Tax Talk
The Monthly Service Tax Bulletin
Vol : 2 - Issue 9 ₹ 5/- 1st December 2013

Editorial

Very warm greetings in this alluring winter to all! Awaiting the onset of the New Year, we hope it would bring in a lot of prosperity in our lives. This season, The ICAI pulled up the warm quotient by organizing the International Conference, which was inaugurated by the Hon'ble President of India, Shri Pranab Mukherjee. This was undoubtedly a life time experience for everyone who was a part of it.

Another event held at the city of joy was the Interactive Session on Service Tax VCES 2013 on 26.11.2013, wherein the Hon'ble Union Finance Minister, Shri P. Chidambaram was present for an interactive discussion on VCES with the mass at large from various industries. During his interaction, the Finance Minister curtailed the fear expressed by the parties regarding chances of rejection of declarations made under the scheme, by categorically stating that the intention of the Government is to accept all or at least 99% of the applications. The 1% margin includes rare cases which fall under the specified categories of section 106(2) as notified with the scheme. He further stated that there are no reasons as to why assessees should have any kind of fear while opting for the scheme.

VCES has been an issue of enormous confusion in the current time phase. VCES, in simple terms, is a scheme that provides an opportunity to assessees wherein they can file a declaration of their part tax dues. However, there are several complexities in this scheme and this is not as simple as it sounds. Hence, while filing a declaration a person should weigh the various pros and cons associated to the scheme and act accordingly. In order to make the scheme successful, the Board and the Ministry are working hand in hand and have issued various clarifications and notifications from time to time. In line of the previous clarifications, recently on 25.11.2013, Circular No. 174/9/2013 - ST has been issued by the CBEC which has clarified many confusions of the prospective declarant under the scheme and other assessees. The same are discussed in detail in Page 3 of this issue.

Overall, in our view, the scheme appears to have been designed well and hopefully shall prove to be beneficial for everyone. However, before commenting on the merit of this scheme, we shall have to see the actual implementation of the scheme at the ground level and its practical viability.

Two new notifications have been issued by the Board. First, Notification No. 15/2013-ST dated 21.11.2013 specifies a due date within which Form A-3 has to be filed by a SEZ Unit or Developer, in which the details of the specified services received by it without the payment of service tax have to be furnished.

Another Notification No. 16/2013-ST dated 22.11.2013 which amends Service Tax Rules, 1994 provides that all assessees who have paid total service tax of one lakh or more (before amendment it was ten lakhs or more) including the amount paid by the utilization of CENVAT Credit in the preceding financial year must deposit their service tax liability electronically through internet banking.

We wish this issue will add some value and prove to be beneficial for the readers.

Best Regards,

CA Sushil Kr Goyal

21

DUE DATES

PAYMENT	Form	Due Date
Payment for month ending November 2013 (assessee other than individual, proprietorship firm, partnership firm and LLP)	Cash/Cheque	5th Dec. 2013
	E-payment	6th Dec. 2013
Payment under VCES, 2013 (not less than 50% of the declared tax dues).	Cash/Cheque/ E-payment	31st Dec. 2013

DUE DATES

RETURN	Form	Due Date
Revised return for the half year October 2012 - March 2013 (Due date was 10th September, 2013)	ST-3	90 days from filing of original return
Return for the quarter July 2013 to September 2013 (For SEZ Unit or Developer)	A-3	15th Dec. 2013
DECLARATION		
Declaration under VCES, 2013	VCES-1	31st Dec. 2013

Service Tax on Leasehold Property

Construction services have been specifically defined as declared service to mean construction of a complex, building, civil structure or part thereof (Commercial or Residential) intended for sale to a buyer, where any part of the consideration is received from the buyer before the issuance of completion certificate by the competent authority. In cases where the entire consideration is received from the buyer after issuance of completion certificate, no service tax is required to be paid on the same.

Currently the whole industry is following protective conviction and levies service tax on certain elements which may not even be taxable. One such area of dispute is construction on Long Term Leasehold land which is sub-leased to others (usually called as buyer) before construction on that is completed.

Across the country, divergent business models and practices are being followed in the real estate sector. Other factors being isolated, the most important factor which is affecting investor's decision is cost of the property and such cost is reasonably affected by service tax applicability on construction services. There has been a lot of ambiguity in the provisions related to service tax in the construction industry. In the scenario under this discussion, it has to be distinguished as to whether the property so constructed is given on long term lease basis (lease) or indivisible portion of land has been transferred (sale) in the name of the person acquiring the property. Leasehold properties are those in respect of which usually perpetual lease has been granted by lessor in favour of the lessee. Apart from lump sum payment sometimes annual/monthly, lease charges are required to be paid to the Land owner/ lessor who may be some person other than the developer. Such properties are not always unconditionally and freely transferable as freehold.

Unlike freehold properties, leasehold properties are not actually transferred. The lease rights are just extended to the acquirer of the property. Here, the taxability of such transactions comes into question and the basic element taxing such services i.e. ***intention for sale*** is somewhat found to be missing. When there is no sale at all, can such real estate properties be taxed under "Construction of Complex or Commercial Construction Services" or somewhere else?

The builder receives lump sum consideration in lieu of construction done by him and assignment of the lease to the buyer/acquirer. Assignment of such long term lease should be regarded as deemed sale of immovable property or otherwise is a question under dispute. Such long term lease assignments attract Stamp Duty under the State Government regulations and are regarded as transfer of immovable property. The issue here is whether such transfer, if accompanied by construction services provided by the builder/land owner, would attract service tax and this is to be decided subjectively as discussed hereunder.

Construction Vs. Works Contract

A query arises as to whether such construction service is to be considered as taxable under "Construction of Complex Services" or "Commercial Construction Services"? This purely depends upon determination of nature of the given transaction. The buyer considers the nature of transaction to be covered in the Construction of Complex Services and claims for abatement of 70% or 75% and hence taxable @ 3.708% or 3.090%. The main condition for availing such abatement of 70% or 75% is that the value of land should be included in the amount charged from the buyer. However, the properties developed on leasehold lands are sub-leased to the buyer and such sub-leasing does not pass on undivided interest in land to the buyer as is passed on in case of transfer of immovable properties. Accordingly, it can be construed that since consideration charged from the buyer does not include any portion for the value of land, such services should be considered as Commercial Construction Services and being classifiable as an "Original Work", as per the applicable valuation rules, 60% of the value charged shall be taxed under service tax.

Lease Vs. Sale

Contrary to the above, the contention of the builder is that as the property is developed on a leasehold land or freehold land and is leased or sub-leased to the buyer, no transfer of property takes place. Here again the taxability issue depends on the classification of property as a commercial or residential one.

Commercial Properties

"**Renting**" means "allowing, permitting or granting access, entry, occupation, usage or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and **includes** letting, **leasing**, licensing or other similar arrangements in respect of immovable property'. Since 'renting' is defined in a way to include these sorts of lease arrangements, the nature of transaction in question may construed to be of 'renting of immovable property' and the developer seeks to charge tax on the whole value charged or as it is deemed to be transferred in some set of laws, should also be treated as sale of property for service tax laws and tax to be paid after abatement.

The basic dispute in case of commercial properties is regarding the rate of tax and subsequently issues like availability of Cenvat credit also be seen.

Residential Properties

In case the property under question is a residential property, applicability of service tax on such transaction itself comes under dispute. Again determination of the nature of given transaction plays an important role as to whether the nature is that of a lease assignment or sale of immovable property.

Attention is invited to Section 66D of the Finance Act, 1994 prescribing the Negative List of services on which service tax is not applicable. Clause 'm' of the said section states that services by way of renting of residential dwelling for use as residence is not taxable under service tax net.

If the contention of the builder or developer to classify such transaction of assignment of lease as Renting of Immovable Property Services is taken into account for a residential property, the same may be covered by the aforesaid entry in the negative list of services. The contention of the buyer, to consider the transaction to be out of the coverage of service tax since 'services by way of renting of residential dwelling for use as residence' are included in the Negative List, is supportive but not conclusive.

The service tax liability on the above transactions have become subjective and cannot be specifically commented without perusing and properly assessing the agreements and all other related documents to arrive at a conclusion in relation to the actual nature of the transaction involved and the service tax applicability thereon. It is advisable that investors should not blindly follow the industry norms and before taking any decision should give a second thought on this area which may materially affect the cost factor for them. Guidance of experts in this field of service tax, before making an investment is advisable.

Voluntary Compliance Encouragement Scheme, 2013 - Clarifications

The Ministry of Finance intends to generate lots of revenue by introduction of the VCES, 2013 and in order to cope up with its target; immense active publicity is being done for the same. The other target of the scheme is to bring persons, who are evading tax, in the regular tax frame.

This is normal scenario, whenever something new happens in any field it needs lot of discussions and clarifications, the same is the case with the Voluntary Compliance Encouragement Scheme (VCES), 2013. CBEC had earlier issued clarification twice and another set of clarifications were provided by the Board on 25.11.2013. The doubts and questions still persist in the minds of the assessee. CBEC is now attempting not to refuse or reject any declarations as far as feasible. Few more issues were clarified vide this circular, and also the grounds for rejection of applications under the scheme are explained more transparently in this circular which are discussed hereunder.

Number of small issues are still to be answered mainly, these are raised by the officers of the department themselves while receiving the declarations filled by declarant. The point of concern is what will be the fate of the declarations received by the department. The Finance Minister in a recent interactive session at Kolkata has announced that a screening committee will be formed after 31st December, 2013 to look into the declaration that has been rejected and see how many of it can be accepted. The issues and their clarifications as covered by recent circulars are as follows:

- **Incomplete declaration.**

  It has already been directed by the board through internal letter No. 137/50/2013 – ST, dated 22.8.2013 that no declaration shall be returned and should be promptly received and acknowledged. Further, request for clarifications should be promptly addressed. In case of any defects, the assessee should be properly assisted to rectify the same. The main objective of the departmental authorities should be to accept all the declarations made and recover arrears of taxes.

  This clarification was issued because department used to return/reject the declaration on the ground that it was incomplete.

- **Different period or Issues.**

  A doubt was raised that declarations are being considered for rejections under Section 106(2) of the act even though the tax dues pertain to an issue which is different from the issue or period for which inquiry / investigation or audit was pending as on 01.03.2013.

  The Board clarified that there are four conditions under which the return can be rejected u/s 106(2) of the Finance Act, 2013.

  i) An inquiry or investigation in respect of service tax , not levied or not paid or short levied or short paid has been initiated by way of

     a) Search of premises under section 82 of the Act or'

     b) Issuance of summons under section 83 of the Act , or

     c) Requiring production of accounts , documents or other evidence under the Act or the rules made thereunder, or

  ii) When an audit has been initiated And such inquiry, investigation or audit is pending as on 1 March 2013.

  These conditions may be interpreted strictly and narrowly by the departmental authorities. Thus the concerned commissioner should ensure that no declaration should be rejected on senseless grounds or by taking a wider interpretation of the conditions.

  If the period or the issue of inquiry, investigation or audit can be properly identified from the summons or any other documents, the declaration only for that period or that issue, should be rejected.

  If the designated authority has reasons to believe that the declaration is covered by section 106(2), he shall give a notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating such reasons to reject the declaration. The Commissioner should ensure that this time line is followed very carefully and precisely.

- **Inquiries of roving nature.**

  The designated authority/ commissioner may take a fair view considering the facts and circumstances to decide each case as to whether the books were called for inquiry under section 106 (2) or under any other inquiry.

  Therefore, the benefit of VCES would be available after considering the above fact.

- **Payment before declaration.**

  An assessee can claim the benefit of the scheme in respect of the payment made by him after the announcement of Scheme, including the remaining tax dues if any, but before filing declaration under VCES.

  Further, it should be noted that the tax has not been paid utilising Cenvat Credit.

- **Declarations with no tax dues.**

  When service tax pertaing for a period covered by the scheme along with interest has been paid by the parties before the scheme came into effect, no declaration can be filed under VCES. However, the assessee may file a case for lenient view of the designated authority on the issue of penalties and other proceedings. In this regard, attention is invited towards sections 73 (3) and section 80 of the Finance Act, 1994 which talks about non imposition of penalty in cases where the assessee pays off its dues voluntarily before issue of notice to it and also about waiver of penalty in case of assessees proving to have a reasonable cause for the failure to comply with applicable provisions.

  This clarification is a very positive step of the board towards the VCES 2013 and may drive many assessees towards opting for the scheme and as rightly said by Honourable Finance Minister, it is a rare opportunity to make a fresh start, so we should make best use of it. However, some issues still remain ambiguous and one such point is that when irregular utilization of CENVAT credit is considered as eligible for benefit of the scheme, going into the same line, would taking incorrect rate of abatement be also eligible as undeclared dues considering the gross taxable amount is already disclosed in the regular returns?

[Circular 174/9/2013 - ST dated 25/11/2013]

NEW NOTIFICATION

DUE DATE FOR SEZs TO FILE DETAILS

The conditions and procedures laid for availing exemption for services provided to SEZ Unit or Developer has been changed several times since the introduction of this exemption.

CBEC has laid down new procedure to grant exemption on the specified services received by the SEZ Unit or the Developer and used exclusively for the authorized operation w.e.f. 01.07.2013. One of the conditions for exemption is that the SEZ Unit or the Developer furnishes to the jurisdictional Superintendent of Central Excise a quarterly statement, in Form A-3, furnishing the details of specified services received by it without the payment of service tax.

First time, a return (in Form A-3) has to be furnished in case of availing exemption but unfortunately the earlier Notification No. 12/2013-ST dated 01.07.2013 which provided the said exemption did not specify any time limit or due date for furnishing of the required details.

A notification which specifies due date within which Form A-3 has to be furnished has been prescribed. Accordingly, Form A-3 is to be submitted by the 30th day of the month following the particular quarter for furnishing the details of specified services received by an SEZ Unit or Developer without payment of service tax.

However, for the quarter July'13 to Sept'13, the form shall be furnished by 15th December, 2013 so as to give the assessees sufficient time to furnish the same.

[Notification 15/2013-ST dated 21.11.2013]

MANDATORY ONLINE TAX PAYMENT

E- Payment of service tax was first introduced on 10.9.2007. The assessee who paid service tax of Rs 50 lakhs or more in the preceding financial year or in the current financial year had to deposit service tax electronically, through internet banking.

Later, with effect from 1.4.2010 the assessee who had paid a total service tax of Rs. 10 lakh or more including the amount paid by utilization of CENVAT credit, in the preceding financial year, shall deposit the service tax liable to be paid by him electronically, through internet banking. The limit of Rs. 10 Lakh is now reduced to Rs. 1 Lakh and will be effective from 01.01.2014.

Henceforth, from 1st January, 2014, all assesses who have paid total service tax of Rs. 1 Lakh or more including the amount paid by the utilization of CENVAT credit in the preceding financial year, have to deposit the service tax electronically, through internet banking.

On a practical analysis, keeping in mind the basic exemption limit of Rs.10 Lakhs and tax payable at current rate of 12.36% on Rs.10 Lakhs being Rs.1,23,600/- it may be conferred that this amendment will ensure that henceforth, almost all service providers will have to pay their tax dues electronically since service tax liability below one lakh shall be rarely found in the practical scenario, barring the assessees liable to pay tax only as a service receiver under reverse or joint charge mechanism.

[Notification 16/2013-ST dated 22.11.2013]

BOOK POST

Published from :

Tax Talk

Stephen House
Room No. 64, 4th Floor
4, B.B.D. Bag (East) Kolkata - 700 001

Printed & Published by Mrs. Reena Goyal on behalf of **Goyal Tax Services Pvt. Ltd.,** (Owner) Stephen House, Room No. 64, 4 B. B. D. Bag (East), 4th Floor, Kolkata-700 001 Phone: 22624632/33, Email: office@goyalstax.com, Printed at **CDC Printers Pvt. Ltd.,** Tangra Industrial Estate-II (Bengal Pottery), 45, Radhanath Chowdhury Road, Kolkata-700 015, Tel: 2329 8856, Email:cdc@cdcprinters.com