What will be the fate of balance of Cess lying unutilized in the hands of manufacturer as on March 1, 2015 and service provider (from a date to be notified)?**

With the Cess on Excise duty being withdrawn effective from March 1, 2015, the major issue which crops up is the destiny of the amount of Cess lying unutilized in the hands of the manufacturers. While the service providers are in a position to utilize the existing balance of unutilised Cess lying in their hands before the enactment of the Finance Bill, 2015 but what will happen to amount of Cess lying unutilized after enactment of Finance Bill, 2015.

- b) **What happen for Cess charged on the excisable goods in transit, received in the factory after March 1, 2015?**

It is likely that there may be a situation of excisable goods in transit as on March 1, 2015, which will involve an element of Cess as the supplier of raw material would have charged Cess. Now, what will happen for such Cess already charged on excisable goods received on or after March 1, 2015.

- c) **Time lag between effective dates of withdrawal of Cess under the Service Tax and the Central Excise – Accumulation of Credit in the hands of manufacturers.**

Since Cess on Service tax will continue, albeit for some time, a service provider shall charge Cess to the manufacturer. In terms of the Credit Rules, while the manufacturer shall be entitled to avail Credit of such Cess, the question is as to how the manufacturer will utilize Credit of such Cess.

With no Cess on Excise duty, the manufacturer will merely accumulate such Credit of Cess without any option for its utilization.

- d) **Accumulation of Cess distributed by an Input Service Distributor ("ISD") to manufacturing Unit**

As an ISD distributes Cess portion also to the factory or the plant, on the services received by it, which will only accumulate at the factory or plant in the absence of any provision for its utilization.

- e) **What will be the treatment of balance 50% of the Credit of Cess on the Capital goods?**

In case of Capital goods, 50% of the Cenvat credit is taken in the current year and balance 50% Cenvat credit is taken in subsequent financial year. Now, in a situation

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where Capital goods are purchased during the financial year 2014-15, 50% of Cenvat credit of Cess is taken in the current year and balance 50% Cenvat credit of Cess on Capital goods would be taken in the subsequent financial year i.e. 2015-16. Accordingly, the assessee would confront the problem of utilizing the additional 50% Credit of Cess w.e.f March 1, 2015 (manufacturer) and from a date to be notified for service provider.

Clarification/ Suggestion: The stated amendment involves multiple unaddressed issues which warrant immediate attention of the Board. The Board should come to the rescue of the industry by bringing in suitable amendment in the Credit Rules to address the above concerns and provide means of utilization of Credit of Cess. Alternatively, allowing refund of the accumulated Cess would perhaps be another solution. However, refund may prove to be a daunting solution keeping in mind the number of issues embracing the procedure of getting refund from the Department.

2. **Swachh Bharat Cess – Impact on ‘Aam Aadmi’**

Pursuing with Mr. Narendra Modi’s Dream of Swachh Bharat, a new Chapter VI has been inserted in the Finance Bill, 2015 that contains a new levy of Cess called the ‘Swachh Bharat Cess’ (“**SB Cess**”). This Chapter empowers the Central Government to impose Cess on all or any of the taxable services at the rate of 2% of the value of such services, for the purpose of financing and promoting Swachh Bharat initiatives or for any other purpose relating thereto.

Clause 117 of Finance Bill, 2015 reads as 'there shall be levied and collected in accordance with the provisions of this chapter, a cess to be called the Swachh Bharat Cess, as service tax **on all or any** of the taxable services at the rate of two percent on the value of such services...'.

The SB Cess shall be levied from such date as may be notified by the Central Government after the enactment of the Finance Bill, 2015. The SB Cess will be levied in addition to any cess/ Service Tax collected on such services under the provisions of Chapter V of the Finance Act, 1994 (“**the Finance Act**”).

Key Concerns: It is worth observing that the Government has not given any further details of the levy of SB Cess. As a matter of course, SB Cess will increase the rate on taxable services and in effect the Service tax rate will increase up to 16%, rather than 14%, as stated by the Hon’ble Finance Minister in his Budget Speech. The hike in Service tax rate will definitely raise the burden of tax on the ‘Aam Aadmi’. Further numbers of questions are haunting the minds of the assessee as follows:

- a) What all services are going to be covered under the levy of SB Cess?

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In the absence of clearly defined provisions, it is likely that the SB Cess may re-ignite the tussle on 'classification' of services.

- b) Whether Cenvat credit of SB Cess would be available or not because there are no amendments proposed in the Credit Rules?
- c) Whether there will be restriction as regards utilisation of SB Cess as was in case of EC and SHEC?

Clarification/ Suggestion: With the aim of Mr. Narendra Modi's Government to introduce GST by April 1, 2016, the logic of introducing such a levy under the banner of SB Cess where the same is not proposed to be subsumed in the Constitution (122nd Amendment) Bill, 2014 in GST presented in the Lok Sabha on December 19, 2014, will definitely create hue and cry among the Trade.

As SB Cess awaits its introduction, a detailed clarification on the various aspects of applicability of SB Cess will surely be welcomed by the Industry at large.

3. **Non-excisable goods included within the ambit of 'exempted goods' - but only for the purpose of Rule 6(1) of the Credit Rules**

Vide Notification No. 6/2015-CE(NT) dated March 1, 2015, Explanations to Rule 6(1) of the Credit Rules have been inserted to state that for the purpose of this Rule, exempted goods and final products shall include **Non-excisable goods cleared for a consideration** from the factory.

The Explanations inserted to Rule 6(1) of the Credit Rules reads as under:

"Explanation 1: - for the purposes of this rule, exempted goods or final products as defined in clauses (d) and (h) of rule 2 shall include non-excisable goods cleared for a consideration from the factory.

Explanation 2: - value of non-excisable goods for the purposes of this rule, shall be the invoice value and where such invoice value is not available, such value shall be determined by using reasonable means consistent with the principles of valuation contained in the excise act and the rules made thereunder."

Key Concerns: Though an Explanation has been added under Rule 6(1) of the Credit Rules, but the stated explanation may open up fresh issues of litigation in the following matters:

- a) **Consideration – Monetary or non-monetary:** In the absence of any definition of the term 'Consideration', application of the stated Explanation under Rule 6(1) of the Credit Rules will pose another problem to the assesseees.

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b) Definition of 'Exempted goods' under Rule 2(d) of the Credit Rules not amended -

The present Explanations inserted in Rule 6(1) of the Credit Rules have been clearly stated to be '*for the purpose of this Rule*'. However, the definition of 'Exempted goods' under Rule 2(d) of the Credit Rules has not been amended simultaneously.

Clarification/ Suggestion: The clear clarification of the terms used and corresponding valuation in the stated Explanations to Rule 6(1) of the Credit Rules is very much required from the Board so as not to create another area of future litigation.

4. Ease of Business: Service tax registration within 2 working days – but only for single premises

The Hon'ble Finance Minister in his Budget, 2015 Speech has stated that "*To further facilitate the ease of doing business, online central excise and service tax registration will be done in two working days...*"

Accordingly, vide Notification No. 5/2015-ST dated March 1, 2015 (effective from March 1, 2015), Rule 4 of the Service Tax Rules, 1994 has been amended to provide that the CBEC shall, by way of an Order, specify the conditions, safeguards and procedure for registration in Service tax.

In this regard Order No. 1/15-ST dated February 28, 2015, effective from March 1, 2015 ("**the Order**") has been issued, prescribing documentation, time limits and procedure for registration for **single premises**. It has also been prescribed that henceforth registration for single premises shall be granted within 2 days of filing of application.

Key Concerns: The speech of the Hon'ble Finance Minister gave an impression that all sorts of Service tax and Central Excise registration would be granted within 2 working days. Had that been the intention, the Order would not have dealt only with the procedure for registration specifically for single premises.

This can be taken to construe that the assessee applying for Centralised registration would not be eligible for benefit of '*ease of doing business*' as contemplated by the Hon'ble Finance Minister.

Clarification/ Suggestion: The Board needs to clarify whether Centralised registration under Service tax would also be granted within 2 working days or not.

5. Introduction of definition of the term 'Government' under the Finance Act – Whether Central Government is also a part of Government

Presently, various services (excluding a few specified services), provided by the Government are excluded from the ambit of Service tax by way of entries in the Negative

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List of services contained under Section 66D(a) of the Finance Act. Further, specified services received by the Government are also exempt by way of Mega Exemption.

Hitherto, despite of the exemption to services rendered/ received by the Government, the term 'Government' has not been defined in the Finance Act. Now, in order to remove interpretational issues, Clause 105 of the Finance Bill, 2015 has introduced the definition of the term 'Government' by insertion of Clause 26A under Section 65B of the Finance Act (to be made effective after enactment of the Finance Bill, 2015).

Key Concerns: The definition of the term 'Government' provided by way of insertion of Clause 26A under Section 65B of the Finance Act reads as under:

“(26A) “Government” means the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder.”

Noticeably, in respect of State Government and Union Territory, the above stated definition specifically provides 'State Government and its Departments' and 'Union territory and its Departments'. However, it is not the case for Central Government. In respect of Central Government, only Departments of the Central Government are covered under the ambit of the term 'Government'. Now, does that mean Central Government is not a part of 'Government'?

Clarification/ Suggestion: It is required to be clarified whether the Central Government would form part of the 'Government' or not while interpreting definition of the term 'Government' in order to determine taxability of a service under the Finance Act.

6. Reimbursable expenditure charged by the service provider – Whether exigible to Service tax?

Clause 109 of the Finance Bill, 2015 has proposed to substitute Explanation (a) to Section 67 of the Finance Act providing meaning of the term 'Consideration' to, *inter alia*, include within its purview all reimbursable expenditure or cost incurred and charged by the service provider:

“(a) “consideration” includes–

(i) any amount that is payable for the taxable services provided or to be provided;

(ii) any reimbursable expenditure or cost incurred by the service provider and charged, in the course of providing or agreeing to provide a taxable service,

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except in such circumstances, and subject to such conditions, as may be prescribed;

(iii) any amount retained by the lottery distributor or selling agent from gross sale amount of lottery ticket in addition to the fee or commission, if any, or, as the case may be, the discount received, that is to say, the difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket."

Key concerns: The issue of taxability of out-of-pocket expenses has always been a matter of litigation. Before April 19, 2006 there was no specific provision to this effect. However, from April 19, 2006 onwards, with the introduction of the Service Tax (Determination of Value) Rules, 2006 ("**the Valuation Rules**") vide Rule 5(1) thereof, Service tax is applicable on gross consideration including all expenses barring the expenses incurred as pure agent. The matter of taxability of such expenses, which is reimbursed by the service recipient, came before various Courts from time to time.

With the landmark judgment in the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd. Vs. Union of India [2013 (29) S.T.R. 9 (Del.)]*** ("**Intercontinental Case**"), the Hon'ble High Court of Delhi declared Rule 5(1) of the Valuation Rules as ultra vires of erstwhile Section 66 and Section 67 of the Finance Act. The Intercontinental Case has laid down clearly that a Rule can never exceed or go beyond the Section which provides for the charge or collection of Service tax. At the same time, it was also laid down that Service tax is not exigible on reimbursements of expenses claimed on actual basis by service provider.

Later being aggrieved by the decision of the Hon'ble High Court of Delhi in the Intercontinental Case, the Department filed a Petition for special leave to appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court has granted leave to appeal and Petition was converted into civil appeal in the case of ***Union of India Vs. Intercontinental Consultants & Technocrats (P.) Ltd. [(2014) 49 taxmann.com 520 (SC)]***.

Now, with the proposed amendment in Section 67 of the Finance Act providing for taxability of all reimbursable expenditure despite the pendency of the matter before the Hon'ble Supreme Court, has given light to another area of doubt as to whether the Industry should wait for decision of the Hon'ble Supreme Court in the stated matter or follow the amendments to be made effective after the enactment of the Finance Bill, 2015.

Clarification/ Suggestion: Immediate clarification on the stated issue is most warranted by the Industry at large considering the fact that taxability of reimbursements has been a long litigated issue. Ideally when the matter is sub-judice before the Apex Court, the same amendment is retrograde and will add more litigation.

7. Tinkering with the legislative powers of taxation amongst the Union and States and issue of double taxation

The Union Budget, 2015 has brought certain amendments in the Negative List of Services given under Section 66D of the Finance Act and the Mega Exemption Notification No. 25/2015-ST dated June 26, 2012 ("**Mega Exemption Notification**"), providing certain new exemptions from Service tax and at the same time, removing certain Service tax exemptions presently available. However, the same has raised the issue of crossing the constitutional hurdles of division of legislative powers of taxation amongst the Union and States and that of double taxation.

Key concerns: Clause 107 of the Finance Bill, 2015 has proposed to omit Clause (j) of Section 66D of the Finance Act. Consequently, post enactment of the Finance Bill, 2015, Service tax would be levied on the services provided by way of access to amusement facility such as rides, bowling alleys, amusement arcades, water parks, theme parks, etc.

Further, Service tax would also be levied on services by way of admission to entertainment event of concerts, non-recognized sporting events, pageants, music concerts and award functions, if the amount charged for admission is more than Rs. 500 (Vide Notification No. 6/2015-ST dated March 1, 2015 amending the Mega Exemption Notification).

Now by resorting to division of legislative powers of taxation amongst the Union and States, the charges recovered by a provider of entry/ admission to entertainment events or amusement facilities are otherwise charged to Entertainment Tax under the provisions of the State Entertainment Tax laws.

However, the stated proposed amendment of omission of Section 66D(j) of the Finance Act will make the same activity chargeable to both Entertainment tax as well as Service tax.

Clarification/ Suggestion: These amendments will raise a question on seriousness of the Union Govt to create consensus with the State Governments for implementing GST by April, 2016. Hence, these amendments can be revisited for the sake of avoiding double taxes.

8. Waiver from penalty if duty and interest is paid before Service (for Service tax)/ Issuance (for Central Excise)/ Receipt (for Customs) of Show Cause Notice – Unwarranted area of turmoil

The Finance Bill, 2015 has proposed to grant complete waiver from penal provisions in cases not involving fraud, collusion, willful misstatement, suppression and contraventions of provisions with the intention to evade duty in the following manner:

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Under the Service tax:

“Section 76. (1) Where service tax has not been levied or paid, or has been short levied or short paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax:

Provided that where such service tax and interest is paid within a period of thirty days of-

*(i) the date of **service** of notice under sub-section (1) of section 73, no penalty shall be payable;...”*

Under the Central Excise:

“11AC(1)....(a) where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any wilful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent. of the duty so determined or rupees five thousand, whichever is higher:

*Provided that where such duty and interest payable under section 11AA is paid either before the **issue** of show cause notice or within thirty days of **issue** of show cause notice, no penalty shall be payable....”*

Under the Customs:

*“28(2).....Provided that where notice under clause (a) of subsection (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of **receipt** of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said notice is served under clause (a) of subsection (1) shall be deemed to be concluded.”;*

Key Concerns: Usage of the word ‘**service**’ in Service tax, ‘**issue**’ in Central Excise and ‘**receipt**’ in Customs, is likely to open a new Pandora Box of chaos amongst assesseees.

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Whether the same has been done intentionally or is the result of inadvertent error – only the Board may clarify.

However, by resorting to the TRU Letter II annexed to the Budget documents, it appears as if the Department has assumed the words to be used interchangeably. Even though Section 76 and Section 78 of the Finance Act specifically uses the word ‘service’ of notice, the TRU Letter II has used the words interchangeably treating the ‘issue’ of notice as ‘service’ of notice for the purpose of Section 76 of the Finance Act but not for the cases falling under Section 78 thereof in the following manner:

“(vi) Section 76 is being amended to rationalize the provisions relating to penalties, in cases not involving fraud or collusion or wilful misstatement or suppression of facts or contravention of any provision of the Act or rules with the intent to evade payment of Service Tax, in the following manner,-

(a) penalty not to exceed ten percent of Service Tax amount involved in such cases;

(b) no penalty is to be paid if Service Tax and interest is paid within 30 days of issuance of notice under section 73 (1);....”

“(vii) Section 78 is being amended to rationalize penalty, in cases involving fraud or collusion or wilful mis-statement of suppression of facts or contravention of any provision of the Act or rules with the intent to evade payment of Service Tax, in the following manner,-

(a) penalty shall be hundred per cent of Service Tax amount involved in such cases;

(b) a reduced penalty equal to 15% of the Service Tax amount is to be paid if Service Tax, interest and reduced penalty is paid within 30 days of service of notice in this regard;....”

Whatever may be the intention of the draftsmen of the Finance Bill, 2015, the fact of bridge long gap between the two term ‘issue’ and ‘service’ of notice cannot be ignored. In legal parlance distinction exists and its significance is high. ‘Issue’ of notice cannot be equated with ‘service’ of notice.

Undoubtedly, the words ‘issue’ and ‘service’ are distinct and separate. The ‘service’ of notice ideally means the time when the delivery of notice is complete in the hands of the Noticee. On the other hand, ‘issue’ of notice would happen when its delivery is merely

initiated. There may be a situation that a notice may be issued today, but may be served 2-3 years later.

Clarification/ Suggestion: There should be uniform usage of expression to accord complete penal waiver in all the three statutes while leaving no scope of interchange of words. The Board is required to clarify the same so as to put an end to the turmoil that may take place on using of the words 'service' and 'issue' interchangeably as the time and purpose demands.

Ideally, the provisions should be unified so as to provide complete waiver from penal provisions where tax/ duty and interest is paid within 30 days of the 'receipt' of the notice rather than 'issue' of notice. Reason being, that in cases of delay in serving of notice to assessee beyond 30 days, he/she would left with no option to avail the benefit of waiver from penalty and as such, the purpose of amendment would be defeated.

9. **Rationalization of penal provisions by substituting Section 78 of the Finance Act**

Section 78 of the Finance Act has been amended to rationalize the provisions relating to penalties in cases involving fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or Rules with the intent to evade payment of Service tax, in the following manner:

"78. (1) Where any service tax has not been levied or paid, or has been short-levied or short paid, or erroneously refunded, by reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under the proviso to sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty which shall be equal to hundred per cent. of the amount of such service tax:

Provided that where such service tax and interest is paid within a period of thirty days of -

*(i) the date of service of notice under the proviso to sub-section (1) of section 73, the penalty payable shall be **fifteen per cent.** of such service tax;*

(ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73, the penalty payable shall be twenty-five per cent. of the service tax so determined:

Provided further that the benefit of reduced penalty under the first proviso shall be available only if the amount of such reduced penalty is also paid within such period.

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(2) Where the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, modifies the service tax determined under sub-section (2) of section 73, then, the amount of penalty payable thereon, shall also stand modified accordingly, and the benefit of reduced penalty under the first proviso to sub-section (1) shall be available if such service tax, interest and reduced penalty so payable, is paid within a period of thirty days from the date of receipt of the order by which such modification is made.”

The said amendment would be effective only after the enactment of the Finance Bill, 2015.

Section 78 of the Finance Act as prevailing at present reads as under:

“(1) 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 the intent to evade payment of service tax, the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:

.....

Provided also that in case of a service provider whose value of taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days.

(2)

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.....”

Key Concerns: On one hand, the stated amendment extends additional benefit of reduced penalty of 15% if Service tax, interest and reduced penalty is paid within 30 days

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of service of Show Cause Notice (“SCN”) under Section 73(1) of the Finance Act which may be considered as an appreciated move to reduce burden of penalty on assesseees.

However, the said amendment would negatively affect assesseees in the following manner:

- a) The period of 30 days could be extended to 90 days as per prevalent provisions for small service providers whose taxable value does not exceed Rs. 60,00,000/- during any of the years covered by the SCN or during the last preceding financial year.
- b) Simultaneous imposition of penalties under Section 76 and 78 of the Finance Act has been a matter of constant litigation. Specific amendment was made in Section 78 of the Finance Act w.e.f. May 10, 2008 by way of insertion of proviso to provide that if the penalty is payable under this Section, the provisions of Section 76 of the Finance Act will not apply.

The new substituted Section 78 of the Finance Act does not contain the stated proviso. No doubt that the amended Section 76 and Section 78 of the Finance Act has upheld the mutually exclusive nature of the penalties under Section 76 and Section 78 thereof by drafting both the Sections in such a manner. In other words, Section 76 of the Finance Act to levy penalties in cases not involving fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or rules with the intent to evade payment of Service tax and Section 78 thereof to cover fraud etc. cases.

However, the issue still remains to be under litigation as in almost all the cases, the Department alleges involvement of fraud or collusion or willful misstatement or suppression of facts or contravention of any provision of the Act or rules with the intent to evade payment of Service tax.

Clarification/ Suggestion: Ironically instead of providing relaxation to the assesseees from penal provisions under the Finance Act, the Union Budget, 2015 has snatched away some important relaxations from penalties specifically from the hands of small service providers. The Board is required to liberalise penal provisions at least for the small service providers and clear amendment that Penalty levied could either be under Section 76 or Section 78 of the Finance Act.

10. Omission of Section 80 of the Finance Act – Harsh amendment for Honest assesseees

Clause 114 of the Finance Bill, 2015 has proposed to omit Section 80 of the Finance Act that provides waiver from penalty in case of reasonable cause shown. At present, Section 80 of the Finance Act reads as under:

“80. (1) Notwithstanding anything contained in the provisions of section 76, or section 77, no penalty shall be imposable on the assessee for any failure referred to

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in the said provisions, if the assessee proves that there was reasonable cause for the said failure.

(2)"

Key Concerns: The Finance Bill, 2015 has proposed to omit the concept of 'reasonable cause' as existing presently in Section 80 of the Finance Act. On the contrary, the newly substituted Section 76 of the Finance Act uses the words "for any reason, other than reason of fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax" for imposing penalty on non-levy, short levy, and default in payments thereto or erroneous refunds of duties and taxes in Service tax.

Accordingly, in terms of the newly proposed Sections 76 of the Finance Act with Section 80 thereof being omitted from the Act, even honest assesseees will have to face the brunt of imposition of penalties even when there is reasonable cause for non-payment of Service tax.

Clarification/ Suggestion: The Board is required to revisit the stated amendments in the penal provisions under the Finance Act to moderate the provisions and to ensure no undue hardship on genuine and honest assesseees.

Conclusion: In the endeavour of the Government to streamline the existing provisions to pave way for smooth implementation of GST from next financial year, the afore stated glitches and unaddressed issues under the Indirect taxes requires suitable amendment(s)/ clarification(s) at the earliest by the Board.

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