Tax Talk

The Monthly Service Tax Bulletin

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Editorial

Happy Chartered Accountants Day!! Since past 64 years, our ICAI has been playing a significant role in the economic development of the country. I salute my profession and feel proud of being a member of the 2nd largest accounting body in the world. I have deep respect for this profession which gave me everything in life. It is a matter of privilege for us that with a start of only 1,700 members, now the strength of the members has reached beyond 2,18,000.

On GST front, the Prime Minister announced that GST would be rolled out only after the General Elections to be held in 2014. Moreover, due to resignation of Mr. Sushil Modi from the chairmanship of the Empowered Committee of State Finance Ministers on GST, the new Chairman would now have to start afresh, building consensus among all states. Thus, the apprehensions for the early implementation of GST, as thought earlier, are fading. However, this may be accorded as a boon, since the concerned persons got substantial scope to chalk out the GST implications, policies, etc. before its roll out, without just hopping for its launch in haste.

The States are now proposing that the dual control by way of CGST and SGST, should be only for taxpayers having turnover beyond Rs 1.5 crore and for those below this cut-off, there should be a single control of the States who would collect not only SGST but also CGST on behalf of the Centre.

A reminder to all the service tax assessees to get ready for filing the service tax return for the period October' 2012 to March' 2013 since the form for filing the return would be available by the end of July' 2013 as stated in Order No. 3/2013 dated 23.04.2013.

Recently, it has been observed that service tax assessees, whose proceedings with respect to appeals filed by them before the respective Authority are pending, are receiving letters from Department to deposit the demanded amount even during the pendency of stay application. Such demand is made by either referring Circular 967/01/2013-CX dated 01.01.2013, which we understand is applicable to Central Excise assessees and on which various Stay Orders have been granted by the Hon'ble High Courts stating that no coercive action should be taken by Indirect Tax Authorities till the time the stay petition is disposed off by the appellate authority, or referring old Supreme Court decision in the case of "Collector of Customs, Bombay Vs Krishna Sales (P) Ltd. [1994(73) E.L.T 519 (S.C.)]," which we feel is wrongly interpreted by the Authorities.

Certain clarifications with respect to the Voluntary Compliance Encouragement Scheme were issued vide Circular No. 169/4/2013-ST dated 13.05.2013 but the CBEC's job is not complete in all respect.

Clarification is required with respect to the assessees' eligibility for the application in the scheme on number of situations. Also, on a general understanding of the term "Tax dues", we understand that it means the service tax net of Cenvat cred it directly attributable to such service, but in Form VCES-1, no space has been provided for showing details of the Cenvat credit. This creates confusion for the assessees, whether tax dues means gross tax liability or it is after adjusting Cenvat credit, though the intention of the law is to pay the tax dues by cash and not in the form of Cenvat credit.

Clarification is also required as to whether the scheme is available in case of tax payable under the reverse charge mechanism, wrong availment of Cenvat credit or wrong utilization of Cenvat credit and number of other issues, which has been forwarded to IDT Committee of ICAI for seeking necessary clarification from the Board. Under these circumstances one should not haste in filing the declaration under the scheme.

Best Regards,

CA Sushil Kr Goyal

DUE DATES

CASE	Form	Due Date
Payment of Month / Quarter ending 30th June, 2013 (all assessees)	Cash/Cheque	5th July 2013
	E-Payment	6th July 2013
Revised return for the quarter July'2012 - September' 2012 (Due date of filing of original return was 30th April, 2013)	ST-3	90 days from filing of original return

Penalties

In our last issue we had discussed on imprisonment provision with respect to offences committed by any person in respect of Service Tax. In this issue, we would like to discuss the penalties under Section 76, 77, 78 and 78A of the Act.

__Failure to pay service tax__

Any person liable to pay service tax, fails to make such payment, is liable to a penalty, in addition to interest and tax, starting with the first day after the due date till the date of actual payment of the outstanding amount of service tax and shall be higher of:

(i) one hundred rupees for every day during which such failure continues, or

(ii) at the rate of one per cent of such tax, per month.

However, the total amount of the penalty payable shall not exceed fifty per cent of the service tax payable. *[Sec. 76 of the Act]*

__Penalty for suppression, etc.__

In case service tax is not levied or paid or has been short-levied or short paid or erroneously refunded by reason of fraud, collusion, willful mis-statement, suppression of facts, contravention of any of the provisions or rules made thereunder with the intent to evade payment of service tax, a penalty (in addition to service tax and interest) is required to be paid that shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded.

Cases where penalty will be reduced:-

Where true and complete details of transactions are available in the specified records, then penalty shall be reduced to 50%.

Further, if service tax and interest is paid within 30 days from the date of communication of order, the amount of penalty will be reduced to 25% of service tax payable provided such penalty is also paid within 30 days.

In case, value of taxable services does not exceed Rs. 60 lakh during the period covered under the notice or last preceding financial year, assessees have been given the extended period of 90 days instead of 30 days for discharging the reduced penalty of 25% along with service tax and interest.

Where the Appellate Authority or Court increases/ reduces the amount of service tax then the amount of penalty, as discussed above, shall be computed accordingly.

However where the service tax to be payable is increased by Appellate Authority or Court, then the benefit of reduced penalty of 25% will be available, if the increased amount of service tax, interest thereon and such increased penalty has also been paid within 30days or 90days, as the case may be, from the date of communication of the Order.

Meaning of specified records

"Specified records" means records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement the invoices recorded by the assessee in the books of account shall be considered as the specified records.

It is also provided that if penalty under this section is payable then provision of Section 76 will not apply. *[Sec. 78 read with Sec. 73 of the Act]*

__Penalty for contravention of rules and provisions__

a) In case a person:

  i) fails to take registration where it is mandatory to do so, or

  ii) fails to keep, maintain or retain books of account and other documents as required, or

  iii) fails to pay tax electronically, where it is mandatory to do so, or

  iv) issues invoice with incorrect or incomplete details or for failure to account for an invoice in the books of accounts,

then penalty may extend to ten thousand rupees.

b) Any person who fails to:

  i) furnish information called by an officer or

  ii) produce documents called for by a Central Excise Officer or

  iii) appear before the Central Excise Officer, when issued with a summon for appearance to give evidence or to produce a document in an inquiry,

shall be liable to a penalty which may extend to ten thousand rupees or two hundred rupees 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. *[Sec. 77(1) of the Act]*

Penalty not specified anywhere

Any person who contravenes any of the provisions for which no penalty is separately provided shall be liable for a penalty which may extend to rupees ten thousand. *[Sec. 77(2) of the Act]*

Penalty for offences by director, manager, secretary, etc. of the company

If a company commits any of the following contraventions namely:

(a) evasion of service tax; or

(b) Issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilization of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which payment becomes due,

then penalty shall be imposable, which may extend to one lakh rupees on any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for the conduct of business of such company and was knowingly concerned with such contravention. *[Sec. 78A of the Act]*

Penalty not to be imposed in certain cases

No penalty shall be imposable on the assessee for any failure referred in Section 76, 77 or first proviso to Section 78(1), if the assessee proves that there was reasonable cause for the said failure. *[Sec. 80 of the Act]*

Electricity Charges on sub-meters

Normally, we see a scenario wherein developers or housing societies are allotted an electric meter by the electric supply company or agency for the whole property's electricity connection. All the occupiers of the Society are provided with separate sub-meters for recording their individual electric consumption. The Electricity company or agency raises electricity bill for the said society in the name of the developer or society and the developer raises Debit Note on the occupiers of Society towards the same on the basis of sub-meter readings and pays the total bill to the Electricity company or agency. Usually, they do not have any profit on the bill amount as issued by the Electricity Board. Now, confusion arises whether such amount collected by the developers or housing societies on above basis is taxable under service tax or not.

Entry in Negative List

Clause (k) of Section 66D of the Act includes, *"transmission or distribution of electricity by an electricity transmission or distribution utility."*

Section 65B (23) of the Act defines electricity transmission or distribution utility as:

"Electricity transmission or distribution utility means the Central Electricity Authority; a State Electricity Board; the Central Transmission Utility or a State Transmission Utility notified under the Electricity Act, 2003; or a distribution or transmission licensee under the said Act, or any other entity entrusted with such function by the Central Government or, as the case may be, the State Government."

Services provided by a developer or housing society cannot be said to be in relation to transmission or distribution of electricity and so they cannot claim benefit of such entry in negative list. However, if such developer or housing society is entrusted with such function by the Central or a State Government or if they hold a distribution license under the Electricity Act, 2003 then they would be covered under this entry. In case of absence of such elements, the developers cannot avail the provisions of the negative list.

As per the seventh proviso of Section 14 of the Electricity Act, 2003, the appropriate Commission as per the said Act may, on an application made to it under Section 15, grant a license to any person to-

a) transmit electricity as a transmission licensee; or
b) distribute electricity as a distribution licensee; or
c) undertake trading in electricity as an electricity trader,

It further states that, *in case where a distribution licensee proposes to undertake distribution of electricity for a specified area within his area of supply through another person, that person shall not be required to obtain any separate license from the concerned State Commission and such distribution licensee shall be responsible for distribution of electricity in his area of supply.*

So, in case where a developer or housing society is a distribution or transmission licensee for the concerned property in discussion, services rendered by them will be covered under transmission or distribution of electricity and thus will not be taxable vide entry in negative list.

Pure Agent

Where the housing society or developer is not covered under the definition of '*Electricity transmission or distribution utility*', the question arises whether such amount received can be considered in capacity of pure agent as the same is taken on actual basis.

Rule 5 of Service Tax (Determination of Value) Rules, 2006 states that, in case where any expenditure or cost is incurred by the service provider as a pure agent of the service recipient, such expenditure or cost shall be excluded from the value of the taxable service, if all the conditions laid there in are satisfied and if the service provider fall under the definition of pure agent which is given as under:

"Pure Agent" means a person who-

(a) *enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;*
(b) *neither intends to hold nor holds any title to the goods or services as procured or provided as pure agent of the recipient of service;*
(c) *does not use such goods or services so procured; and*
(d) *receives only the actual amount incurred to procure such goods or services.*

In the discussed scenario, the electricity bill issued by the Electricity Board is in the name of the housing society or developer and not in the name of the occupiers which means that they hold the title on the electricity so procured. Hence the condition of being a pure agent and also the conditions specified in Rule 5 of Service Tax (Determination of Value) Rules, 2006 is not satisfied by such housing society or developer. Thus, they will not be able to claim exemption under the category of 'pu re agent'.

However, an alternative view was upheld in the matter of "Ticel Bio Park Ltd. [2012-33 (Taxmann.com 102-Chennai Bench)]", wherein it was stated that Electricity charges, towards electricity consumed by tenant, recovered on actual basis by landlord and paid to State Electricity Board shall not form part of taxable value as such sums are collected as 'pure agent' and are excludible in view of rule 5(2) of Service Tax (Determination of value) Rules, 2006. Thus, Electricity charges paid towards the electricity consumed, by the tenant and recovered on actual basis by the landlord are not includible in the value of Renting of Immovable property services. But this judgment is subject to further approval of higher authorities as such reliance cannot be placed on this judgement.

Electricity as goods

Section 3 of Central Excise and Tariff Act, 1985 provides that central excise duty is leviable on excisable goods manufactured in India and electrical energy is specified in tariff item 2716 00 00 of the 1st schedule of Central Excise and Tariff Act, 1985 which means electrical energy is covered under the definition of 'goods'.

Further, the West Bengal Value Added Tax Act, 2003 exempts electrical energy (item no. 13 of Schedule A) from VAT in West Bengal. Hence, VAT is not leviable on trading of electricity.

Conclusion

Under such circumstances, we are of the opinion that one can take the benefit of electricity as goods and avoid Service Tax. However, assessees are at a dilemma as to whether tax is leviable on such amount or not, whether they can avoid service tax. All we can do is to expect that CBEC issues some clarification on this, to resolve the confusions prevailing in the present scenario.

FAQ

Recent Changes

Q *We have received a bill for the advertisement in newspaper from the advertising agency and service tax has been charged on it. We understand that there is no service tax on the advertisement. Whether we should pay service tax on such advertisement bill?*

A Advertising agency is a person who books advertisement on behalf of the newspaper and collects advertisement charges. Advertisement is defined as *"any form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include advertisement made in person"*. The negative list is contained in Section 66D of the Act and according to clause (g) of the said Section, "selling of space or time slots for advertisements other than advertisements broadcasted through radio or television" is outside the scope of service tax. Thus, if the advertisement is by any mode, other than radio or television, then you are not liable to pay service tax as it is covered under negative list.

Q *In the above situation, the advertising agency is accepting the fact that the service tax is not applicable on advertisement but they said that tax is applicable on commission. I want to know whether service tax should be paid by me even if I am not paying any commission to the agency?*

A The advertising agency is getting commission from the newspaper company and they should collect service tax on this commission, only from the newspaper company. The person paying service charges should bear the burden of service tax, it should not be collected from you being the advertiser.

New Notification

A new Notification has been issued to amend the earlier Notification No. 06/2013-ST dated 18.04.2013 which exempted the taxable services provided or agreed to be provided against scrip under the Focus Market Scheme (FMS) by a person located in the taxable territory from the whole of the service tax leviable thereon under section 66B of the Act.

A conditional provision has been inserted in the earlier Notification that for the purpose of calculation of export performance or for computation of entitlement, the incremental growth shall be in respect of each exporter [Importer Exporter Code (IEC) holder] without any scope of combining the export for group company or for transferring export performance from any other IEC holder and the incremental growth shall be in terms of freely convertible currency to the designated markets. A list of the category of the exports that shall not be counted for the calculation of export performance or for computation of entitlement has also been provided.

Also the phrase 'Focus Market Scheme' has been substituted with 'paragraph 3.14.2 of the Foreign Trade Policy'.

[Notification No. 11/2013-ST dated 13.06.2013]

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