Tax Talk

The Monthly Service Tax Bulletin

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Editorial

Heartfelt thanks to all our readers. With this issue we are going to complete the first year of our publication. Yes! This is the 12th issue of our monthly service tax bulletin and this is giving us a sense of contentment and achievement. We are once again expressing gratitude to all our readers, as it is because of their encouragement, support and guidance, that we have been able to reach this mile stone.

A lot of apprehensions wrapped with feeling of astonishment pops up in our mind when we gaze at the current situation in service tax where a total of 4 Notifications only, has been issued in the last 3 months. As based on the past experience, the average number of Notifications that are issued in a year is almost 50 i.e. 4 Notifications were issued per month each year. On a comparative basis, the number of notifications issued this year is much lower. This incites both positive and negative vibes in our minds that either Service Tax is settling down or "something big" is accumulating which will flow down soon in future, at one go.

Eating at air conditioned or centrally heated restaurant with friends and family has become a pocket-pinching affair. In addition to a rise of West Bengal Value Added Tax to 14.5% with effect from April 1, 2013, the consumer will also have to bear the added cost of service tax at the rate of 4.944%, even if the restaurant does not have license to serve liqour. In few States of our country where liqour is banned, none of the restaurants were covered by service tax in the past. Now with change in exemption all the air conditioned or centrally heated restaurants in these States would also be liable to pay service tax from April 1, 2013.

We had already been awarded with the opportunity of having a glance of the service tax return to be filed for the period July 2012 to September 2012 vide Notification No. 1/2013 and with the e-version of the ST-3 return form introduced on 25th March 2013, the differences between the current and the earlier e-return form has become clear. It took the department more than one and a half year to synchronize the return form with the provisions of Point of Taxation Rules, 2011 which was made mandatorily effective from 1st July 2011.

The proposal of introduction of a monthly/quarterly service tax return seems to have taken a back seat as of now. It is presumed that the service tax return for the next half-year i.e. October 2012 to March 2013 will be filed on half yearly basis only as suggested from the Notification No. 01/2013-ST and other communications from CBEC.

Exporters facing difficult time are also receiving letters from the Department to pay service tax for last 5 years on services received by them and even consumed for the purpose of export. This is creating undue hardship on the exporters because they were under impression that they are not liable to pay service tax due to the assurance given by the Ministry of Commerce & Industry in the past.

The exemption/refund available to exporter is based on procedural formalities required to be complied pre or post export. Further, in cases where exemption is granted by refund based mechanism, the circuitous route of first paying the service tax and subsequently claiming refund of the same ultimately involves a lengthy process where most of the refunds either gets rejected or gets time-barred. The present hardship can only be saved by Central Government if it wishes for the same.

We by this newsletter aim to benefit all section of professionals and business entities. To further facilitate the process, we are posting FAQs in all our issues. In order to help us serve you better, we request you to forward your queries to our email-id 'office@goyalstax.com'. We endeavour to solve your queries in the subsequent issues.

If any of your friends and well wishers wants to receive this newsletter, please feel free to contact us at servicetaxgoyal@gmail.com.

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DUE DATES

CASE	Form	Due Date
Return for the period July 2012 to September 2012 (All Assessee)	ST-3	15th April 2013
Half Yearly Declaration (Exemption to Exporters)	EXP-2/ EXP-4	15th April 2013

Supply of Tangible Goods for Use

The service of 'Supply of Tangible Goods for Use' became taxable with effect from 16.05.2008.

As per general understanding the term 'tangible' means capable of being touched or discernible by touch. Therefore, the goods being supplied should be tangible goods i.e. having physical existence and form in order to attract liability under this category.

Taxability under the Current Provisions

In the new era of comprehensive taxation w.e.f. 01.07.2012, the definition of the term "service" as per Section 65B(44) of the Act stands as follows:

*"any activity carried out by a person for another for consideration, and includes a **declared service**, but shall not include-*

*(a) an activity which constitutes **merely**-*

……..

(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or

……….

Declared service

From 1st July'2012 onwards, Supply of tangible goods for use has been included in the list of Declared Service under point (f) of Section 66E, which reads as follows :

"*Transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods".*

'Transfer of right of goods' involves transfer of possession and effective control over such goods. Therefore the activity amounting to transfer of right to use such goods is not transaction of service but transaction of sale of goods.

However only transfer of custody along with permission to use or enjoy such goods does not lead to transfer of possession and effective control. This transaction would be considered to be in the nature of deemed service and would fall under service tax net.

The settled law here is that one transaction can be either a service or a sale. Hence both VAT and service tax cannot be levied on the same transaction. The intention here is to tax such supply of goods where no VAT/Sales Tax is leviable. Therefore, one would have to analyze each case (agreements, invoices, conduct of parties etc.) to find out whether there is a transfer of possession and effective control as it would determine whether the transaction is to be taxed as one of service or one of sale.

Significance and interpretation of the word 'merely' in the definition of Service

Only such transactions which merely fall in the nature of transfer of title in goods or immovable property would be considered as sale and shall not be included in definition of service. So, in case where a transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be outrightly excluded from the definition of service. Such transactions are liable to be treated in the following manner-

- If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words, the discernible portion of the transaction which constitutes a transfer of title in goods would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of service.
- In cases of composite transactions, i.e. transactions involving an element of provision of service and an element of transfer of title in goods in which various elements are so inextricably linked that they essentially form one composite transaction then the nature of such transaction would be determined by the application of the dominant nature test which is discussed below:
  - If the dominant nature of such a transaction is sale of goods or immovable property then such transaction would be treated as such.
  - If the dominant nature of such a transaction is provision of a service then such transaction would be treated as a service and taxed as such even if the transaction involves an element of sale of goods.

Transactions that do not amount to transfer of right to use goods and hence chargeable to service tax

(i) A car is given in hire by a person to a company along with a driver on payment of charges on per month/mileage basis. Here right to use is not transferred as the car owner retains the permissions and licenses relating to the cab and possession and effective control remains with the owner.

(ii) Supply of equipment like excavators, wheel loaders, dump trucks, cranes etc for use in a particular project where the person to whom such equipment is supplied is subject to such terms and conditions in the contract relating to the manner of use of such equipment, return of such equipment after a specified time, maintenance and upkeep of time, maintenance and upkeep of such equipment.

In this case since the receiver not being made free to use such equipment in any manner as he likes and conditions have been imposed on use and control of such equipment, the possession and effective control over such equipment has not been transferred even though the custody may have been transferred along with permission to use such equipment.

(iii) Hiring of bank lockers - Even though the contents of the locker would be in the possession of the hirer, the transaction does not involve the right to use goods as possession of the lockers is not transferred to the hirer.

(iv) Hiring out of vehicles where it is the responsibility of the owner to abide by all the laws relating to motor vehicles - No transfer of right to use goods as effective control and possession is not transferred.

(v) Hiring of audio visual equipment where risk is of the owner - No transfer of right to use goods as effective control and possession is not transferred.

Exemption in case of Goods Transport Agency

Mega exemption has been granted under point 22(b) of Notification 25/2012 from the whole of Service Tax if tangible goods i.e. a means of transportation of goods, has been supplied to a Goods Transport Agency.

What do you mean by Agricultural Produce

The Government has provided various exemptions to agriculture and agriculture related activities by way of inclusion in the negative list contained in Section 66D(d) of the Finance Act, 1994 as given below:-

Negative List

The services relating to agriculture or agricultural produce that are specified in the negative list are services relating to –

i) agricultural operations directly related to production of any **agricultural produce** including cultivation, harvesting, threshing, plant protection or seed testing;

ii) supply of farm labour;

iii) processes carried out at the agricultural farm including tending, pruning, cutting, harvesting, drying cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter essential characteristics of **agricultural produce** but makes it only marketable for the primary market;

iv) renting of agro machinery or vacant land with or without a structure incidental to its use;

v) loading, unloading, packing, storage and warehousing of **agricultural produce**;

vi) services provided by any Agricultural Produce Marketing Committee or Board or services provided by commission agent for sale or purchase of **agricultural produce**;

The definition of agriculture produce has been provided in Section 65 B (5) of the Finance Act, 1994 as given hereunder:-

"agricultural produce" means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market;

From the definition we can interpret that produce of agriculture which is saleable in primary market alone shall qualify the definition of agricultural produce. This means the produce of agriculture shall only qualify the above definition in case no processing is done or such processing is done to make the product fit for primary market. We now shall analyse the term 'produce of agriculture'. Produce of agriculture shall mean outcome of agriculture operation. Thereon we need to understand the term agriculture as defined in Section 65B(3) of the Finance Act, 1994 as reproduced below:-

"agriculture" means the cultivation of plants and rearing of all life-forms of animals, except the rearing of horses, for food, fibre, fuel, raw material or other similar products;

What is covered in agriculture is cultivation of plants, i.e. farming/harvesting of crops, and thus agricultural produce is the crops resulting from the agricultural operations. Hence, if the process carried out for bringing the item in existence falls under the definition of agriculture then the end product should be agricultural produce. The only variation in the above conclusion is that in case any additional process (which in substance does not qualify the definition of agriculture) is carried out on the agricultural produce to make it marketable for primary market then also the product after such processing will qualify the definition of agricultural produce. Now we shall take support of two items for a better understanding of the term 'agricultural produce' namely, rice and tea.

Rice

Rice in its raw form is known as paddy. The paddy is cultivated and harvested in the farm and has the protective covering of husk on it. The harvested rice in this form is commonly known as paddy rice. This paddy rice is usually sent outside the farm for shelling, milling and other processes as per the end use of rice.

The Education guide in its paragraph 4.4.6 states that *"Shelling of paddy would not be covered in the negative list entry relating to agriculture as this process is never done on a farm but in a rice sheller normally located away from the farm"*. Hence as per the above definition and the input from Education Guide, we understand that **paddy rice** is an agricultural produce and **rice** is not an agricultural produce as because the additional processes carried out on paddy rice to remove the husk etc, is not required to make it saleable for primary market. The paddy rice is normally saleable in the primary market and so the exemption listed in negative list and mega exemption may not apply to rice but shall be limited to paddy rice.

Further the Educational guide states that "... *if shelling is done by way of a service i.e. on job work then the same would be covered under the exemption relating to carrying out of intermediate production process as job work in relation to agriculture*". We feel that if shelling is considered to be in relation to agriculture then why the resultant 'rice' is not an Agricultural produce. Any outcome of job in relation to agriculture should be considered as agriculture produce following the definition of Agricultural produce.

Tea

Tea leaves are grown in the tea gardens and harvested by hand picking followed by processing the green leaves into black tea in a factory. This processing involves various stages like tending, pruning, cutting, drying cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling etc. at a factory either located within the tea garden or outside.

The Education Guide in its paragraph 4.4.4 provides that Plantation crops like rubber, tea or coffee are covered under agricultural produce. This means that the crops consisting of green leaves shall alone qualify as agricultural produce and not the black tea. In Mega Exemption Notification item 20 and 21 classify tea as foodstuff.

We feel that black tea has primary market and not the tea leaves, even though the leaves may be sold in some cases. Under the above contradictions a clarification is warranted on urgent basis. The Central Government had considered both tea and rice as an agricultural produce in the past as per the definition given below:-

*"Agricultural produce 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 makes it marketable and includes all **cereals**, pulses, fruits, nuts and vegetables, spices, copra, sugarcane, jaggery, raw vegetables fibres such as cotton, flax, jute, indigo, unmanufactured tobacco, betel leaves, tendu leaves, rice, coffee and **tea** but does not include manufactured products such as sugar, edible oils, processed food and processed tobacco."* (Notification No.13/2003-ST dated 20.06.2003)

We all are at a mess whether rice, tea and like produce would fall under the ambit of agricultural produce or not, post 1st July 2012.

Frequently Asked Question

Q What is the exemption to a Association on the charges collected from own members by way of reimbursement of charges or share of contribution for the common use of its members in a housing society or a residential complex?

A The service provided by a Association to its members can range from security of premises, maintenance of common passage, running, upkeep of lifts, etc for which reimbursement of charges or share of contribution is charged from the members.

Positive List Regime (upto 30.06.2012)

The following is the extract of the Notification No. 8/2007-ST dated 1st March 2007 which was valid upto 30th June, 2012:-

"………hereby exempts the taxable services, specified in sub-clause (zzze) of clause (105) of section 65 of the Finance Act, 1994 provided or to be provided, by a resident welfare association where the sole criterion for its membership is the residential status of a person in a residential complex or locality, to its members, from the whole of the service tax leviable thereon under section 66 of the said Act, ***subject to the condition*** *that the total consideration received from an individual member by the said association for providing the said services does not exceed three thousand rupees per month."*

As per the above stated provisions it clear that there was an exemption under the category of Club or Association Membership service, if the consideration for services provided by Resident Welfare Association to its member does not exceed Rs. 3000 per month. In this case the condition laid down for exemption was that the amount of consideration was less than equal to Rs. 3000. i.e., in case the consideration was Rs. 4000 per month then the whole amount was liable to service tax.

Negative List Regime (from 01.07.2012)

Mega Exemption Notification No. 25/2012-ST dated 20th June 2012 provides the following at entry No. 28(c):-

"……hereby exempts the following taxable services from the whole of the service tax leviable thereon under section 66B of the said Act, namely: Service by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution ***up to an amount of*** *five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;"*

As per the above entry it is clear that amount collected by association either as reimbursement or as share of contribution from the members of the society for availing the services of a person for the common use of all the members is exempted upto an amount of Rs.5000 per month per member. Therefore in the present scenario, if the share of any member is Rs. 7500 per month then only Rs. 2500 is leviable to service tax. Please note that the Association is also entitled to basic exemption of Rs. 10 lacs after taking the said former exemption.

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