Rs. 5/-

Tax Talk

The Monthly Service Tax Bulletin

September 2015 1 Vol: 3 Issue : 6

Editorial

Heartiest welcome to Sri S. K. Panda as the Chief Commissioner of Service Tax, Kolkata, Sri Bijay Kumar as Principal Commissioner of Kolkata–I Service Tax and Sri Ashutosh Awasthi as Commissioner (Appeals)-II, Kolkata.

A significant change revamping the earlier penal provisions has been brought by the Finance Act, 2015. The provisions now are much more stringent and objective and accommodates no space for any discretion of the authorities since the provision enabling waiver of penalties in case of reasonable cause has been omitted ignoring the clause of natural justice. A clarification has been issued with regards to issuance of show cause notice in case of involving the extended period of limitation, where the assessee pays tax, interest and 15% penalty as prescribed and with regards to the officer, who is competent to conclude the proceeding. Such clarification has been issued to reduce litigation as well as paper works and compliance formalities. The circular is discussed in detailed at Page – 2.

A landmark judgement has been delivered by Supreme Court, whether service tax is leviable on works contract prior to 01.06.2007. This issue has traversed through all the Benches of the CESTAT, several High Courts and recently the famous Five Member Bench of the CESTAT. Finally, this issue has been put an end in favour of the assessee that no service tax is payable on works contract prior to 01.06.2007.

Recently, two judgments have been passed by the Hon'ble CESTAT, Delhi on inclusion of value of free materials supplied by the recipient to the provider of service in the gross amount charged for the purpose of service tax valuation. The decisions in both the cases placed reliance on the case law Bhayana Builders (P) Ltd v. Commissioner of Service Tax, Delhi as per which the value of goods and materials supplied free of cost would be outside the taxable value and the gross amount charged. However, one who wants to take the benefit of these case decisions must ensure whether the case is directly related to his case since the case is not a blanket decision suitable for all cases. The case has been discussed in detail at Page – 3.

The Monsoon Session of the Upper House of the Parliament ended without the passage of the Goods and Services Tax (GST) Constitutional Amendment Bill. Seeing the uncertainty, there is a confusion in the minds of stakeholders about the introduction of GST. According to the present situation it can be concluded that GST will be surely introduced in 2016 if not 01.04.2016. Let keeps the finger cross and hopes that its get through then biggest hindrance will be crossed.

We hope this newsletter will add some value and prove to be beneficial to the readers. We highly solicit suggestions/opinions of the readers. Please feel free to convey your views at servicetaxgoyal@gmail.com.

We are regularly receiving request for early issues of Tax Talk. Understanding the needs of our valued readers we have posted soft the copy of the newsletter at our website. You may refer all earlier issues of Tax Talk at www.gstpeople.com.

Editorial Board

DUE DATES		
PAYMENT	**FORM**	**DUE DATE**
"Payment for Month ending August, 2015 (assessees other than individual, proprietorship firm, partnership firm and LLP)"	E-Payment	6th September, 2015

Clarification on Section 73, 76 and 78

Consequent to the amendments made to section 73, 76 and 78 of the Finance Act, 1994 and section 11AC of the Central Excise Act, 1944, vide Finance Act, 2015 with effect from 14.05.2015, CBEC issued clarifications with regard to detections made during audit, investigation or scrutiny, keeping in mind the need to reduce litigation as well as paperwork and compliance formalities.

Qus: Does a SCN have to be issued in a case involving the extended period of limitation, where the assessee pays the tax/duty, interest and 15% penalty as prescribed?

Ans: In a case involving the extended period of limitation, if an assessee pays the service tax/central excise duty, interest and penalty equal to 15% of the tax/duty and makes a request in writing that a written SCN may not be issued to them, then in such cases the SCN can be oral and the representation (if he desires) against it also oral. In other words, an assessee can request for an informed waiver of a written SCN. The Supreme Court in the case of Commissioner of Customs, Mumbai versus Virgo Steels reported in **2002(141) E.L.T 598** (S.C.) has held that:

14. From the ratio laid down by the Privy Council and followed by this Court in the above cited judgments, it is clear that even though a provision of law is mandatory in its operation if such provision is one which deals with the individual rights of person concerned and is for his benefit, the said person can always waive such a right.

15. Bearing in mind the above decided principle in law, if we consider the mandatory requirement of issuance of notice under Section 28 of the Act, it will be seen that that requirement is provided by the Statute solely for the benefit of the individual concerned, therefore, he can waive that right. In other words, this Section casts a duty on the Officer to issue notice to the person concerned of the proposed action to be taken. This is not in the nature of a public notice nor any person other than the person against whom the proceedings are initiated has any right for such a notice. Thus, the right of notice being personal to the person concerned the same can be waived by that person.

16. If the above position in lab IS correct, Which we think it is, Mls Virga Steels, having specifically waived its right for a notice, cannot now be permitted to turn around and contend that the proceedings initiated against them are void for want of notice under Section 28 of the Act, so as to frustrate the statutory duty of the Revenue to demand and collect customs duty which Mls Virgo Steels had intentionally evaded.

Although this decision is in relation to section 28 of the Customs Act, 1962, the principles laid down are equally applicable to SCNs issued under other statutes. Hence, an assessee can waive the requirement of a written SCN.

Further, section 124 of the Customs Act, 1962 provides, inter alia, that no order confiscating any goods or imposing any penalty on any person shall be made unless the owner of the goods or such person is given a notice in writing, an opportunity of making a representation in writing and a reasonable opportunity of being heard. The section also provides that the notice and the representation may, at the request of the person concerned, be oral. This provision has been made applicable to the Central Excise Act, 1944 vide Notification No. 68/63-Central Excise dated 04.05.1963 issued under section 12 of the Central Excise Act, 1944. The said section of the Central Excise Act is also applicable to service tax vide section 83 of the Finance Act, 1994.

If the grounds on which the department feels that there has been short/ non-payment of tax/duty are intimated to the assessee orally with its quantification and the assessee indicates in writing that he has been informed about such grounds and he accepts the grounds and the quantification and is waiving the requirement of a written SCN, then a written SCN need not be issued.

Further, clause (i) of the second proviso to section 78 of the Finance Act, 1994 and clause (d) of sub-section (1) of section 11AC of the Central Excise Act, 1944 refer to a thirty day period, from the date of service of the notice, within which the assessee may make the payment of tax/duty, interest and reduced penalty of 15%. In case the assessee makes a written request for waiver of a written SCN, the thirty day period can be computed from the date of receipt of such a letter by the department.

Qus: Who is competent to order conclusion of proceedings if conditions meriting conclusion of proceedings are fulfilled?

Ans: Conclusion of proceedings may be approved by an officer equal in rank to the officer who is competent to adjudicate such cases. The cases can be closed by offices of DGCEI/Executive Commissionerate/Audit Commissionerate, as the case may be. If multiple issues involving different monetary values arise from same proceedings, then the sum total involved in all the issues arising from the same proceeding should be considered for conclusion of proceedings. The conclusion of proceedings should invariably be intimated to the assessee in writing. There is no need to issue an adjudication order. Further, there is no need to undertake review of such conclusion of proceedings.

It is further clarified that as per section 73(3) of the Finance Act, 1994, in cases not involving fraud, suppression of facts ,etc, if the assessee pays the tax and interest thereon, on the basis of his own ascertainment or that ascertained by the department, no penalty is payable and no show cause notice shall be served under sub-section (1) of section 73 in respect of the amount so paid. Further, as per provisions of clause (i) of proviso to section 76, in such cases not involving fraud, suppression of facts ,etc, if the tax and interest thereon is paid within 30 days of the issuance of SCN, no penalty shall be payable and the proceedings shall be deemed to be concluded. These two provisions have to be read harmoniously to conclude that in cases not involving fraud, suppression of facts,etc, if the assessee pays the tax along with interest, either within 30 days of issuance of SCN or before the issuance of SCN, then in such cases proceedings shall be deemed to be concluded. Legal provisions for similar closure in central excise are present in clause (a) of sub-section 11AC of Central Excise Act, 1944.

[F. No. 137/46/2015- Service Tax dated 18.08.2015]

Tax on Works Contract

Long awaited dispute whether the tax is leviable on works contract service even prior to 01.06.2007 has now come to an end with the landmark judgement of Apex Court in the case of Gannon Dunkerley.

There were conflicting views by different High Courts with Delhi High Court in G D Builders case holding that Service Tax is applicable on Works Contracts even before 01.06.2007. Recently, the Five Member Larger Bench of the CESTAT where the three Technical Members in majority overruled the two Judicial Members (including the President) by holding that service elements in a composite (works) contract (involving transfer of property in goods and rendition of services), can be classifiable under "Commercial or Industrial Construction"; "Construction of Complex" or "Erection, Commissioning or Installation" and made liable to service tax even prior to 01.06.2007.

Though the Justice Raghuram, the President of the CESTAT observed that the G. D. Builders decision is and with great respect to the formidable weight accorded to a jurisdictional High Court, in error on per incuriam and sub silentio grounds. He observed that the Karnataka and Madras High Courts, in Turbotech Precision Engineering Pvt. Ltd. and in Strategic Engineering Pvt.Ltd have clearly concluded that a works contract is not leviable to service tax prior to 01-06-2007. However, the majority was against them.

The Apex Court without any ambiguity terms ruled that Works Contracts cannot be taxed before 01.06.2007 under five different heads, i.e., Consulting Engineer, Erection, Commissioning or Installation, Technical Testing and Analysis, Commercial or Industrial Construction and Construction of Complex services.

The Apex Court has very beautifully explained that a closer look at the Finance Act, 1994 would show that the five taxable services referred to in the charging section 65(105) would refer only to service contracts simpliciter and not to composite works contracts.

Further, under Section 67, the value of a taxable service is the gross amount charged by the service provider for such service rendered by him. This clearly shows that what is referred to in the charging provision is the taxation of service contracts simpliciter and not composite works contracts. It shall also be noticed that no attempt to remove the non-service elements from the composite works contracts has been made by any of the aforesaid sections by deducting from the gross value of the works contract the value of property in goods as the same has been made in Rule 2(A) of Service Tax (Determination of Valuation) Rules, 2006.

In our opinion no such litigation was required. The law was amply clear that service tax was not leviable prior to 01.06.2007. However, in order to harvest the revenue the department went to unproductive litigation, involving thousands of crores of liability and hundreds of cases.

Free Supply of Materials

The taxability and valuation of free supply of goods during the course of rendering Works Contract Services, Repairs and Maintenance Service, Construction Service, etc., has always been a point of dispute. In terms of Section 67 of the Finance Act, service tax is payable on gross value of taxable services, which includes both monetary and non-monetary consideration. It is an area of litigation whether value of goods supplied free of cost by the service recipient to the service provider should be included for the purpose of service tax valuation or not. The Larger bench of the Hon'ble Tribunal in Bhayana Builders case has held that the value of goods and materials supplied free of cost by a service recipient to the provider of the taxable Construction service, being neither monetary or non-monetary consideration paid by or flowing from the service recipient, accruing to the benefit of service provider, and would be outside the taxable value or the gross amount charged, within the meaning of the later expression in Section 67 of the Finance Act. However, it is worth here to mention that the Larger Bench decision was in the context of 'Construction services' and that also for the period prior to the Negative List regime of Service tax.

Under the Negative List regime (w.e.f July 1, 2012), the Abatement Notification No. 26/2012-ST dated June 20, 2012 (effective from July 1, 2012) defines the amount charged shall be the sum total of the amount charged for the service including the fair market value of all goods and services supplied by the recipient(s) in or in relation to the service, whether or not supplied under the same contract or any other contract, after deducting- (i) the amount charged for such goods or services supplied to the service provider, if any; and (ii) the value added tax or sales tax, if any, levied thereon. Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Similarly, for valuation of 'Works contract services' in terms of Rule 2A of the Service tax (Determination of Value) Rules, 2006, duly amended vide Notification No. 24/2012-ST dated June 6, 2012 where the tax payer has an option to pay Service tax on a specified percentage of the total amount charged, which also includes fair market value of all goods and services supplied in or in relation to the execution of the Works contract

Thus, the Larger Bench decision in Bhayana Builders case and the present judgment of the Hon'ble CESTAT, Delhi in Millennium Constructions Pvt. Ltd. [2015(39) S.T.R 477 (Tri.-Del)] and Capital Builders [2015(39) S.T.R 478 (Tri.-Del)] has provided a great relief to various pending litigations for the period prior to July 1, 2012.

GST Updates

The idea of implementation of the Goods and Services Tax is yet to take a longer time as it seems from the outright behavior of the opposition. Continuous allegations from the opposition are making it very difficult for the ruling party to gear up for the implementation of the GST. The opposition is all set to have word with the Finance Minister on the matter of passing the GST bill. The opposition spokesperson while addressing media persons said "GST is good and simple tax. But this bill is neither good nor simple". He further added that the Finance Minister should have a meeting with Dr. Manmohan Singh and P Chidambaram so as to pave an easier path for framing and implementing the GST law although the ministry is regularly showing some growth in this regard. It seems from the recently updated website which comes with a GST column.

An order No 01/Ad.IV/2015 was issued on 31.07.2015 which states that "Upon the decision of the Board to create a GST Directorate in Delhi by Shifting DGST, Mumbai to Delhi, the directorate General of Service Tax will be named as Directorate General of Goods and Service Tax (DGGST) w.e.f 01.08.2015".

Again an order was issued on 27.08.2015 which shows that the Government is continuously trying to clarify the issues pertaining to faster implementation. For this the Government has come up with orders stating the terms of reference where it provides that with the approval of the competent authority it has become necessary to clearly delineate the roles of the GST policy wing in CBEC and the GST Directorate.

As per the said order the policy wing will be performing several functions such as a) dealing with all policy matters relating to GST including the related legislation, b) Formulating CBEC's views on the GSTC Secretariat and also matters relating to the subsuming of various central taxes in the GST c) Handling various parliamentary matters related to issues raised in parliament including parliamentary questions to GST will also be handled by the policy wing. d) The policy wing will interact with the Empowered Committee and State Governments and will assist CBEC in finalizing its views in relation to various facets of GST. However, the Directorate of GST shall be headed by a principal Director General and Headquarters will be in Delhi. Further several duties of the Directorate of GST has also been laid down.

BOOK POST

Published from :

Tax Talk

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

Owner: M/s Goyal Tax Services Pvt. Ltd., **Printer & Publisher:** Mrs. Reena Goyal Published from Stephen House, Room No. 64, 4 B. B. D. Bag (East), 4th Floor, Kolkata-700 001 And **Printed from** M/s CDC Printers Pvt. Ltd., Tangra Industrial Estate-II (Bengal Pottery), 45, Radhanath Chowdhury Road, Kolkata - 700 015. **Editor:** CA Sushil Kumar Goyal.

Date of Publication : 1st September 2015

Postal Registration No. KOL RMS/465/2015-17

Registration under RNI No. WBENG/2013/55099