SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

# *Practical Note – Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019*

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## Background

1. Years of pending litigation in various IDE[1] has become a huge burden to the Central Government, assessee and tax positions involved therein. As per the Economic Survey Report of 2019, the cases pending with CESTAT[2], High Courts and Supreme Court as on 31.03.2017 are 1,00,425[3]. Apart from the burden on the eco-system, such huge pending litigation also effects the foreign investment, since lack of tax certainty has a significant effect on foreign investment.

2. The Honorable Finance Minister during her maiden budget speech has mentioned that more than Rs. 3.75 lakh crores were blocked in litigations under IDE. Certainly, pending litigation of the erstwhile regime has become also become baggage for Central Government and assessees which has to be offloaded to concentrate on the new legislation and way forward.

3. In order to unload the burden of huge pending litigation and to liquidate the amounts blocked in litigation, Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 is introduced in Finance (No.2) Act, 2019. The objective of the scheme is twofold. One is dispute resolution by liquidating a portion of the amounts blocked in litigations and the other one is amnesty where an opportunity is given to taxpayers to voluntarily disclose and discharge their actual tax liability. This paper broadly summarizes the scheme, the clarifications provided so far and highlights some of the important questions which are to be answered for effective implementation of the scheme. At the end of the paper, we also share the modus operandi which has to be adopted to choose among the normal route of litigation or the scheme.

- Around 1,00,425 cases are pending in Indirect Tax Enactments before CESTAT, High Courts and Supreme Court.
- FM announced that Rs. 3.75 lakh crores is blocked in litigation.
- The scheme is announced with objective of unloading pending litigation and to liquidate amounts blocked in litigation.

## Indirect Tax Enactments

4. In terms of section 122[4], the scheme is applicable to demands pertaining to Central Excise, Service Tax and the rules made thereunder. In addition, the scheme is applicable to demands by way of various cesses including Education Cess, Secondary Higher Education Cess, Swacch Bharat Cess, Krishi Kalyan Cess as listed in Annexure. In addition, the Central Government has been conferred with the power to make the scheme applicable to any other Act by notifying the

[1] Indirect Tax Enactments
[2] Customs, Excise and Service Tax Appellate Tribunal
[3] Out of these, 83,338 are pending before CESTAT, 14,141 are before High Courts and 2,946 are pending before Supreme Court.
[4] All the sections referred as part of the scheme are of Finance (No.2) Act, 2019 and accordingly reference to any section in this paper would mean a reference to section in Finance (No.2) Act, 2019.

same. No such notification has been given so far to make the scheme applicable to any other Act which is not specified in Section 122.

1.1 The scheme is not applicable to the following duties and taxes pertaining to:

i. Duties of Customs payable under Customs Act, 1962 and Customs Tariff Act, 1975
ii. Duties of Customs payable under the Special Economic Zone Act, 2005
iii. Taxes payable under GST[5] laws
iv. Taxes payable under the Central Sales Tax Act, 1957

## *ISSUES*

**Whether the scheme is applicable to demands pertaining to VCES[6] disputes?**

The possible VCES dispute could be the show cause notices received for rejection of benefit under the scheme which is pending before appellate forums. The dues covered by VCES disputes are arising out of chapter V of Finance Act, 1994. Hence, the said matters which were arising out of VCES scheme and pending at various stages can be applied under the current scheme. We also garner support from the provisions of Section 111 (3) of Finance Act, 2013 (vide which VCES was implemented), wherein it was stated that a show cause notice issued under the VCES was deemed to be a show cause notice issued under section 73 and section 73A of the Finance Act, 1994.

Further, there is no specific exclusion to these dues under the present scheme like it exists for persons who have filed application before settlement commission. Hence, we are of the view, that even though a matter which pertains to VCES is normally eligible under the current scheme. However, a case to case analysis must be made before arriving at the conclusion. CBIC should also clarify as to whether a notice issued rejecting the benefit of VCES is eligible for filing declaration under the current scheme, for certainty in this matter.

## Eligibility

5. In terms of section 125, all persons are entitled to make a declaration under scheme except those mentioned as under:
   a. who has filed an appeal before appellate forum and such appeal has been finally heard on or before 30.06.2019;
   b. who has been convicted for any offence punishable under IDE for matter for which he intends to make declaration;
   c. who have been issued a show cause notice and final hearing taken place on or before 30.06.2019;
   d. who has been issued a show cause notice for refund or erroneous refund;
   e. who has been subjected to an enquiry/investigation/audit and amount of duty was not quantified as on 30.06.2019;
   f. A person making a voluntary disclosure:
      a. after being subjected to an enquiry, investigation or audit.

[5] Goods & Services Tax

[6] VCES – Voluntary Compliance Encouragement Scheme was rolled out by Central Government to give an opportunity to assessees who have not paid service tax dues pertaining to the period 1st October 2007 to 31st December 2012. The benefit under the scheme was immunity from interest, penalty and prosecution. The Commissioner was empowered to issue notice, if he believes that the declarant has made a substantially false declaration under the said scheme.

b. having filed the return under indirect tax enactment, wherein, he has indicated the amount of duty as payable but has not paid it.

g. who has filed an application before the settlement commission for the settlement of a case;

h. who is seeking to make a declaration of petroleum and tobacco products covered under Fourth Schedule to Central Excise Tariff Act, 1994.

## *ISSUES*

**Can the Declaration be filed on selected matters?**

Sometimes, the show cause notice or the pending appeal involves multiple matters on which duty would be demanded. It is clarified that a declarant cannot opt to avail benefit of the scheme in respect of selected matters. The declarant has to file a declaration for all matters concerning duty liability covered under the show cause notice.

The manner in which the tax dues are to be arrived in terms of section 123 and the relief specified in section 124 indicates that the scheme is required to have opted for all matters covered by *Lis*. Accordingly, the clarification given would equally apply to more than one matter covered by appeal or enquiry, investigation or audit proceedings as the case may be.

**What is the meaning and scope of the term 'finally heard' for dis-entitlement to the scheme?**

In terms of section 125(a) &(c), with respect to an appeal pending before an appellate forum or a show cause notice, the taxpayer is not entitled to file the declaration under the scheme if the final hearing has taken place on or before 30.06.2019. The hearings of adjudication or appellate proceedings are typically rescheduled even after the final hearing due to new bench, change in officer or any other reason. It is clarified that this restriction will apply to only those cases, where the relevant forum has heard the matter finally as on 30.06.2019. This implies that in any case where the matter was heard satisfactorily before 30.06.2019 but an additional hearing opportunity is required to be given subsequently due to reasons like change in new bench, change in officer etc., it can be concluded that the matter was not finally heard and therefore, the taxpayer becomes eligible for declaration under the scheme.

- The scheme can be opted if person making declaration was not declared as ineligible.
- Persons whose appeals, SCNs are finally heard on or before 30.06.2019, persons who are subjected to audit, inquiry, investigation but demands not quantified as on before 30.06.2019 are ineligible for the scheme.
- Person subjected to inquiry, investigation, audit or declared tax liability in returns are ineligible to make declaration by way of voluntary disclosure.
- Person convicted, filed application before settlement commission or dealing with petroleum and tobacco products covered under IV Schedule to CE Act, 1944.

## Tax Relief and Other Benefits

6. The declarant under the scheme is entitled to relief from payment of the specified percentage of the tax dues. This implies that the balance percentage of tax dues are required to be paid. The details of relief available from tax dues are tabulated as under:

| Situation | Tax Relief[7] (= not required to be paid) | |
|---|---|---|
| | Tax Dues < 50 lakhs | Tax Dues > 50 lakhs |
| **Appeal pending before Appellate Forum** | 70% | 50% |
| **SCN[8] for Tax** | 70% | 50% |
| **SCN only for penalty and late fee** | 100% | 100% |
| **Enquiry, Investigation or Audit[9]** | 70% | 50% |
| **Amount in Arrears** | 60% | 40% |
| **Voluntary Disclosure[10] [11]** | 0% | 0% |

7. In addition to the tax relief, the declarant is also eligible for the following benefits as enumerated in Section 129:
   i. is not required to pay interest, the penalty with respect to the matter and time period covered by the declaration.
   ii. shall not be prosecuted with respect to matter and time period covered by the declaration.
   iii. The matter and period covered by such declaration shall not be re-opened in any other proceeding.

8. However, show cause notice can be issued with respect to the same matter for subsequent period i.e. other than the period covered by the declaration or for different mater for same time period i.e. time period covered by declaration but for a different matter.

9. Thus, no proceedings can be initiated or re-opened with respect to the tax dues covered by the declaration. However, the only exception is

- Relief is also available against interest and penalty on tax dues declared under the scheme.
- SCN can be issued for same matter for different tax period or for different matter for same tax period.
- In case of voluntary disclosure, where any material particulars relating to declaration is found to be false, the declarant can be proceeded within a year time as if no declaration is made.
- Taxes paid during the proceedings or pre-deposit are eligible for set-off against the tax dues payable.
- Payments already made through CENVAT Credit are eligible for set-off.

[7] For example, a matter involving INR 40 lakhs is pending before CESTAT, then declarant is eligible for 70% relief (that is discount), if he pays 30%. This implies that if the tax payer pays Rs 12 lakhs, the balance 70% i.e. 28 lakhs need not be paid as relief under the scheme.
[8] Show Cause Notice
[9] Where amounts are quantified – more about this - read here
[10] Certain Instances of voluntary disclosure are not eligible – more about this - read here
[11] Declarant shall be eligible for additional benefits like interest, penalty and prosecution

the case of voluntary disclosure. Where a material particular relating to voluntary disclosure is found to be false, then proceedings shall be initiated within one year from the date of issue of discharge certificate, as if the declaration has never been filed.

10. The amount of pre-deposit made at any stage of appellate proceedings, any deposit made during enquiry, investigation or deposit shall be deducted from the amount of tax payable as per the declaration under the scheme. In a case where such amount paid is in excess of tax payable under as per the declaration under the scheme, then declarant shall not be eligible for a refund of such excess paid amount.

## Tax Dues

11. In terms of section 124, the relief specified under the scheme is with respect to the 'tax dues'. The meaning and scope of the term 'tax dues' is provided under section 123. As per the said section, the tax dues are set out based on different types of scenarios:

| Scenario | Description of Tax Dues |
|---|---|
| Pending Appeal | Whether a single appeal is arising out of an order and is pending as on 30.06.2019, the amount of duty being disputed in the said appeal is considered as tax dues. |
| | Whether appeals are filed by both taxpayer and Revenue against an order and are pending as on 30.06.2019, the total amount of duty being disputed by taxpayer and Revenue in their respective appeals. |
| Adjudication Stage | A show cause notice issued has been received on or before 30.06.2019, the amount of duty stated to be payable in the said notice. |
| | In case the notice is served to more than one person making them liable to the duty amount jointly and severally, then entire amount indicated in the said notice shall be considered as tax dues by the taxpayer making a declaration under the scheme. |
| Enquiry, Investigation or Audit | Where an enquiry, audit or investigation is pending and the amount of duty payable is quantified on or before 30.06.2019, such quantified amount. |
| Amount in Arrears | The amount of arrears payable by the taxpayer. |
| Voluntary Disclosure | Tax amount voluntarily declared by the taxpayer |

12. On a combined reading of section 123 and 125 and clarifications given by CBIC, there are no major interpretational challenges which exist for pending appeal and adjudication stage. Certain minor interpretation challenges do exist (dealt separately in this paper) and it would be appropriate if CBIC would come up with more circulars clarifying the issues to make the scheme successful.

13. Hence, let us focus on the interpretational challenges that exist for 'enquiry, investigation or audit', 'amount in arrears' and 'voluntary disclosure' when read in combination with Section 125 and others.

## Enquiry, Investigation or Audit

14. In view of the above-specified dis-entitlements under the scheme with respect to enquiry, investigation or audit, it would be impertinent to understand the meaning and scope of these terms. The term 'audit' has been defined under section 121(1)(g) to mean any scrutiny, verification and checks carried out under the IDE, other than an enquiry or investigation, and will commence when a written intimation from the central excise officer regarding conducting of the audit is received. Thus, a taxpayer is said to be subjected to proceedings under audit when he has received a written intimation in this regard.

15. The term 'enquiry or investigation' has been defined in section 121(1)(m) to include the search of premises, issuance of summons, requiring the production of accounts, documents or other evidence, recording of statements. Thus, a taxpayer is said to be subject to these proceedings when he was in receipt of communications in this regard. However, CBIC vide Para 2(vi) of Circular 1072[12] has stated that in cases, where documents like balance sheet, profit and loss account etc. are called for by department by virtue of authority under Section 14 of Central Excise Act, the designated committee shall take a view on merit, taking into account the facts and circumstances of each case as to whether such assessee is eligible or ineligible to make declaration under the scheme.

16. As discussed above, in terms of section 125(1)(e), a taxpayer is disentitled to make a declaration under the scheme when he was subjected to an enquiry, investigation or audit and the demands are not quantified as on 30.06.2019. Similarly, in terms of section 125(1)(f), a taxpayer is disentitled to make a voluntary disclosure under the scheme if he was subjected to an enquiry, investigation or audit. In simpler words, if an enquiry, investigation or audit has been concluded, wherein the amounts involved are quantified as on 30.06.2019, then the declarant is eligible to opt for the relief under the scheme. In case, if the amounts are not quantified, then the declarant is not eligible for opting for the relief under the scheme even under the category of voluntary disclosure also.

## Meaning and Scope of 'Quantified'

17. In case of taxpayer subjected to enquiry, investigation or audit then he would be eligible to make a declaration under the scheme only when the demands are quantified on or before 30.06.2019. Therefore, it is very important to understand the meaning and scope of the term 'quantified'.

18. The expression 'quantified' has been defined under section 121(1)(r) to mean a written communication of the amount of duty payable under the indirect tax enactment. This will generally imply the communication shared by officers mentioning the amount of duty payable along with interest and penalties. Further, vide para 10(g) of the Circular 1071, it has been clarified that such written communicated will include a letter intimating duty demand or duty liability admitted by the taxpayer during enquiry, investigation or audit or audit report. Hence, instances, where tax liability was agreed by tax payer during the course of summons, will fall under the ambit of 'quantified' and if done prior to 30.06.2019, stands eligible under the scheme.

[12] Circular No 1072/05/2019- CX dated 25th Sept 2019

## *ISSUES*

**Can a taxpayer voluntarily declare tax dues pertaining to a period other than that covered by audit, enquiry or investigation?**

Let us take an example that a taxpayer has been issued a notice for audit for the period 01.04.2015 to 30.06.2017. Can this taxpayer be entitled to declare tax dues pertaining to a period up to 31.03.2015? Section 125(1)(f) imposes a restriction that a person shall not be eligible to make voluntary disclosure after being subjected to audit. On a plain reading of the restriction, it implies that the person is disentitled to make voluntary declaration of tax dues irrespective of the fact whether they pertain to a period other than the period for which audit has been undertaken.

Para 10(b) of the Circular 1071 has clarified that the exceptions specified under section 125(1) are not with respect to the person but with respect to the dispute/case involved. The said para was dealing with a situation, whether a person who has a pending notice for refund matter and another notice pertaining to tax dues, is ineligible from the scheme qua matter pertaining tax dues, since the provisions of Section 125(1)(d) specifically makes persons with refund matters as ineligible. Para 10(b) clarified that ineligibility is qua matter and not person and stated that such clarification equally holds good for other instances in Section 125 (1) (a), (b), (c), (e) and (g).

Even though, the instance of 'enquiry, audit or investigation' which falls under (f) is not specifically covered in the Circular, in our opinion, the same rationale holds good. Hence, an enquiry, audit or investigation which has been initiated, the period which gets mentioned becomes ineligible and for other period, a declaration can be filed as voluntary disclosure.

**Can a taxpayer be eligible to make a declaration if demand quantified on or before 30.06.2019 was modified subsequently due to any reason?**

Upon plain reading of the definition of 'quantified', it only provides for quantification of demand and nothing more. To better understand such expression, a reading of FAQ 59 is needed. FAQ 59 deals with a situation where the amount quantified under an enquiry, investigation or audit on or before 30.06.2019 gets modified subsequently due to any reason. The question is, whether still such tax payer is eligible for making declaration under the scheme? The response of CBIC was that only such cases of enquiry, investigation or audit are covered under the scheme where the duty/tax demanded ***has been worked out*** on or before 30.06.2019 but SCN has not been issued.

Hence, only such instances where the final amounts payable by tax payer are worked out (quantified) on or before 30.06.2019 are only covered. In our opinion, any changes to amounts which were already quantified is not possible, if the declarant wishes to pay tax on the amended amount. However, the declarant can still opt for the scheme in respect of the amounts which appear as quantified by the tax authorities.

For example, an audit has been concluded and an audit note is issued stating that tax payer is required to pay an amount of INR 45 lakhs. The date of audit note is 25.06.2019. The tax payer makes a reply dated 29.06.2019 stating that the amount is not INR 45 lakhs but the liability would be INR 40 lakhs for whatsoever reason. The audit party accepts the plea of the tax payer on 15.07.19 and states the liability to be INR 42 lakhs.

In the above situation, the tax payer cannot file a declaration for INR 42 lakhs and can only file a declaration for INR 45 lakhs. Assume that the audit party has accepted and worked out the amount of INR 42 lakhs on 30.06.2019. In such instance,

the amount of INR 42 lakhs gets quantified on or before 30.06.2019 and accordingly declaration can be filed for INR 42 lakhs instead of earlier demand of INR 45 lakhs.

Hence, declaration based on subsequent modification to the quantified amounts might put the declarant under risk stating that the audit is on-going as on 30.06.2019 and accordingly make his application ineligible. At the same time, a unilateral amendment post 30.06.2019 by the tax authorities should not make the declarant ineligible by placing reliance on FAQ 59.

**Whether a person is subjected to a roving enquiry or summons of routine nature would still be considered as subjected to enquiry or investigation to obtain disqualification under the scheme?**

Many times, the taxpayers are subjected to certain correspondences of roving nature. Sometimes, the summons is also issued in such routine manner. Once the information sought to has been produced, there may not be further findings by the officer concerned. At the same time, the proceedings may not have been concluded by way of written correspondence. This could even happen for audits as well where the officers may not turn up for audit after the service of the notice intimating the intention to conduct the audit. Can a stand be taken in those cases that enquiry, investigation or audit are said to have completed and accordingly eligible for the credit?

Going by the strict interpretation of the definition of 'Audit' and 'Enquiry or Investigation', the said proceedings would also be considered for disqualification to make a voluntary disclosure. However, the said proceedings may not be maneuvering to any findings of revenue leakage. In order to upkeep the objective of the scheme, such persons should not be prevented from making voluntary disclosure. This is also supported by Para 2(vi) of Circular 1072 explained supra. Hence, the declarant with all the relevant facts and circumstances has to make a declaration and the designated committee may take a decision on the basis of merits involved.

**An enquiry, audit or investigation has commenced post announcement of the scheme, let us say on 10th July 17. In that situation, whether the assessee can make declaration under the scheme? In other words, what is mentioned vide Section 125(1)(f)(a) is only for instances where the audit, enquiry or investigation has already initiated prior and ongoing as on 30.06.2019 or even a fresh instance which has been started post 30.06.2019?**

Let us take an example that a person has not discharged his full liability under excise or service tax. After the scheme was announced on 05.07.2019, he has decided to declare the tax liability voluntarily under the scheme and pay the same to obtain relief from interest and penalty. On 20.07.2019, he has received a communication from the Audit Division of Service Tax Department for the conduct of audit. In such a situation, the issue involved is whether the person can make declaration under the scheme for voluntary payment of tax dues or is he prevented by reason of initiation of audit, enquiry or investigation post 30.06.2019.

In our opinion, the tax payer is not prevented from making any declaration if the audit, enquiry or investigation has been initiated post 30.06.2019. This would be a better interpretation since the right constituted by the scheme cannot be taken away by a letter issued by tax authorities.

Any other interpretation would create two different class of defaulters for the purpose of benefit conferred under the scheme. One who has not subject to such proceedings before filing declaration would be entitled to the amnesty benefit under the scheme while the other category who received notices for such proceedings would be initially entitled to the benefit of the scheme but acquires disqualification as soon as such notices are received.

Recently, the Telangana High Court, in the context of VCES scheme, in the case of Crescent EPC Projects & Technological Services Limited vs. UOI, vide para 17 & 18 has held as under;

*"17. It is an irony of law that Schemes such as VCES, VDS (Voluntary Disclosure Scheme) or Composition Scheme, are intended for the benefit of defaulters. Therefore, while interpreting the provisions of such Schemes, the Court cannot adopt such an interpretation which will create two different classes of defaulters, greater and smaller or chronic and ordinary.*

*Therefore, all that is required to be done in cases of this nature is to see the object sought to be achieved by such schemes, without violating the express language employed in the Scheme"*

Therefore, in view of the above decision of Telangana High Court, in case of schemes meant for defaulters, any interpretation to create two different class of defaulters shall be avoided. In the present case, as on the date of announcement of the scheme taxpayers who are not subject to inquiry, investigation or audit proceedings would be entitled to voluntary disclosure under the scheme. If few of them are served with notices for inquiry, investigation or audit, at a later point of time, if they are held to be ineligible, such interpretation clearly creates two different class of defaulters in an arbitrary manner in so far as the eligibility under voluntary disclosure is concerned.

## Amount in Arrears

19. The phrase 'amount in arrears' has been defined in section 121(c) and accordingly, it means an amount of duty which is recoverable as arrears under the indirect tax enactment on account of the following:
    - no appeal having been filed by the declarant against an order or an order in appeal before the expiry of the period of time for filing an appeal.
    - An order in appeal relating to declarant attained finality.
    - the declarant having filed a return under the indirect tax enactment on or before the 30.06.2019, wherein he has admitted a tax liability but not paid it

20. There are multiple issues which arise from the above definition. CBIC has to come up with more clarifications on the above definition and instances which would fall under the ambit of 'amount in arrears. We would like to take up some issues hereunder.

**Amount in Arrears v Voluntary Disclosure**

21. The third limb of definition of 'amount in arrears' deals with instance where the declarant having filed a return under the indirect tax enactment on or before 30.06.2019, wherein he has admitted a tax liability but not paid it. On the other hand, Section 125(1)(f)(ii) makes ineligible a person who makes voluntary disclosure who having filed a return under the indirect tax enactment, wherein he has indicated an amount of duty as payable but has not paid it.

22. On a close reading of both the instances, there is no significant difference between instance covered in amount in arrears and voluntary disclosure when it deals with filing of returns and admission of tax liability thereof. In other words, what is stated to be covered under amount in arrears comes as ineligible instance to file declaration under the scheme vide voluntary disclosure. There is an apparent contradiction.

23. Let us take an example to understand the contradiction. Assume a tax payer has filed service tax returns for period April 16 to September 16 admitting that there is a liability of INR 57 lakhs but has not paid it. The tax payer is contemplating to file a declaration under the scheme. When he sees the definition of 'amount in arrears', the said instance finds mention therein since he has filed return and admitted his liability and accordingly, he is eligible for tax relief of 40%. However, when he reads persons who are not eligible for filing declaration under voluntary disclosure, there also he finds the mention of the said instance, which states that tax payer who has filed return indicating an amount as payable but not paid it. In such a situation, how to reconcile this apparent contradiction?

24. In our opinion, the 'amount in arrears' has to be interpreted as instances where the tax authorities have initiated recovery proceedings, basis the language used in the definition of expression 'amount in arrears'. The said definition states that 'amount in arrears' means the amount of duty ***which is recoverable as arrears of duty on account of..'.***

25. Hence, if the taxpayer is served with a notice stating that returns were filed admitting tax liability and if not paid within stipulated time, they become recoverable as arrears, then such notice alone should be treated as 'amount in arrears. In all other instance, the same would fit under voluntary disclosures. If this rationale is not brought in, there would be no difference between voluntary disclosure and amount in arrears, which has different consequences altogether. However, FAQ 13 released by CBIC brushes away that there is no apparent contradiction between the two instances and accordingly stated that such amounts can be declared under amount in arrears. In our opinion, the said clarification requires re-consideration.

**Time limit for Appeal has not exhausted by 30.06.2019**

26. With respect to order and order-in-appeal, let us examine the cases which are covered and not covered by amount-in-arrears. In order to come within the ambit of the amount in arrears, no appeal should have been filed against the order or order-in-original before the expiry of the period of time for filing the appeal. To put this in another way, an amount demanded by an order or order-in-appeal will become amount in arrears if no appeal has been filed and the time limit to file an appeal has expired.

27. This implies that in a case where time limit to file an appeal has not lapsed, then the amount covered by the order or order-in-appeal will not come under the ambit of the amount in arrears. Further, only amounts pertaining to appeals and show cause notices pending for disposal as on 30.06.2019 would be considered as eligible for relief. In other words, a matter on which an order has been passed on or before 30.06.2019 but the time limit for filing appeal has not been exhausted by the said date, does not find place either under amount in arrears or pending matters as on 30.06.2019.

28. In our opinion, such cases where the time limit for filing an appeal has not exhausted by 30.06.2019 would fit under the pending matters that is under Section 124(1)(a) instead of amount in arrears under Section 124(1)(c). The rationale we think is that matter which can be appealable because the time limit has not exhausted by 30.06.2019 would better fit under pending matter than the amount in arrears.

29. Circular 1072 vide Para 2(viii)[13] has clarified that if the tax payer does not want to file an appeal even though the time period for filing appeal is not exhausted, he can file a declaration under the scheme subject to a condition that he

[13] This part of Circular 1072 is in contradiction to the FAQ 7. Hence, FAQ 7 may be ignored.

submits a binding declaration that he shall not prefer an appeal. Even though the said para deals with 'amounts in arrears', there is no absolute clarification that such an instance will fall under 'amount in arrears', since the language used suggests that tax payer can file a declaration under the scheme but not specific as to under which category/instance.

30. Hence, our understanding would be that such an instance where tax payer has time as on 30.06.2019 to file an appeal, such matter can be filed declaration under the pending matters instead of amount in arrears. If such a matter is classified as 'amount in arrears', it would be injustice to the tax payer, since the tax relief under the 'amount in arrears' is lower when compared with relief under pending matters.

31. Let us understand the above with an example. A tax payer was finally heard in May 2019 and an order has been passed on 25.06.2019 confirming demand of INR 45 lakhs. The tax payer can file an appeal against such order before Commissioner (Appeals) within two months from the date of receipt of order. Assuming the date of receipt of order is 30.06.2019, the tax payer can file an appeal by 29.08.2019. If the said matter must be filed under 'amount in arrears', the tax payer is supposed to pay 40% of INR 45 lakhs instead of 30% of INR 45 lakhs as in pending matters. Hence, the tax payer will be under a disadvantageous position when compared with a tax payer whose order has been passed earlier, so that making him ready for filing the appeal before 30.06.2019.

32. To summarize:
    i. A case where no appeal has been filed against an order or order-in-original and the time limit for filing the appeal has exhausted as on 30.06.2019, then the same will qualify as an amount in arrears.
    ii. A case where time limit has not exhausted by 30.06.2019, the said matter can be filed as declaration under the scheme vide pending matters instead of amount in arrears.

**Appeals where application for condonation of delay is pending as on 30.06.2019:**

33. On a plain reading of the definition for 'amount in arrears', in order to qualify as an amount in arrears, the appeal should have been filed before the expiry of time limit for appeal an appeal. Many a times appeals would be filed after the expiry of the time limit prescribed with an application to condone the delay. If the condonation application was accepted at any time on or before 30.06.2019, it would be considered as appeal pending on or before 30.06.2019.

34. In cases where the applications for condonation of delay are pending as on 30.06.2019, the issue that arises for consideration is whether the taxpayer is entitled to make a declaration under the scheme as arrears or as amounts pending in appeal? This has bearing on the extent of relief available for payment of tax dues declared under the scheme as illustrated above.

35. In our opinion, the said instance would fall under pending in appeal, if the statue allows the appellate forum to condone such delay if reasonable grounds exists without any time limit. In simple words, under the service tax law, the Commissioner (Appeal) can only condone delay of one month, whereas CESTAT can condone delay for any number of days. Hence, if the condonation application is pending with CESTAT and since there is no time limit for condoning such delay by CESTAT, the said matter must be treated as pending in appeal instead of amount in arrears since the statute itself has given the tax payer right to seek condonation if he can substantiate the delay is due to reasonable grounds.

However, if such condonation application is pending before Commissioner (Appeal) to condone delay more than one month, then such matter will be treated as attaining finality and should be filed under amount in arrears.

**Appeals where application for restoration is pending as on 30.06.2019:**

36. Another area of concern where a clarification from CBIC would help is the position of application for restoration of appeal which is pending as on 30.06.2019. Let us assume a tax payer has given an opportunity of being heard for the matter before CESTAT on 25.03.2019. For genuine reasons, the tax payer could not receive such intimation of hearing and the matter was decided by CESTAT *ex parte.* The final order has reached to the tax payer on 25.06.2019. Basis such final order, a miscellaneous petition is filed before CESTAT seeking restoration of appeal and hearing the matter on merits. Such miscellaneous petition was heard by CESTAT on 10.07.2019 and basis the genuine reasons, the CESTAT has restored such appeal.

37. In such a situation, whether the subject appeal should be treated as amount in arrears or pending appeal is a question for which clarification must be given by CBIC. On a strict reading, the subject appeal shall be classified as amount in arrears since the order in appeal has attained finality. On the other hand, since CESTAT has restored the appeal and has given opportunity to argue on merits, the matter may be given status quo and be treated as pending as on 30.06.2019 because of restoration.

38. In our opinion, once restoration application has been accepted by CESTAT, the matter travels to old date and should be treated as pending in appeal as on 30.06.2019 despite of the fact that said matter is heard and restored subsequent to 30.06.2019.

## Conviction for any Offence

39. Section 125(1)(b) provides that a person who has been convicted for any offence punishable under the indirect tax enactment for the matter for which he intends to make a declaration under the scheme shall be ineligible to make a declaration under the scheme. The ineligibility is only with respect to the matter for which the prosecution proceedings were initiated and the taxpayer was convicted. FAQ 8 issued by CBIC also clarified the same. In case the taxpayer is convicted of any matter other than the matter for which he is convicted is eligible to make a declaration under the scheme.

40. The disqualification under the scheme would arise only when the taxpayer is convicted for any offence under the Indirect Tax enactment. In a case where a taxpayer is subject to mere prosecution proceedings for any offence without any conviction, then he is not disqualified from the benefit of the scheme.

41. No clarity is available about the eligibility to make a declaration under the scheme in a case where a person was convicted by a lower court was challenged before a higher court and the conviction was stayed by the higher court.

## Settlement Commission

42. Section 125(1)(g) provides that a taxpayer is ineligible to make a declaration under the scheme if an application was filed before the settlement commission. Therefore, a person who has approached the settlement commission for the settlement of a dispute is ineligible to make a declaration under the scheme.

43. Para 10(f) of the Circular 1071 provides the above disqualification is not applicable in the following cases:
    i. In cases where proceedings before the Commission may abate due to reasons such as rejection of the application by the Commission or due to order of the Commission not being passed within the prescribed time etc. It is clarified that all such cases which are outside the purview of the Settlement Commission shall be covered under the Scheme under the relevant category of adjudication or appeal or arrears as the case may be provided the eligibility is otherwise established under this Scheme.
    ii. Further, any pending appeals, reference or writ petition filed against or any arrears emerging out of the orders of Settlement Commission are also eligible under the Scheme.

## Procedure

44. The broad procedure involved is that the taxpayer is required to make declaration electronically in Form SVLDRS-01 on or before 31.12.2019. The declaration shall be filed in the portal www.cbic-gst.gov.in. A separate declaration shall be filed with respect to each pending appeal, show cause notice, proceedings by way of enquiry, investigation or audit.

45. Except in cases of voluntary disclosure, the declaration filed shall be verified by Designated Committee[14] based on particulars furnished by the declarant as well as the records available with the Department. If the amount payable as per the declaration is accepted by the Designated Committee, then a statement indicating the amount payable by the declarant in Form SVLDRS-03 shall be issued to the declarant within 60 days of the declaration.

46. If the amount estimated by Designated Committee is different from the amount payable as per the declaration, then the designated committee shall issue electronically in Form SLVDRS-02 an estimate of the amount payable by declarant within 30 days of the receipt of the declaration along with notice of personal hearing.

47. The declarant is required to submit electronically in Form SVLDRS-02A, the agreement or disagreement with the estimate, written submissions, waive or seek an adjournment of personal hearing. The request for adjournment may be granted by Designated Committee in Form SVLDRS-02B. The Designated Committee after granting the opportunity of being heard to the declarant, declare the amount payable by the declarant in Form SVLDRS-03 within 60 days of the declaration.

48. In terms of section 128 of the scheme, the Designated Committee is entitled to modify the statement in Form SVLDRS-03 to correct an arithmetical error or clerical error which is apparent on the face of the record. Such rectification can be undertaken suo-moto or after being brought to their notice by the declarant.

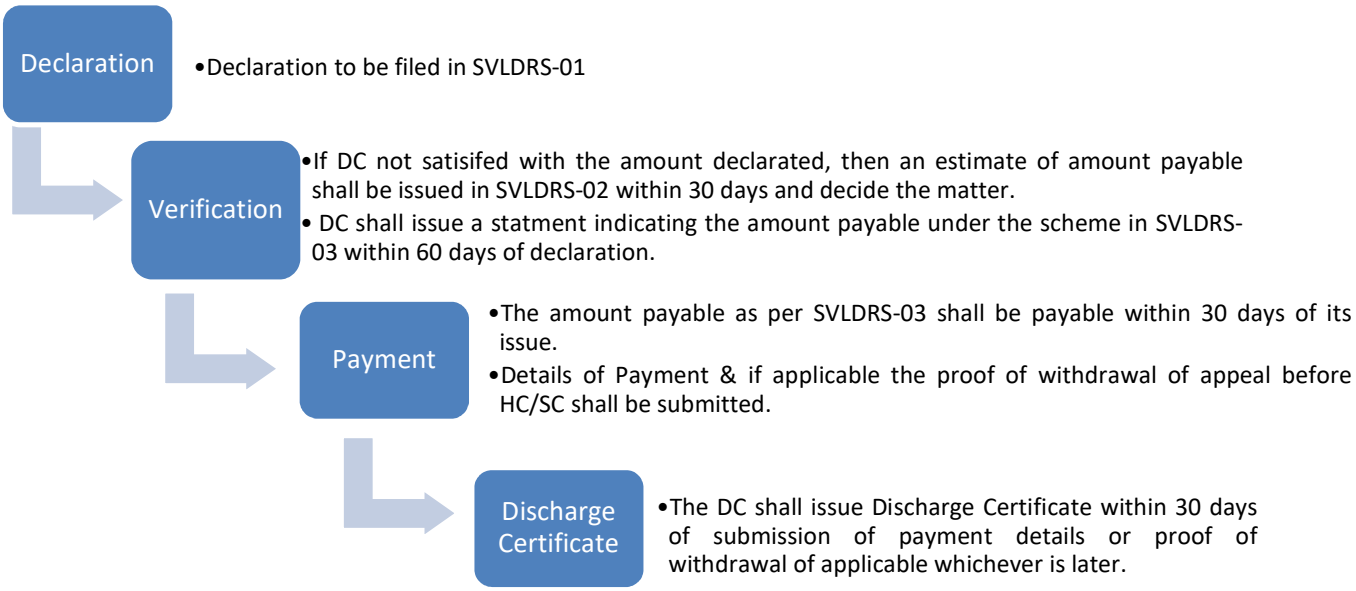
[14] In terms of section 125 and 126 of the scheme, Designated Committee is entrusted with the responsibility to verify the declarations filed under the scheme and to issue a statement of tax dues to be payable under the scheme. The Designated Committee will consist of jurisdictional officers.

49. The declarant shall be liable to pay the amount determined to be payable within 30 days from the date of issue of form SVLDRS-03. In a case where the declaration pertains to an appeal or writ petition pending before the High Court or Supreme Court, then a proof of withdrawal of appeal shall be submitted to the Designated Committee.

50. On being satisfied with the payment of tax dues and on submission of proof of withdrawal of appeal wherever applicable, the Designated Committee shall issue a discharge certificate within 30 days of said payment or submission of said proof whichever is later. Discharge Certificate shall be conclusive of the matter and period covered by declaration except in case of voluntary disclosure.

51. In a case of voluntary disclosure where any material particular furnished in the declaration is subsequently found to be false, within a period of one year of issue of the discharge certificate, it shall the as if the declaration was never made and proceedings under the applicable indirect tax enactment shall be instituted

## *SNAPSHOT OF THE PROCEDURE*



## Certain Important Issues

### Demands quantified by 30.06.2019 but Notice issued subsequently

**Whether a person subjected to enquiry, investigation or audit with dues quantified as on 30.06.2019 is ineligible to make a declaration under the scheme if he was served with show cause notice at any time from 01.07.2019 onwards?**

52. Section 123(b), while dealing with tax dues states that, where a show cause notice under any IDE has been received by declarant prior to 30.06.2019, then the amount of duty stated therein would be tax dues. In other words, the section dealing with tax dues only deals with notices which were received by declarant prior to 30.06.2019. If the notices are issued post 30.06.2019, such instance was not dealt by tax dues and accordingly the declarant cannot file declaration making him in a way ineligible for the scheme.

53. However, in a situation where an audit, enquiry or investigation has commenced prior to 30.06.2019 and amounts are quantified on or before 30.06.2019, but a notice to such an extent has been issued post 30.06.2019, would not disentitle the declarant from making declaration, since the tax dues qua section 123(c) can be resorted. Therefore, a person who has been subjected to audit, enquiry or investigation would be entitled to make declaration of their tax dues if the demands are quantified as on 30.06.2019 even if he was served show cause notice subsequently.

### Penalty or late fee alone is quantified under audit, inquiry or investigation

**Whether penalty or late fee alone quantified in audit, enquiry or investigation are covered under the scheme?**

54. Section 124(1)(b) provides that where the tax dues are relatable to a show cause notice for a late fee or penalty only, and the amount of duty in the said notice has been paid or is nil, then, the entire amount of late fee or penalty will be waived off. As this sub-section referred only to show cause notice alone, doubts were expressed about the applicability of the benefit to cases of pending appeals where the penalty or late fee alone are the subject matter of dispute.

55. It is clarified that the provisions apply to any show cause notice for penalty/late fee, irrespective of the fact that it is under adjudication or appeal. Moreover, there can be a show cause notice that originally also involved a duty demand, and the amount of duty in the said notice became 'nil' whether on account of the fact that same has been paid under this Scheme or otherwise. Such cases are also covered under Section 124(1)(b).

56. At times, penalty or late fee alone would be quantified in audit, enquiry or investigation but there were no dues towards taxes and interest. This situation is not covered by section 124(1)(d) which only covers cases of audit, enquiry or investigation where dues quantified includes taxes. In the absence of any clarification like the case of appeals, whether the benefit of the scheme can be availed by these taxpayers to claim relief from penalty or late fee.

57. In our opinion, such situations where no dues are pending with respect to tax should be considered in light of clarification given by CBIC and accordingly complete relief can be claimed. However, there also might be another argument that such instances are to be treated as cases pending under section 124(1)(d) with tax quantified to be payable as nil but there are quantifications relating to penalty and late fee. Accordingly, the benefit of the scheme can be claimed. However, this issue is not free from doubt in the absence of express clarification like the case of pending appeals.

## Interest alone is the subject matter of dispute

**Whether the benefit of the scheme can be availed if interest alone is the subject matter of the dispute?**

58. There might be cases where interest alone is the subject matter of dispute. Examples of the same would include demands pertaining to mobilization advance on receipt basis whereas the taxpayer has paid tax at the time when invoices are issued. By the time inquiry or investigation or audit proceedings have started, the tax would have been paid by the service provider on an invoice basis. As there are no tax dues but dues are towards interest alone, the issue involved is whether the taxpayer is entitled to make a declaration under the scheme.

59. Section 124 does not confer expressly any benefit under the scheme like the case of penalty or late fee, with respect to cases where interest alone is the subject matter of dispute. In the absence of any provision that exists for penalty or late fee, we opine that such interest cannot be declared under the scheme for any relief and required to be paid. Any positive clarifications from CBIC on this aspect would benefit the tax payers.

## Rejection of Declaration by Designated Committee

**Whether a declaration filed under the scheme can be rejected by the officers if found to be ineligible?**

60. The scheme provides for various conditions as provided under section 123 and 124 to be satisfied in order to claim eligible for declaration under the scheme. In fact, the form for declaration in SVLDRS-01 also provides a questionnaire which the declarant has to answer in order to declare himself as eligible to make a declaration under the scheme.

61. There might be cases where a person might be ineligible to make a declaration. Say, for example, a person who was subjected to audit filed a declaration under the scheme under the category of voluntary disclosure. Sub-section (1) of section 126 provides that the correctness of the declaration shall be verified by the Designated Committee. The provisions of section 127 including the procedure for show cause and opportunity of being heard to issue a statement of amount payable by declarant indicates that the Designated Committee is entitled to verify and confirm the correctness of the tax dues declared by the declarant and not to decide upon issues related to eligibility of declarant to the scheme.

62. Further, the provisions of the scheme do not prescribe the manner in which issues related to eligibility of declarant to the scheme shall be decided. It has been clarified in the circular 1072 that the designated committee can inform the ineligibility to declaration under the scheme through a letter.

63. However, as no show cause notice and opportunity of personal hearing are not provided under the scheme, the rejections made for declarations under the scheme shall be prone to litigation.

## Restriction on Co-Noticees

**Whether the co-noticees are required to file a declaration under the scheme to obtain relief from penalty and other proceedings?**

64. In terms of proviso to section 123(1)(b), where a show cause notice has been issued on the declarant and other persons making them jointly and severally liable for the amount indicated in the said notice, it has been provided that the tax dues payable by declarant under the scheme shall be the amount indicated in the said notice as joint and several liability of declarant and co-noticees.

65. In this context, the issue that arises for consideration is whether the co-noticees are automatically granted relief from payment of penalties and other proceedings under the said notice. In this regard, it was clarified that co-noticees are also required to file a declaration under the scheme to obtain relief. However, it is clarified that such a declaration cannot be filed by co-noticees until the duty demand was settled by the main noticee who discharges the tax liability under the scheme.

66. The scheme is operational between the period 01.09.2019 to 31.12.2019. The main noticee filing declaration under the scheme can settle the tax dues only after the statement of tax dues in Form SVLDRS-03 are issued by Designated Committee. In light of this procedure, the restriction that the co-noticees can file the declaration only after the tax dues are settled by the main noticee would cause difficulty to co-noticees in timely filing of declaration.

67. In view of this clarification, it is advisable to ensure the main notice file declaration and settle the tax dues at the earliest to provide ample time to co-noticees to file their declaration.

## Failure to Pay Tax Dues

**What will be the implications if the taxpayer fails to pay the declared tax dues within 30 days from the date issue of Form SVLDRS-03?**

68. Section 127(5) provides that the amount indicated in the statement of tax dues issued in Form SVLDRS-03 shall be paid within 30 days from the date of such issue. In a case where a taxpayer fails to pay the said tax dues within the said time period, it has been clarified that the declaration filed under the scheme will lapse. This implies that the regular proceedings of appeal, adjudication or recovery as the case may be will continue.

## Jurisdiction of Designated Committee

**How will the jurisdiction of the taxpayer before the Designated Committee be determined in cases where matters of a taxpayer under investigation by DGGI relates to more than one Commissionerate?**

69. In respect of matters under investigation by DGGI, there may be cases where the duty quantified relates to more than one Commissionerate. In such cases, the Designated Committee of the Commissionerate involving the maximum amount of duty will decide the case. Further, in other cases of DGGI wherein the show cause notice that has been

issued covers more than one Commissionerate, a common adjudicator must be quickly appointed under intimation to the Chief Commissioner concerned and DG Systems so the Designated Committee of that Commissionerate can finalize this matter.

## Annexure

List of Indirect Tax Enactments to which the Scheme is applicable

1. The Central Excise Act, 1944
2. The Central Excise Tariff Act, 1985
3. Chapter V of the Finance Act, 1994 (service tax)
4. Rules made under the above enactments
5. The Agriculture Produce Cess Act, 1940
6. The Coffee Act, 1942
7. The Rubber Act, 1947
8. The Salt Cess Act, 1953
9. The Mica Mines Labour Welfare Fund Act, 1946
10. The Medicinal and Toilet Preparations (Excise and Duties Act, 1955)
11. The Additional Duties of Excise (Goods of Special Importance) Act, 1957
12. The Mineral Products (Additional Duties of Excise and Customs) Act, 1958
13. The Sugar (Special Excise Duty) Act, 1959
14. The Textiles Committee Act, 1963
15. The Produce Cess Act, 1966
16. The Limestone and Dolomite Mines Labour Welfare Fund Act, 1972
17. The Coal Mines (Conservation and Development) Act, 1974
18. The Oil Industry Development Act, 1974
19. The Tobacco Cess Act, 1975
20. The Iron Ore Mines, Manganese Ore Mines and Chrome Ore Mines Labour Welfare Cess Act, 1976
21. The Bidi Workers Welfare Cess Act, 1976
22. The Additional Duties of Excise (Textiles and Textile Articles) Act, 1978
23. The Sugar Cess Act, 1982
24. The Jute Manufacturers Cess Act, 1983
25. The Agricultural and Processed Food Products Export Cess Act, 1985
26. The Spices Act, 1986
27. The Finance Act, 2004 (Education Cess)
28. The Finance Act, 2007 (SHE Cess)
29. The Finance Act, 2015 (SBC)
30. The Finance Act, 2016 (KKC)

## Modus Operandi – Normal vs LDR

*Modus Operandi to Decide Normal Route of Litigation vs LDR Scheme*

### Summary:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Particulars | Relevant Details |
|---|---|
| Nature of Tax | Service Tax on Liquidated Damages |
| Period Involved | April 2016 to June 2017 |
| Amount Involved | ST of Rs. 55,00,000/- plus interest under Section 75, and penalty of Rs. 50,47,741/- under section 78 of Finance Act, 1994 |
| Current Stage of Proceedings | Commissioner Appeals |
| Any Other Application | No |
| Date of Last Hearing | Not heard as on 30.06.19 |
| Status on Stay | Not Applicable |
| Details of Pre-Deposit (in %) | 7.5% |
| Details of Pre-Deposit (in INR) | Rs.4,12,500/- |
| Eligibility under LDR | Yes as appeal before Commissioner Appeal is pending as on 30.06.19 |
| Tax Relief | Rs.27,50,000/- (50% since tax dues exceeded Rs 50 Lakhs) |
| Balance to be Payable if opted for LDR | Rs.23,37,500 (Rs 27,50,000 – Rs 4,12,500) |

2

## Facts:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Particulars | Brief of Facts |
|---|---|
| Summary of Facts | 1. M/s XYZ Limited is engaged in construction, execution and undertaking of power projects, taking/giving on the lease of infrastructure facilities to power and other industries.<br>2. During the period in dispute, they have entered into agreement with M/s ABC Limited for supply and commissioning of generators with a condition that liquidated damages attracts in event of failure to commission within the stipulated time.<br>3. As the vendor has not installed within the specified time, XYZ limited has issued a debit note for liquidated damages amounting to the disputed amounts.<br>4. SCN issued to demand service tax on the amounts recovered from vendor stating them that tax is payable along with interest under section 75 and penalty under section 78 of Finance Act, 1994.<br>5. The same was confirmed by order of adjudicating authority which is now challenged before Commissioner (Appeals). |

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## Main Allegations:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Particulars | Brief of Allegations |
|---|---|
| Allegation #1 | • Non-payment of service tax on declared service, which is falling in taxable criteria under Section 66E(e) of Finance act,1994 and attracted.<br>• The collected amount should be considered as demurrage under Sub rule (x) of Rule 6 of Service Tax (Determination of Value) Rules,2006. |
| Allegation #2 | • For contravening provisions and for suppression of facts and wilful mis-statement liable for penalty u/s 78. |

4

## Main Grounds:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Particulars | Brief of Grounds | Tax Position based on current jurisprudence |
|---|---|---|
| Ground #1 | Nature of Receipt is compensation for breach of contract hence not a service to attract service tax.<br>• the compensation is paid due to loss or damage caused on breach of contract in a usual course and are compensatory in nature. | The said ground is upheld in the following cases:<br>• Vimlachal Print & Pack Pvt. Ltd Vs. CCE (Ahmedabad)<br>• Inox Air Products Ltd Vs. CCE (Nagpur & Mumbai) |
| Ground #2 | Interest u/s 75 should not be payable and Penalty u/s 78 cannot be imposed<br>• Since ST demanded were not payable the question of paying interest does not arise.<br>• Issue involved is interpretative in nature and hence no intention to evade service tax can be attributed. | • Based on the facts stated it can be argued that there is no fraud or willful mis-statement or suppression of facts nor there was any intention to evade payment of tax.<br>• Further, there are favorable decisions on this issue as mentioned above. Hence, penalty may not be payable. |

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## Allegation vs Grounds:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Allegation | Ground | Probability of Success |
|---|---|---|
| Allegation #1:<br>• Non-payment of service tax on declared service, which is falling in taxable criteria under Section 66E(e) of Finance act,1994 and attracted.<br>• The collected amount should realised as demurrage under Sub rule (x) of Rule 6 of Service Tax (Determination of Value) Rules,2006. | • Nature of Receipt is compensation for breach of contract hence no Service tax will be leviable.<br>• the compensation is caused due to loss or damage on breach of contract in a usual course and are compensatory in nature | 30% - 45% |

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## Allegation vs Grounds:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

| Allegation | Ground | Probability of Success |
|---|---|---|
| Allegation #2:<br>• For contravened provisions and for suppression of facts and wilful mis-statement liable for penalty u/s 78. | • Since ST demanded were not payable then interest payable should not arise and since there is no intention to evade service tax, penalty may not be triggered. | Depends on the success of previous allegation. |

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## Advise as to LDR:

SBS AND COMPANY LLP
CHARTERED ACCOUNTANTS

- The issue involved in the present case is covered by various judgments as referred. However, the judgments referred are not elaborate and conclusive to place reliance completely.
- The advance rulings pronounced under GST laws are not in favor of the issue. Since there is no major shift with respect to taxation on liquidated damages under service tax laws and GST laws, considering the current trend, the issue may be settled in favour of revenue.
- An exemption entry is specifically carved out for Governments making them not to pay tax on similar incomes of liquidated damages. Hence, there is a possibility that revenue may press for taxation in absence of such exemption entry for non-government.
- In light of no established jurisprudence on the subject, specific exemption for government entities and unfavourable advance rulings under GST laws, we advise to opt for LDR in the best interests of XYZ Limited.
- In the event, XYZ opts for LDR scheme, XYZ is required to pay an additional amount of Rs 23,37,500/- after adjusting the pre-deposit made.

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**The above is contributed by CA Sri Harsha & CA Manindar. For any further queries or discussion on the above, please reach, harsha@sbsandco.com**