Volume-8 March-2015 Pages 1-20

SBS Wiki

monthly e-Journal

By

SBS and Company LLP
Chartered Accountants

CONTENTS

INCOME TAX

DRAFT INCOME COMPUTATION AND DISCLOSURE STANDARD (ICDS)

Contributed by CA Ram Prasad

This Income Computation and Disclosure Standard is applicable for computation of income chargeable under the head "Profits and gains of business or profession" or "Income from other sources" and not for the purpose of maintenance of books of accounts.

In the case of conflict between the provisions of the Income-tax Act, 1961 ("the Act") and this Income Computation and Disclosure Standard, the provisions of the Act shall prevail to that extent.

Revenue Recognition:

"Revenue" is the gross inflow of cash, receivables or other consideration arising in the course of the ordinary activities of a person from the sale of goods, from the rendering of services, or from the use by others of the person's resources yielding interest, royalties or dividends.

(Words and expressions used and not defined in this Income Computation and Disclosure Standard but defined in the Act shall have the meanings assigned to them in that Act.)

Scope

This Income Computation and Disclosure Standard deals with the bases for recognition of revenue arising in the course of the ordinary activities of a person from

(i) The sale of goods;

(ii) The rendering of services;

(iii) The use by others of the person's resources yielding interest, royalties or dividends.

This Income Computation and Disclosure Standard do not deal with the aspects of revenue recognition which are dealt with by other Income Computation and Disclosure Standards.

Sale of Goods:

- The revenue shall be recognised when the seller of goods has transferred to the buyer the property in the goods for a price or all significant risks and rewards of ownership have been transferred to the buyer and the seller retains no effective control of the goods transferred to a degree usually associated with ownership.

- Where the ability to assess the ultimate collection with reasonable certainty is lacking at the time of raising any claim for escalation of price and export incentives, revenue recognition in respect of such claim shall be postponed to the extent of uncertainty involved.

Revenue shall be recognised when there is reasonable certainty of its ultimate collection.

Disclosure:

In a transaction involving sale of good, total amount of claim raised for escalation of price and export incentives but not recognised as revenue during the previous year along with nature of uncertainty about such claims.

Rendering of services:

Revenue from service transactions shall be recognised by the Percentage completion method. Under this method, revenue from service transactions is matched with the service transactions costs incurred in reaching the stage of completion, resulting in the determination of revenue, expenses and profit which can be attributed to the proportion of work completed.

Income Computation and Disclosure Standard on construction contract shall *mutatis mutand is* apply to the recognition of revenue and the associated expenses for a service transaction

Disclosure:

(I)
- The amount of revenue from service transactions recognised as revenue during the previous year ; and
- The methods used to determine the stage of completion of service transactions in progress.
- For service transactions in progress at the end of previous year:

(ii) Amount of costs incurred and recognized profits (less recognized losses) upto end of previous year;
(iii) The amount of advances received; and
(iv) The amount of retentions.

The transitional provisions of Income Computation and Disclosure Standard on construction contract shall *mutatis mutandis* apply to the recognition of revenue and the associated costs for a service transaction undertaken on or before the 31st day of March, 2015 but not completed by the said date.

The Use of Resources by Others Yielding Interest, Royalties or Dividends:

- Interest shall accrue on the time basis determined by the amount outstanding and the rate applicable. Discount or premium on debt securities held is treated as though it were accruing over

the period to maturity.

- Royalties shall accrue in accordance with the terms of the relevant agreement and shall be recognised on that basis unless, having regard to the substance of the transaction, it is more appropriate to recognise revenue on some other systematic and rational basis.

- Dividends are recognised in accordance with the provisions of the Act.

Transitional Provisions:

Revenue for a transaction undertaken on or before the 31st day of March, 2015 but not completed by the said date shall be recognised in accordance with the provisions of this standard for the previous year commencing on the 1st day of April, 2015 and subsequent previous year. The amount of revenue, if any, recognised for the said transaction for any previous year commencing on or before the 1st day of April, 2014 shall be taken into account for recognizing revenue for the said transaction for the previous year commencing on the 1st day of April, 2015 and subsequent previous years.

This article is contributed by CA Ram Prasad, Partner at SBS and Company LLP, Chartered Accountants. The author can be reached at caram@sbsandco.com

SERVICE TAX

COMPLETE STUDY ON RENTING OF IMMOVABLE PROPERTY – SERVICE TAX

Contributed by CA Sri Harsha

In continuation to the series of articles on real estate transaction, we bring vide this edition, a complete study of service tax impact on renting of immovable property.

1. Renting of Immovable Property Service:

   a. Applicability of Service Tax:
   i. Commercial to Commercial;
   ii. Residence to Commercial;
   iii. Commercial to Residential;
   iv. Residential to Residential;
   b. Valuation under Service Tax;
   c. Impact of Cenvat Credit;
   d. Reverse Charge Mechanism;
   e. Issues in Small Service Provider Exemption;
   f. Impact of Place of Provision of Service Rules, 2012
   g. Frequently Asked Questions (FAQ's)

2. Construction of Residential/Commercial Complexes/Villas:

   a. Evolution of service tax on construction industry – A glance;
   b. Understanding the Works Contract;
   c. Rationale for Entries under Declared Services;
   d. Applicability of Service Tax – Construction of Complex:
   i. Services Provided to the Ultimate Customers;
   ii. Services Provided to the Land Owners in Joint Development Agreement;
   iii. Preferential Location and other Services;
   iv. Valuation thereof;
   e. Valuation under Service Tax – Works Contract other than Construction of Complex;
   f. Impact of Cenvat Credit;
   g. Reverse or Partial Charge Mechanism;
   h. Impact of Place of Provision of Service Rules, 2012
   i. Frequently Asked Questions (FAQ's)

Renting of Immovable Property Services:

Applicability of Service Tax:

From Inception to 30.06.2012:

Renting of immovable property service is taxable with effective from 01.06.2007. Initially services 'in relation' to renting of immovable property service were only covered under the tax net. The trade was under a belief that only services in relation to renting of immovable property were covered and mere renting of immovable property was still outside the tax net. However, with an amendment introduced vide 01.07.2010 with retrospective effect, the activity of 'mere renting of immovable property' was also covered under the tax net.

From 01.07.2012 to till date:

Under the new tax regime which is effective from 01.07.2012 colloquially called as 'Negative List Regime', the activity of mere renting of immovable property service is declared to be service vide Section 66E of the Finance Act, 1994. Hence, it is very clear that the renting of immovable property attracts service tax in the Negative List regime.

The phrase 'renting' has been defined vide Section 65B (41) of the Act as "means allowing, permitting or granting access, entry, occupation, use 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".

From the above definition, it can be understood that the phrase 'renting' is wide in its ambit and covers all the type of transactions that the trade and business enter in day to day business. The transfer of possession or control which is very vital criterion is not a pre-requisite for calling the transaction as 'renting' under service tax law. Hence, all the transactions by whatever name called which are in substance 'renting' are taxable.

Coverage under Negative List and Mega Exemption Notification:

Under the negative list regime, all activities are taxable unless specified in the negative list or such an activity finds a place in the Notification No 25/2012-ST dated 20.06.2012 (colloquially called as 'Mega Exemption Notification'). The negative list vide entry (m) of Section 66D covers the activity of 'services by way of renting of residential dwelling for use as residence'and hence the said activity does not attract the impact of service tax. Further, the mega exemption notification vide entry 5(a) covers activity of 'renting of precincts of a religious place meant for general public' and accordingly such a transaction does not attract service tax.

Nature of Transactions and Impact of Service Tax thereon:

It is very common that the trade and business enter into variety of agreements depending upon the circumstances in existence. This section of the book aims to analyse sample of such transactions and impact of service tax on such transactions. The entire variety of transactions can be comprehended as under:

I. Commercial to Commercial;
ii. Residential to Commercial;
iii. Commercial to Residential;
iv. Residential to Residential;

Commercial to Commercial:

The transactions entered between commercial entities for exploiting the commercial usage of real estate properties are covered under the said category. The exemption or coverage in the negative list is restricted either for residential dwelling or religious usage by general public. Hence, all the transactions between the commercial entities in any form/nature/style/name of renting are covered under the ambit of service tax.

Residential to Commercial:

The transactions entered by individual owners of residential complex with the companies for letting out the said flats for commercial usage by the later are covered under the said category. For example an individual buys a flat in a residential apartment and lets out the same to the software company on rental basis. The software company uses such flat for accommodation of its employees and pays rental to the individual owner.

In such a scenario, the said service provided by the individual owner shall attract service tax since the negative list covers only such service of letting out of a residential dwelling for residential usage. In the instant case, the individual owner has let out the residential dwelling for commercial purpose and hence the said service attracts service tax. The same is clarified by the Board's Education Guide vide Para 4.13.3, which is reproduced as under:

4.13.3 Would the nature of renting transactions explained in column 1 of the table below be covered in this negative list entry?

1	2
If - a residential house taken on rent is used only or predominantly for commercial or non-residential use.	*Then - the renting transaction is not covered in this negative list entry. The renting transaction is not covered in this negative list entry because the person taking it on rent is using it for a commercial purpose.*

Commercial to Residential:

The transactions entered by a commercial entity pertaining to renting of a residential dwelling unit for residence usage to an individual are covered under the said category. For example, a company owns a flat in an apartment which is partly used for commercial and residential purposes. The company lets out such residential dwelling to Mr X for his residential purpose. In such a scenario the said activity shall be covered under the negative list entry since letting out of residential dwelling for residential use is satisfied in the instant case.

However, if the residential flats are given on rent for temporary stay for various persons, then the said services are not covered under the negative list and accordingly subjected to service tax since the purpose of residential use has been defeated when the said flat is given for various persons from time to time. The service apartments will be covered under the said instance and accordingly subjected to tax.

The same is clarified by the Board's Education Guide vide Para 4.13.3, which is reproduced as under:

4.13.3 Would the nature of renting transactions explained in column 1 of the table below be covered in this negative list entry?

1	2
If - (v) furnished flats given on rent for temporary stay (a few days)	*Then - such renting as residential dwelling for the bonafide use of a person or his family for a reasonable period shall be residential use; but if the same is given for a short stay for different persons over a period of time the same would be liable to tax..*

Residential to Residential:

The transactions entered for letting out residential dwelling for residential use are covered in the said category. As discussed above when the residential dwellings are rented out for residential usage, the said services are covered under the negative list and accordingly service tax is not required to be paid.

Valuation under Service Tax:

Section 67 of the Finance Act, 1994 deals with valuation of services. As per Section 67 ibid, the gross amount charged for the services provided shall be the value for taxation. In the instant case, the rent which is the gross amount charged for the service provided has to be taken for discharging service tax. The property tax paid for the rented out property can be claimed as abatement from the taxable value vide Notification No. 29/2012-ST dated 20.06.2012 and on the balance amount service tax shall be paid @ 12.36% (the present rate).

Impact of Cenvat Credit:

The eligibility of the Cenvat Credit pertaining to the renting of immovable property service both for the service provider and service receiver is a contentious issue. We shall discuss the eligibility of Cenvat Credit for service provider and service receiver separately in below paragraphs.

Understanding of definition of 'Input Service' – Cenvat Credit Rules, 2004:

Before examining the issue, it is very important for the reader to note the changes that have taken place in the definition of 'input service' as laid down vide Rule 2(l) of Cenvat Credit Rules, 2004. Earlier to 2011, the definition of 'input service' is very wide enough to cover all the services in its ambit to claim as Cenvat Credit for the service provider. This definition has led to a huge revenue loss to the exchequer and hence there was an amendment to the definition of 'input service' post 2011 which has restricted the scope of such definition, which shall be discussed in detail in the later part of the article.

The amended definition which was effective from 01.04.2011 has made the definition of 'input service' into 3 parts.

1st Part – 100% nexus with the provision of the output services provided by service provider;
2nd Part – Irrespective of the Nexus theory, the credit stand eligible;
3rd Part – Specifically Excluded from the ambit of the definition.

As laid above, the first part of the definition deals with eligibility of the credit of services, which are having nexus with the provision of output services. Hence, all services which are having intimate nexus shall be eligible vide this part of the definition except specifically excluded (vide third part of the definition). The second limb of the definition of the said input service deals with eligibility of the credit of services irrespective whether they having nexus with the provision of output services. To be more lucid, once the services procured falls in the second limb, they are eligible for availment of credit irrespective of having nexus with the output services. The third limb of the definition deals with instances where certain services are specifically excluded and allowed only for certain services providers subject to certain conditions. Once a services falls under the third limb, the same stands excluded (except on satisfaction of certain conditions) and accordingly service tax paid on such services can be claimed as credit despite such service has nexus with the output service.

For Service Provider:

The service provider receives services namely construction/works contract services, architect services, chartered accountant services and various other for construction of the immovable property which is subsequently used for generation of rental income. As discussed above, the said rental income is subjected to service tax. The service provider obviously intends to avail the cenvat credit of service tax paid on the input services to utilise the same against the output service tax liability on the rental income.

However, the revenue was of the view that the cenvat credit shall not be eligible since the said input services are used for construction of an immovable property by gathering the support of Board's Circular No 98/1/2008-ST dated 04.01.2008. The said circular states that the credit of input service is available only when the output is 'service' or 'goods' and not an 'immovable property'. Since the input services are used for construction of immovable property the revenue was of the view that the cenvat credit of the input services cannot be availed. The trade not being happy with this interpretation have approached courts and the cases are pending across India across all forms of the courts and the final view pertaining to the eligibility has to be delivered yet.

However, with effective from 01.07.2012, the service provider engaged in renting of immovable property service cannot avail the cenvat credit of the input services received due to the change in the definition of the 'input service'. The definition has been amended to an extent that the credit of service tax paid on works contract/construction services can be availed only by a service provider who is also engaged in provision of works contract/construction services and not by any other service provider. Hence, the renting of immovable property service provider does not have any option to avail the credit of works contract/construction services used for construction of immovable property since the output of the

service provider is not works contract/construction services. The trade has an option of availing the credit even under the amended definition vide first limb of the definition of 'input service' which allows credit of all services which are having 100% nexus with the provision of output service. It can be argued that without construction service there cannot be generation of rental income and hence the same is having 100% nexusfor eligibility. However, whether a credit stands eligible vide general clause against specific exclusion has to be carefully seen in the future.

For Service Receiver:

There are no restrictions as to the availment of cenvat credit on the service tax paid on the input service of renting of immovable property both under the earlier and new law. The service receiver can avail such service tax paid and utilise the same against liability on his output service. However, in certain parts of the country, the cenvat credit is also being disallowed by the revenue at the service receiver's end. Let us understand the point of views expressed by the trade and revenue by considering an example.

Consider a company engaged in provision of services pertaining to leasing of vacant land with infrastructural supports to manufacturers. The manufacturer enters a lease agreement with such company for availing the leasing services and infrastructural support. The said company charges service tax and the manufacturer pays the same and avails the said service tax paid as cenvat credit.

Now the revenue is of the opinion that such service tax is not eligible since the same does not have nexus with the output service provided or manufacturing of the finished goods as far as the service tax on the lease hold land is concerned. Further, they were of opinion that service tax paid on the infrastructural services is not eligible since said services are used outside the premises of the manufacturer/service provider. In this context let us examine whether the contention laid out by the department stands to the test of the judicial scrutiny.

For the manufacturer, the definition of 'input service' vide 1st limb of the definition of 'input service' allows services used by manufacturer whether directly or indirectly in or in relation to manufacture of the final products. Without the land, a factory cannot be established and without the factory, there cannot be any manufacturing activity and hence it is very absurd and illogical to state that the immovable property is not having nexus with the manufacture of final product.

Further, for the service provider, as laid down above, the 1st limb of the definition allows credit on services which are having intimate nexus with the provision of output service unless specifically excluded by 3rd limb. It is very illogical or completely absurd that to state that without a leased land there would be provision of output services. There cannot be a provision of output service without an premises of the service provider, it is highly unimaginable and hence the service tax paid on the lease hold land is very eligible since the said input service is also not specified in the 3rd limb of the definition of 'input service'.

It is very important to note that the provision of infrastructure services plays a crucial role for the manufacturer/service provider to avail the land on the lease. In absence of the proper infrastructural services, the land shall not be useful because no prudent business man would avail the land for

construction of factory. Hence, the said infrastructural services are also having nexus with the manufacture of final products and hence eligible for availment of cenvat credit.

So, in our view, the credit of service tax paid on lease land hold and infrastructure services are eligible for availment as cenvat credit both for manufacturer and service provider for utilisation against the output payable. The contentions raised by the revenue would not stand before the judicial scrutiny at the higher levels. When the 99 year lease hold land is considered as service and service tax is being collected, the same shall be eligible for credit in absence of any specific restrictions in the definition of 'input service'

Reverse Charge Mechanism:

The renting of immovable property service when availed from specified persons would attract obligations under reverse charge mechanism which is notified vide Notification No 30/2012-ST dated 20.06.2012 read with Section 68(2) of the Finance Act, 1994 which is discussed as under.

Normally, the support services received from Government or Local Authority are covered under the obligation of reverse charge mechanism. However, if the Government or Local Authority is engaged in provision of renting of immovable property service, in such case, there shall not be any obligation under reverse charge for the service receiver.

The said notification specifically excludes 'renting of immovable property' services from the ambit of support services for the sole purpose of determining the obligation of person responsible to pay service tax. Hence, whenever renting services are procured from the Government or Local Authority, the service receiver is not obliged to pay service tax on such rental expenses.

Issues in Small Service Provider Exemption:

The trade is now facing another problem from the revenue pertaining to the claim of small service provider exemption notified vide Notification No 06/2005-ST dated 01.03.2005 (as amended from time to time) in relation to the renting of immovable property. This part aims at analysing the problem faced by the trade with respect to the exemption notification vis-à-vis renting of immovable property service.

It is very common in certain parts of the country that the immovable property is being purchased togetherly by immediate family members vide single sale deed or inherited by surviving family members from their ancestors vide a single document. Let us assume there was a family of three brothers who have purchased a property togetherly vide single sale deed. Later the said property was given on rent by three brothers to a single person by entering three different rental agreements individually.

As per the said agreement, each land lord (brother) is entitled for separate rental income amounting to the tune of Rs 30,000/- per month which is to be credited to the individual bank accounts after deduction of tax at source as per the provisions of the Income Tax Act, 1961.

Before discussing about the applicability of service tax on the said rental income, it is very important to discuss the benefit of exemption notification provided vide Notification No 6/2005-ST dated 01.03.2005

(in the earlier law) and Notification No 33/2012-ST dated 20.06.2012 (in the existing law). Both of the said notifications deal with the benefit of exempting small service providers from the ambit of service tax. There shall be no applicability of service tax on the first Rs 10,00,000/- if the previous financial year's taxable services turnover is less than Rs 10,00,000/- subject to certain conditions in the notifications, which shall be dealt in the later part of this article.

Applying such benefit to the instant case, there shall be no service tax impact on the said rental income since the income pertaining to each land lord (brother) is Rs. 3,60,000/- (Rs 30,000/-*12 months) which is less than Rs 10,00,000/-.

However, the revenue has a problem here. They were of the opinion that the benefit of the exemption notification shall not be applied individually and has to be applied for all the three brother put together, since the three brother have formed an 'Association of Persons' since the property is purchased vide single sale/title deed. That is to say, if the entire rental incomes of all the brothers is considered, the rental income shall be Rs 10,80,000/- (Rs 30,000*12*3) which would cross Rs 10,00,000/- and hence service tax is applicable.

From the above it is clear that if the rental incomes are to be considered individually, then the benefit of exemption is applicable and if the same are considered jointly the benefit of exemption notification is not applicable. Hence, the question whether such land lord has to be treated as 'individuals' or 'Association of Persons' is to be answered for claiming the benefit of the exemption notification.

The revenue's claim is that since the property has been purchased jointly, the three brothers have to be treated jointly and hence the service tax has to be charged in the capacity of 'Association of Persons'. It is very important to note that with effect from 01.07.2012, the phrase 'person' has been defined in the Finance Act, 1994 to include 'Association of Persons'. However, the claim of the land lord is they never had an intention to form an association of persons to rent out the property. They have entered the rental agreements individually, the rents are collected separately by three different cheques and the tax is deducted in the capacity of the 'individual' by the tenants and hence there cannot be any tax in the capacity of association of persons which is claimed by the revenue.

In our view, there cannot be tax in the capacity of the 'Association of Persons' as claimed by the revenue, since the reason laid by the revenue is inappropriate. The Apex Court in the case of RamanlalBhailal Patel vs State of Gujarat, Appeal No (Civil) 4420 of 2004 has held that just because a property is purchased vide single sale deed by two persons, there cannot be called that an 'Association of Persons' coming into existence. There should be any intention between the parties that they have come together to achieve a common goal/purpose to call them as an 'Association of Persons' which is absent in the instant facts of the case. Hence, the claim of the revenue shall not be held good by the higher courts since they have failed to prove that the parties (brothers) have an intention to achieve a common goal/purpose to call them as an 'Association of Persons'.

Hence, the benefit of exemption can be claimed individually even if the properties are held by virtue of single title/sale deed. The Honourable CESTAT, Ahmedabad in a bunch of cases held that the benefit of

exemption notification shall be available to each co-owner separately and there cannot be any assessment under 'Association of Persons'. However, the ultimate judgment shall be delivered by the apex court since the revenue shall be determined to take this matter to such a forum in light of the stakes involved.

Impact of Place of Provision of Service Rules, 2012:

The Place of Provision of Service Rules, 2012 (for brevity 'POP Rules') has been introduced with effective from 01.07.2012 (The entire text of the rules is produced as annexure to this opinion). As stated above, the said rules help in determining whether the services provided are in taxable territory or not. As per the said rules, the place of consumption of the service is determined in light of Rule 3 to Rule 12 of POP Rules as under:

Rule	Particulars	Place of Consumption
3	General Rule	Location of Service Receiver
4	Performance Based	Location of Service Performed
5	Immovable Property Based	Location of Immovable Property
6	Event Based	Location of Event
7	Greater Proportion Rule	Location where greatest proportion of service
8	Proxy Rule	If Service Provider and Service Receiver are located in taxable territory - taxable territory
9	Specified Services	Location of Service Provider
10	GTA Services	Destination of the Goods
11	Passenger Transportation Services	Place where passenger embarks on a continuous journey
12	Services provided on Board	First Scheduled point of departure

Hence, from the above it is clear that the rule applicable for the present transaction is Rule 5 of POP Rules since the leasing of the immovable property is concerned. The said rule is extracted hereunder for ready reference and understanding as under:

The place of provision of services provided directly in relation to an immovable property, including services provided in this regard by experts and estate agents, provision of hotel accommodation by hotel, inn, guest house, club or campsite, by whatever, name called, grants of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

From the above, it is clear that a service involving grant of right to use immovable property, the consumption of the service shall be the location of the immovable property. Hence, if the immovable property is located in the taxable territory, the place of consumption of the services irrespective of the location of the service provider or service receiver. Let us take a case study to examine the tax impact of 'renting of immovable property' in the context of Place of Provision of Service Rules, 2012.

Case Study 1:

Mr A, resident of United States of America, owns an immovable property located in Hyderabad. The said immovable property is let out for commercial exploitation to a company ABC Ltd, resident in Hyderabad.

In such a situation, where is the service deemed to be consumed and who is required to pay the service tax?

As discussed above, it is clear that the location of the immovable property is in India, the consumption of the service shall be deemed to be in India irrespective of the fact that the service provider is located in India.

Now, the question that has left to be answered is, who is obliged to pay service tax on such transaction since the service provider is located outside India. Normally, the service provider is called up to pay service tax in light of Section 68(1) of the Act. However, in certain circumstances as provided in Section 68(2) (as discussed above)and notified by the Central Government vide Service Tax Rules, 1994, the service receiver is obliged to pay the service tax and the service provider does not have a role to play in such circumstances.

Section 68(2) read with Rule 2(1)(d)(i)(G) of the Service Tax Rules, 1994 states that 'in relation to any taxable service provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory, the recipient of such service.'

Hence, from the above, it is evident that the person liable to pay service tax is the recipient of such service that is ABC Ltd since the service provider is located in non-taxable territory and service receiver is located in the taxable territory. The Central Government vide Notification No 30/2012-ST dated 20.06.2012 has laid down the quantum of service tax payable by the service receiver and service provider in respect of the services notified vide Section 68(2) read with Rule 2(1)(d) of Service Tax Rules, 2012.

As per Entry 10 of the Notification No 30/2012-ST dated 20.06.2012, the service receiver has to pay 100% of the service tax in a case where the services are received from a person located in non-taxable territory. Hence, the service provider is not obliged to remit any service tax in the current transaction and accordingly the service receiver has to register with the service tax authorities and pay service tax accordingly.

Case Study 2:

DEF Pte Ltd, a company located in Singapore is engaged in provision of construction related services globally. It has entered agreements with various companies to develop properties in India and currently engaged in execution of construction services in 5 locations in India. To oversee such works, it has appointed KLM Ltd, a company located in India. Vide agreement the role and responsibilities of KLM Ltd are fixed as to oversee the construction activities and update DEF Pte Ltd.

In such a situation, where is the service deemed to be consumed and who is required to pay the service tax?

As discussed above, any services which are directly related to the immovable property shall be falling under the ambit of Rule 5, the place of consumption being the location of immovable property that is India and accordingly KLM Ltd is required to collect service tax from DEF Pte Ltd.

However, if the services are not directly related to immovable property, the same shall be falling under Rule 3, general rule where by the consumption of service is deemed to be the location of service receiver that is DEF Pte Ltd located in Singapore. In such a situation there shall be no service tax impact since the consumption of service is done in non-taxable territory.

Let us now, try to examine whether the said services performed by KLM Ltd shall fall under Rule 5 or Rule 3 of Place of Provision of Service Rules, 2012. Rule 5 is extracted hereunder for ready reference:

The place of provision of services provided directly in relation to an immovable property,including services provided in this regard by experts and estate agents, provision of hotel accommodation by hotel, inn, guest house, club or campsite, by whatever, name called, grants of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located.

The services that are required to be provided by KLM Ltd are in relation to the co-ordination of construction works and also involve certain expertise. Hence, the services provided by KLM Ltd shall fit in Rule 5 and accordingly the same are taxable since the consumption of the service is location of the immovable property which is intended to be located that is India. It can be also argued that KLM Ltd only updates the construction activities day–to–day status and it cannot be called either as provision of expertise or co-ordination activities, which may eventually fail before the judicial scrutiny. The agreement entered between KLM Ltd and DEF Pte Ltd shall only actually categorise the service as to whether it would fit under Rule 5 or Rule 3.

Frequently Asked Questions (FAQ's):

1. Whether 'renting of immovable property service' is taxable?

Response: The taxability of mere renting of immovable property service is still pending with the Honourable Apex Court in the case ofRetailers Association of India vs Union of India 2011 (24) STR J 49 (SC). Hence, it can be said that the said service is taxable unless the apex court delivers otherwise.With effective from 01.07.2012, the service of 'renting of immovable property' is declared as a service vide Section 66E of the Finance Act, 1994 and attracts service tax post 01.07.2012 unless the apex court delivers otherwise.

2. Whether a stay for recovery of arrears of service tax is granted by the Honourable Supreme Court till the disposal of the above case?

Response:The Honourable Apex Court vide the above decision has stayed the recovery of service tax on renting of immovable property till 30th September, 2011. However, the court has expressly stated the service tax shall be paid with effective from 01st October, 2011.

3. What is the retrospective amendment that was challenged in the case of 'renting of immovable property' service?

Response: Renting of immovable property service is taxable with effective from 01.06.2007. Initially services 'in relation' to renting of immovable property service were only covered under the tax net. The trade was under a belief that only services in relation to renting of immovable property were covered and mere renting of immovable property was still outside the tax net. However, with an amendment introduced vide 01.07.2010 with retrospective effect, the activity of 'mere renting of immovable property' was also covered under the tax net.

4. I am a service provider engaged in provision of renting of immovable property service. I do not have any idea that my service attracts liability under Finance Act, 1994. The department has initiated proceedings and issued a notice demanding service tax, interest and penalty for the period 01.06.2007 to 31.05.2012. Am I required to pay so?

Response: The payment of service tax and interest is inevitable. However, the interest can be payable only from 01.07.10 to 31.05.12, since there cannot be any interest liability for the retrospective amendment done for the period 01.06.07 to 30.06.10. Further, the penalty can be pleaded for waiver quoting the benefit of Section 80 of the Finance Act, 1994.

5. I am a service provider engaged in provision of renting of immovable property service. I do not have any idea that my service attracts liability under Finance Act, 1994. Now, I wish to pay the service tax voluntarily. What has to be done?

Response:The service tax along with interest can be paid voluntarily and claim immunity from penalty

vide Section 73(3) of the Finance Act. The modus operandi is as under:

a. Obtain registration under Finance Act, 1994 ;
b. Calculate the tax dues after availing the benefits as described below;
c. Calculate the interest as per Section 75 of the Finance Act, 1994;
d. Pay the service tax and interest;
e. Intimate to the Jurisdictional Assistant Commissioner regarding the payment of service tax aninterest along with working notes and claiming the immunity from penalties vide Section 73(3);
f. Prepare a monthly invoice and send it to the customer for future collection of service tax and remit it monthly/quarterly as the case may be.
g. File the half-yearly returns disclosing the rental incomes and payment details and store them safely at a retrievable place.

6. I am a service provider engaged in provision of renting of immovable property service. I do not have any idea that my service attracts liability under Finance Act, 1994. Now, I wish to pay the service tax. What are the exemptions, abatements and deductions available?

Response:

Exemption of Small Service Provider:

The service provider can claim the exemption notified vide Notification No 33/2012-ST dated 20.06.2012 for first Rs 10 lakhs if the previous financial year value of taxable services is less than Rs 10 lakhs and subject to other conditions specified therein. The service provider should disclose such exemption in the half-yearly returns.

Abatement of Property Tax:

The service provider can claim abatement of property tax paid vide Notification No 29/2012-ST dated 20.06.2012 from the gross rental value. Suppose the property tax paid per month is Rs 10,000/- and the monthly gross rental value is Rs 10,00,000/-, then service tax has to be paid on Rs 9,90,000/- (10,00,000-10,000).The service provider should disclose such abatement in the half-yearly returns. It is be remembered that such an abatement cannot be claimed after collecting the service tax on full value from the service receiver.

7. We are ABC Ltd engaged in providing rental spaces to various corporate entities. For providing such rental spaces, we enter agreement with various flat owners and take their flats on rental basis and let them out to the corporates. We pay monthly rentals to such flat owners and receive monthly rent from the corporates. The corporates use such rental spaces to for residential purposes to accommodate their employees. In this regard, please let us know the taxability of our company and the individual flat owners?

Response:

For ABC Ltd:

The service tax exemption shall be available only if the residential dwelling is let out for residential purposes vide Entry (m) of Section 66D of Finance Act, 1994 that is negative list of services. As discussed in the earlier paragraphs, the let out by ABC Ltd is subjected to service tax despite the usage by the corporates is for residential purposes.

For Individuals:

The service tax exemption shall be available only if the residential dwelling is let out for residential purposes vide Entry (m) of Section 66D of Finance Act, 1994 that is negative list of services. In the instant case, the flat owners have let out their flats to ABC Ltdfor commercial exploitation and hence the same is subjected to service tax. However, the individuals can examine the benefit under Notification No 33/2012-ST dated 20.06.2012.

This article is contributed by CA Sri Harsha, Partner at SBS and Company LLP, Chartered Accountants. The author can be reached at harsha@sbsandco.com

COMPANIES ACT

COMPOUNDING OF OFFENCES UNDER COMPANIES ACT, 1956& 2013.

Contributed by CS Phanindra DVK

To err is human:

It is very human, to make a mistake or to do something which should have not been done or not doing something which should have been done in time, so as to be compliant with the law of the land.

But, Ignorantia juris non excusat/ignorantia Legis non excusat!!!

Which simply means, ignorance of any law/legislation is no excuse, and if ignorance is considered an excuse, a person responsible of doing a particular thing or not doing a particular thing under a law/legislation, would merely claim that he was not aware of the law or provision in question to avoid liability thereunder.

The act of doing something wrong or not doing something which ought to have been done, under a particular law constitutes an offence under the law.

Let us see the definition of the word Offence:

Definition of the word Offence:

"Offence" shall mean any act or omission made punishable by any law for the time being in force. [Section 3(38) of General Clauses Act, 1897];

"Offence" means any act or omission made punishable by any law for the time being in force and includes any act in respect of which a complaint may be made under section 20 of the Cattle-trespass Act, 1871(1 of 1871); [As per Section 2(n) of the Code of Criminal Procedure, 1973];

So, a person guilty of committing an offence is liable to be prosecuted under the relevant provisions of law.

Now, is getting prosecuted under the relevant provision is the lone remedy available to the person guilty of committing an offence or is there an alternate resolution available to him, is where the concept of Compounding comes in the picture. [the scope of this article is restricted to the provisions of the Companies Act]

As per Black's Law Dictionary "Compounding" means to settle a matter by money payment in lieu of other payments.

Further, it is to noted that not all the offences under the Companies Act, are compoundable and some are non-compoundable offences. The types of offences that are eligible for composition under the act, are discussed in the Article.

What is Compounding of an Offence ?

Having seen the words "Offence" and "Compounding", now we need to understand as what is "Compounding of an Offence(s)".

The concept of "Compounding of an offence(s)" in legal parlance generally means, a process to settle the matter(charge/offence) amicably before the respective adjudicating authority, by paying the fine as imposed by the respective authority, thereby avoiding prosecution under the relevant provision, attending court hearing and undergoing mental tensions/pressure.

Provisions under Companies Act, 1956 and 2013.

Under Companies Act, 1956:

Section 621 A of the Companies Act, 1956 deals with Compounding of offences under the Act. Vide the Companies (Second Amendment) Act, 2002, the effective date of which is not yet notified, some changes to the section were proposed. Since the said changes are not notified, the provisions of Section 621-A, as inserted by the Companies (Amendment) Act, 1988, and amended by the Companies (Amendment) Act, 2000, are still in force.

Based on the language used in Section 621-A, offences under the Act, may be classified as below:

Offences Punishable:

(I) with Fine only;
(ii) with imprisonment or with Fine;
(iii) with imprisonment or with Fine or both;
(iv) with imprisonment only;
(v) with imprisonment and also with fine.

Compoundable offences:

Of the list above, an Offences punishable

(I) with Fine only, and
(ii) with Imprisonment or with Fine

CAN be compounded.

Offences punishable with Imprisonment or with Fine or both, can also be compounded with the permission of the Court.

Non-compoundable offences:

Offences punishable

(I) with Imprisonment only, and
(ii) with Imprisonment and also with Fine.

CANNOT be compounded.

Compounding Authority:

The Authority for Compounding offences under Section 621-A of the Companies Act, 1956, depends upon the maximum amount of fine which may be imposed for such offence under the relevant provisions of the Act, as below:

Compounding Authority	Maximum aamount of fine which may be imposed for such offence, as mentioned in the Section/provision
Hon'ble Company Law Board	Exceeding Rs.50,000/-
Regional Director concerned	Not exceeding Rs.50,000/-

Compounding Procedure:

➔ A Company and or any officer of the company who has committed a offence, may either before or after the institution of any prosecution under the relevant section, can apply for compounding;

➔ The compounding authority shall impose amounts to be paid for compounding of the offence, and the amount directed by the authority to be paid by the Company or any officer of the company, shall not exceed the maximum fine payable under the relevant section for offence under composition;

➔ The fees for compounding of offences as per the directions of the compounding authority, are to be paid by the respective applicant i.e., in case of Company, then from the funds of the company, and in case of Directors, the fees is to be paid by the Directors from their own pocket and not from the company funds;

➔ Any amounts paid as additional fees under section 611(2) shall be deducted from the amount specified for compounding of offence;

➔ Compounding Application shall be made to the Registrar concerned, who shall forward such compounding application along with his comments to the compounding authority;

➔ If an offence is compounded before or after the institution of prosecution, intimation thereof is to be given to the Registrar within 7 days from the date on which the offence is so compounded;

➔ If the offence under composition involves filing of any return, form by the Company or any officer of the company, then the Compounding authority, while compounding the offence, in his order may direct,

the Company or the officer to file such return, form, with such fees required to be paid under the Act, within such time as may be specified in the order; and any failure on the part of the Company or any of its officer shall be punishable with imprisonment upto 6 months or with fine not exceeding Rs.50,000/- or with both.

➔ Any second or subsequent offence committed after the expiry of a period of 03 (Three) years from the date on which the offence was previously compounded shall be deemed to be a first offence. So, in case an offence is committed within 03 (Three)years period, then the same is not compoundable.

Compounding Application and Prosecution:

Composition of offence:

➔ before Initiation of Prosecution under the relevant section:

In case the Compounding application is filed and the offence is compounded by the Authority, before the initiation of prosecution against an offence, then no prosecution shall be initiated either by the Registrar or any Shareholder of the Company or any person authorized by the Central Government, against the Company or any officer of the Company.

➔ after Initiation of Prosecution under the relevant section:

In case the Compounding application is filed after the initiation of prosecution against an offence, and the offence is compounded by the Authority, then the composition shall be informed by the Registrar in writing to the concerned Court, in which the prosecution is pending, and on such notice of the composition of the offence being given, the Company or the officer, in relation to whom the offence is so compounded shall be discharged.

Provisions under Companies Act, 2013:

Section 441 of the Companies Act, 2013, deals with the Compounding of offences. The said section is yet to be notified, and accordingly, the provisions of Section 621-A of the Companies Act, 1956, are applicable, till the notification of Section 441 of the Companies, 2013.

The structure of the Section 441 is similar to that of Section 621-A, except for some changes and limits as to authority.

Offences Punishable:

(I) with Fine only;
(ii) with imprisonment or with Fine;
(iii) with imprisonment or with Fine or both;
(iv) with imprisonment only;
(v) with imprisonment and also with fine.

Compoundable offences:

Offences punishable with Fine only CAN be compounded.

Offences punishable (a) with Imprisonment or with Fine, or (b) with Imprisonment or with Fine or both, can also be compounded, but with the permission of the Special Court.

Non-compoundable offences:

Offences punishable

(I) with Imprisonment only, and
(ii) with Imprisonment and also with Fine; and

CANNOT be compounded.

Investigation initiated/pendingagainst an offence – Matter cannot be compounded:

Apart from the above, any offence by any company or its officer cannot be compounded, if any investigation against such company has been initiated or is pending under this Act.

Compounding Authority:

The Authority for Compounding offences under Section 441 of the Companies Act, 2013, depends upon the maximum amount of fine which may be imposed for such offence under the relevant provisions of the Act, as below:

Compounding Authority	Maximum amount of fine which may be imposed for such offence, as mentioned in the Section/provision
National Company Law Tribunal	Exceeding Rs.5,00,000/-
Regional Director or any officer authorised by the Central Government	Not exceeding Rs.5,00,000/-

Compounding procedure:

The procedure for composition of offence under Section 441 of the Companies Act, 2013, is similar to that of Section 621-A of the Companies Act, 1956

Details of the relevant Sections/Offences under both the Acts:

Since the aim of the article is bring out the provisions as to composition of offences, the details of the sections/offences, both under the Companies Act, 1956 and the Companies Act, 2013, that can be/cannot be compounded, are not being listed.

Discussion Point:

➔ The main point of discussions is that the provisions of Section 441, of Companies Act, 2013, are not yet notified, so provisions of Section 621-A of the Companies Act, 1956 will be applicable for the compounding proceedings, which again bring lot of confusion as to the following:

➔ Matters that can be compounded:

Under Companies Act, 1956	Under Companies Act, 2013
With Fine only, and with Imprisonment or with Fine with permission of court: With Imprisonment or with Fine or both	With Fine only With permission of Special Court: with Imprisonment or with Fine, or with Imprisonment or with Fine or with both [Offence cannot be compounded in investigations is initiated or pending against the particular offence]

What would be the position of an offence under the Companies Act, 2013, which is punishable with Imprisonment or with Fine ?

Whether the same can be directly compounded under 621-A or whether permission of Special Court, is required to be obtained[as prescribed under Section 441 of CA, 2013], is not clear.

➔ Decision of the Compounding Authority:

As discussed in the beginning of the Article, the threshold limit of the deciding upon the Compounding Authority, as applicable under 621-A [i.e., maximum fine less than Rs.50,000/- then the concerned RD and if Maximum fine more than Rs.50,000/- then Hon'ble CLB], will be applicable for offences under the Companies Act, 2013, also, which some what seems to be improper, because everybody is aware that there are hardly any sections under Companies Act, 2013, which provide for a maximum fine of Rs.50,000/-, thereby all the offences under Companies Act, 2013, will come under the purview of the Hon'ble Company Law Board, by virtue of Section 621-A.

While appreciating the efforts made by all the concerned in bring the new Companies Act, in to force, the practical difficulty is that not all the provisions have come in to force, thereby, the 1956 Act, also needs to be referred, in the instant case, for an offence committed under the New act, the compounding procedure under the 1956 Act, is to be referred, thereby creating differences of opinion on interpretation of the provisions and giving way to confusions. Hope these confusions are sorted at the earliest.

This article is contributed by CS Phanindra DVK, an associate to SBS and Company LLP, Chartered Accountants. The author can be reached at phanindra@sbsandco.com

TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Budget Updates in Service Tax	13-Mar-2015	CA Sri Harsha	SBS - Hyd
2	Budget Seminar in Tada	18-Mar-2015	Team SBS	SBS - Tada
3	Overview on Dormant Company - Companies Act	27-Mar-2015	CS Phanindra DVK	SBS - Hyd
4	Technology Impact on Chartered Accountants	03-Apr-2015	CA Saran Kumar U & Mr. Jay Gopal T (Gopal Systems Private Limited)	SBS - Hyd

Overview of GST - CA Sri Harsha

Compounding of offences under Companies Act, 1956 & 2013 - CS Phanindra D V K

Tax matters relating to HUF - CA Suresh Babu S

BUDGET SESSION - CONDUCTED BY SBS AND COMPANY LLP & BIGSUN GROUP

Date : 18th March 2015
Venue : BigStay - NH 5 - Near Sricity, TADA
Fee : No Delegate Fee
Topics : Read Below

S No.	Topic	Timing
1	Inaguration & Welcome Speech ; Mr. Jagadeesh (Bigsun Group CEO)	09:30 - 10:00
2	Budget Changes in Direct Taxes Including T P ; CA Ram Prasad, CA Mallikarjun Rao G & CA Mithilesh Sai	10:00 - 11:45
3	Tea Break	11:45 - 12:00
4	Budget Changes in Indirect Taxes-Service Tax ; CA Sri Harsha Vardhan K & CA Praveen Kumar G	12:00 - 13:00
5	Lunch Break	13:00 - 13:45
6	Technical Session on Labour Laws ; Mr. S V Ramachandra Rao (MD of Resource Inputs Ltd)	13:45 - 14:30
7	Budget Changes in Indirect Taxes - Central Excise ; CA Praveen Kumar G & CA Sri Harsha Vardhan K	14:30 - 15:30
8	Tea Break	15:30 - 15:45
9	Impact Analysis - Union & AP State Budget ; CA Murali Krishna G	15:45 - 16:45
10	Closing Remarks ; CA Suresh Babu S	16:45 - 17:00

© All Rights Reserved with SBS and Company LLP

Hyderabad: 6-3-900/6-9, #103 & 104, Veeru Castle, Durganagar Colony, Panjagutta, Hyderabad, Telangana
Kurnool: No. 302, 3rd Floor, V V Complex, 40/838, R.S. Road, Near SBI Main Branch, Kurnool, Andhra Pradesh
Nellore: 16-6-259, 1st Floor, Near Santi Sweets Opp: SBI ATM, Vijayamahal Centre, SPSR Nellore, Andhra Pradesh
Tada: 8-3-425/2, Flat No. 202, 2nd Floor, Bigsun Avenue, Near SRICITY, TADA, SPSR Nellore Dist, Andhra Pradesh
Visakhapatnam: # 39-20-40/6, Flat No.7, Sai Yasoda Apartments, Madhavadhara,Visakhapatnam (Urban),Vizag, Andhra Pradesh

Disclaimer:

The articles contained in SBS Wiki, are contributed by the respective resource persons and any opinion mentioned therein is his/their personal opinion. SBS Wiki is intended to be circulated among fellow professional and clients of the Firm, to provide general information on a particular subject or subjects and is not an exhaustive treatment of such subject(s). The information provided is not for solicitation of any kind of work and the Firm does not intend to advertise its services or solicit work through SBS Wiki. The information is not intended to be relied upon as the sole basis for any decision. Before making any decision or taking any action that might affect your personal finances or business, you should consult a qualified professional adviser.

SBS AND COMPANY LLP [Firm] does not endorse any of the content/opinion contained in any of the articles in SBS Wiki, and shall not be responsible for any loss whatsoever sustained by any person who relies on the same.

To unsubscribe, kindly drop us a mail at kr@sbsandco.com with subject 'unsubscribe'.