No simultaneous penalty under Sec 76, 78 of Fin Act, 1994

30 December, 2009 Ahmedabad :

Can simultaneous penalties under various sections of the Finance Act be imposed for non-payment of Service tax?

Law loses its sheen if not enforced. Penalties form a very vital part of any law to ensure its enforcement. However, many a time law enforcing authorities, in an effort to set examples, indulge into abuse of power and impose irrational and arbitrary penalties.

The judiciary has time and again emphasised that law enforcing officers should be more careful at the time of imposition of penalties and the same should be in proportion to the magnitude of breach of the legal provisions.

There are several provisions for imposition of penalty under the Finance Act, 1994 as made applicable to Service tax. Section 76 of the Finance Act relates to penalty for failure in payment of Service tax. This section has been amended time and again.

As of today, it reads, "Any person, liable to pay Service tax in accordance with the provisions of Section 68 or the rules made under this Chapter, who fails to pay such tax, shall pay, in addition to such tax and the interest on that tax amount in accordance with the provisions of Section 75, a penalty which shall not be less than Rs200 for every day during which such failure continues or at the rate of two per cent.of such tax, per month, whichever is higher, starting with the first day after the due date till the date of actual payment of the outstanding amount of Service tax: Provided that the total amount of the penalty payable in terms of this section shall not exceed the service tax payable."

The controversy related to methodology of calculation of number of days, whether linear or compounded or cascading, lasted for years till the time an illustration was added to the said section. The penalty provision has come a long way since 1994.

Another controversial penal provision is Section 77, wherein general penalty and penalty for specific violations are elaborated. The said section proposes penalties for violation of basic principles, including maintenance and retention of records, books of accounts, and documents as required in accordance with provisions of the Finance Act. It also proposes penalties for failure of taking Service tax registration.

This penalty may extend to Rs5,000 or Rs200 for every day the failure continues, whichever is higher, starting with the first day after the due date, and till the date of actual compliance.Further, Section 77 proposes penalties for a person who fails to either furnish information called by an officer in accordance with the provisions of this chapter or rules made there under; or produce documents called for by a Central Excise Officer in accordance with the provisions of this chapter or rules made there under; or appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry.

The person concerned shall be liable to a penalty which may extend to Rs5,000 or Rs200 for every day during which such failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance. Again, the methodology of calculation of such penalty is questionable, as the CBEC has yet not clarified the principles governing the same.

Section 77 also proposes penalties if a person required to pay tax electronically fails to do so.

And also for a person who issues invoice in accordance with the provisions of the Act or rules made there under, with incorrect or incomplete details or fails to account for an invoice in his books of account.

Any person who contravenes any of the provisions of this chapter or any rules made there under for which no penalty is separately provided in this chapter, is liable to a penalty which may extend to Rs5,000.

Moreover, Section 78 proposes penalties where a service provider fails to pay proper tax with the motive of fraud or collusion or wilful misstatement or suppression of facts. Here, the intention to evade tax has to be established before imposing the penalty.

It is notable that Section 76 and Section 78 are mutually exclusive. However, the position was different a few years back. It is only after the insertion "Provided also that if penalty is payable under this section, the provisions of Section 76 shall not apply" with effect from May 10, 2008 that the two sections are mutually exclusive and simultaneous penalty cannot be invoked.

Courtesy: From the desk of Monish Bhalla, Founder, www.servicetaxonline.com

Print Date: 04-01-2010