POST-BUDGET MEMORANDUM 2014

Indirect Taxes

THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
NEW DELHI

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CONTENTS

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I. INTRODUCTION

1.0 The Council of the Institute of Chartered Accountants of India considers it a privilege to submit this Post-Budget Memorandum to the Government.

1.1 In this memorandum, we have suggested certain amendments to the proposals contained in the Finance (No.2) Bill, 2014 which would help the Government to achieve the desired objectives.

1.2 We have noted with great satisfaction that the suggestions given by the Committee in the past have been considered very positively. Certain representations made in the post-budget memorandum of earlier years have formed the basis of amendments proposed in the current Finance Bill. In formulating our suggestions in regard to the Finance (No. 2) Bill 2014, the Indirect Taxes Committee of the ICAI has considered in a balanced way, the objectives and rationale of the Government and the practical difficulties/hardships faced by taxpayers and professionals in application of the Indirect Tax Laws. We are confident that the suggestions of the Indirect Taxes Committee of ICAI given in this Memorandum shall receive positive consideration.

1.3 In this memorandum, firstly an executive summary of our suggestions on the specific clauses of the Finance (No.2) Bill, 2014 has been given in respect of Indirect Taxes. The detailed suggestions are given thereafter.

1.4 In case any further clarifications or data is considered necessary, we shall be pleased to furnish the same.

The contact details are:

Name and Designation	Contact Details	
	Ph. No.	**Email Id**
CA. Atul Gupta , Chairman, Indirect Taxes Committee	9810103611	atul@servicetax.net; atulservicetax@gmail.com
CA. Sharad Singhal, Secretary, Indirect Taxes Committee	09310542608 0120-3045954	idtc@icai.in

II. EXECUTIVE SUMMARY

S.No.	Topic(s)	Suggestion(s)
A.	**SERVICE TAX**	
1.	**Section 67A- Proposed amendment to determination of rate of exchange for calculation of taxable value in respect of certain services**	➢ *It is suggested that AS 11 be prescribed for determining the rate of exchange for calculation of taxable value in respect of certain services in order to avoid existence of two different set of method for accounting of foreign exchange related transactions.* ➢ *Additionally, it is suggested that instead of prescribing new rules for determination of rate of exchange, the method for determination of rate of exchange in line with AS-11 be included under Service Tax Rules, 1994 itself.*
2.	**E- Payment of Service Tax**	➢ *It is suggested that appropriate limit for the e- payment be prescribed according to the data available with the ministry in order to support the small service providers.*
3.	**Increase in value of service portion in respect of certain works contracts**	➢ *It is suggested that the entry given in sub-clause B & C of Rule 2A (ii) be merged to 60% instead of 70%.*
4.	**Interest on delayed payment of service tax**	➢ *It is suggested that this amendment should be applicable for those assesses who have collected the tax but not remitted to the government. The assessee making delay in payment of tax due to other reasons be not penalized in parity with the evaders.*

		➢ *It is suggested that the rates of interest be restored to the original rate at 18% irrespective of the period of delay as from the aforesaid calculation effective rate of interest comes to 36% per annum or 3% per month which is very huge. It may be noted that under the Income-tax Act, delay in payment of tax only attract interest that too at the much lower rate of 12% per annum (after return date 18% P.A) and there is no penalty provisions for delay in payment of income tax.* ➢ *Without prejudice to above, it is suggested that a higher rate of interest rate may be charged according to slab rate of the duty demanded to protect the small service providers.* ➢ *The interest rates for both the demand of the duty/tax and the refund of the duty/tax be made uniform. There is need for fairness and equity in the rates at which interest is paid by the department and that is charged from tax payer.* ➢ *Further, uniformity be also ensured in respect of date of charging interest on duty/tax demands vis-à-vis date of paying interest on refund of duty/tax. Interest on delayed refunds be also paid by the Department from the date on which duty/ tax was actually paid.*
5.	**Proposed amendment in Section 80(1) – No waiver of penalty even when complete details of the transactions are available in the specified record**	➢ *It is suggested to drop the proposed amendment in Section 80(1).*

6.	**Services received by Educational Institutes**	➢ *It is suggested that Renting of Immovable property service provided to Education Institutions continue to be exempted.* ➢ *It is also suggested that scope of exempted services to be enhanced by covering guest faculty / teachers, and computer / IT lab / software services. (Or All services directly relating to the delivery of education or training to students)*
7.	**Proposed Amendment in Section 83 Proposed -Application of Section (2A) of the Central Excise Act, 1944**	➢ *It is suggested not to apply Section 5A(2A) of the Central Excise Act, 1944 in Service Tax by amending Section 83 of the Finance Act, 1994.*
8.	**Non-removal of condition of payment in case of partial reverse charge Credit Mechanism**	➢ *It is suggested that appropriate amendment be made so that service recipient of partial reverse charge be made at par with service recipient of 100% reverse charge cases.*
9.	**Definition of Intermediately Services**	➢ *It is suggested that intermediary of services and intermediary of goods can be covered under rule 3 itself.* ➢ *Alternatively, it is suggested that appropriate amendment be made so that foreign exchange earnings from both commission on services and goods be zero rated.*
10.	**Time Limits for Completion of Adjudication**	➢ *It is suggested that the words use "where it is possible to do so" need to be omitted to make it mandatory. It may be noted that in the Income Tax Act, 1961 assessments has to be completed by the assessing officer with in the specified time limit.*

B.	**CENTRAL EXCISE**	
11.	**Pre-deposit for Appeal**	➢ *It is suggested that, Pre-deposit of only 1% be demanded at first stage and second stage appeal or 2% be demanded at first appeal to CESTAT only.* ➢ *Alternatively, it is suggested that a Bank Guarantee be provided as an alternative to pre deposit to safeguard the working capital of the assessee.* ➢ *Without prejudice to the above, it is suggested that a Slab system may be introduced to safeguard the small scale industries, small service providers or BIFR industries.* ➢ *It is also suggested that the relevant provisions be suitably clarified such that on payment of mandatory pre-deposit, the balance demand stands automatically stayed and no recovery proceeding thereof would be initiated by the department to meet the intention beyond the proposed provision.* ➢ *It is suggested that in case pre deposit is mandated and obligated then the interest on duty/tax demanded should not be charged for the period till the appeal is disposed off.* ➢ *It is suggested that said pre deposit should only be in respect of duty/ tax demanded and not on the penalty amount as pre-deposit on penalty cannot be levied unless its cause is proved.*

		➢ *Subject to above, appropriate clarification may be inserted to avoid the interpretation of TRU Letter.* ➢ *It is Suggested that appropriate clarification be provided in respect of the cases remand back to commissioner for re-assessment and what would happened to deposition of pre deposited against original order and whether again pre deposit needs to be paid to appeal for re-assessed order.* ➢ *It is suggested that appropriate clarification be provided in respect of appeal to assessment order passed against duty paid under protest.*
12.	**Appeal to the Supreme Court**	➢ *It is suggested that disposal of appeals pertaining to all cases be also routed through High Court as it is easily accessible from various parts of the Country.*
13.	**Amendment in rule 6 of Central Excise (Determination of Price of Excisable Goods Rules), 2000**	➢ *In case, where goods are sold at price less than the cost, the transaction is at arm's length and invoice price constitutes transaction value. Therefore, it is suggested that transaction value would be the assessable value when goods are sold at a price less than the manufacturing cost.*
C.	**CENVAT CREDIT RULES, 2004**	
14.	**Availment of Cenvat Credit on Input and Input Service**	➢ *It is suggested that the said new proviso should not be made applicable as it is not in sync with principles of Value Added Tax/*

		CENVAT Credit. Also, this is not in line with international trade and practices. *Further, in case the payment to provider of services/ manufacturer is not made within the period of 3 months then the receiver of input or input service is required to reverse the CENVAT credit so availed and he is allowed to avail the same only when the payment is made to the vendor. With this amendment, the receiver of input or input service is compelled to make the payment within 6 months to avail the credit which leads to blockage of working capital.* ➢ *There could be instances wherein the date of CENVAT invoice would be dated much earlier than the date of actual receipt of goods. In this scenario, the assessee loses substantial time. It is suggested that it would have been better if six months time period is allowed from the date of receipt of goods instead of issue date/invoice date.* ➢ *In case of interpretational issues and extended period is invoked, then there will be demand of 5 years whereas credit of the same period will not be allowed which is against the spirit of law and will cause hardship to assessee. To illustrate, an assessee is rendering 100 Rs. services and outsourcing the same in 80 Rs.. Now in case of old period investigation on some interpretational issue or based on some judgment form apex court, he is obliged to pay tax on Rs. 100 but will not be allowed to claim credit on Rs. 80/-. We may live example in case of reimbursement of expenses, where different judgment suggests to pay tax after a substantial period pass over.*

		➢ *Without prejudice to above, it is suggested that an appropriate clarification be provided in respect of retention money retained by the service provider or manufacturer as per the terms of contract.*
15.	**Transfer facilities to LTU**	➢ *One of the main attractions to the LTU scheme was the flexibility given to such LTU's. Such flexibility was desirable given the contribution of the LTU to the exchequer. Withdrawal of facilities would only make the scheme unattractive and give doubts in the mind of the tax paying LTU. Therefore, it is suggested that this amendment be withdrawn forthwith.*
D.	**COMMON ISSUES**	
16.	**Creation of additional posts**	➢ *It is suggested that creation of additional posts at the higher levels should be done only where the statute clearly provides for specific functions and after discussion with stake holders. It should not be seen that posts are created where there is no additional benefit to the taxpayer. It also militates against the very principle of "maximum governance minimum Government".*

III. SUGGESTIONS IN DETAIL

A. SERVICE TAX

1. Section 67A- Proposed amendment to determination of rate of exchange for calculation of taxable value in respect of certain services

Section 67A of the Finance Act 1994 provides that the rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided. For the purposes of this section, "rate of exchange" means the rate of exchange referred to in the *Explanation* to section 14 of the Customs Act, 1962 (52 of 1962).

Union Budget 2014-15 has amended the explanation to Rule 67A so as to enable the Government to prescribe rules for determination of rate of exchange for calculation of taxable value in respect of certain services. This amendment has been proposed in view of requests from the trade and industry to delink the conversion from the notified Customs rates of exchange as at present.

Issue

Determination of rate of exchange by government prescribed rules will lead to duplication of accounting as in the case of Income Tax. .

Assesses follow Accounting Standard 11 prescribed by Companies Act 1956/2013 dealing with Foreign Exchange Rates and Foreign Currency transactions. It states that "foreign currency monetary items should be reported using the closing rate. However, in certain circumstances, the closing rate may not reflect with reasonable accuracy the amount in reporting currency that is likely to be realised from, or required to disburse, a foreign currency monetary item at the balance sheet date. In such circumstances, the relevant monetary item should be reported in the reporting currency at the amount which is likely to be realised from, or required to disburse, such item at the balance sheet date. "

Thus, introduction of new rules for determination of rate of exchange for calculation of taxable value in respect of certain services will propagate double set of accounting and add to the woes of the assessee.

Suggestions:

- *It is suggested that AS 11 be prescribed for determining the rate of exchange for calculation of taxable value in respect of certain services in order to avoid existence of two different set of method for accounting of foreign exchange related transactions.*

- *Additionally, it is suggested that instead of prescribing new rules for determination of rate of exchange, the method for determination of rate of exchange in line with AS-11 be included under Service Tax Rules, 1994.*

2. E- Payment of Service Tax

Rule 6(2) of Service Tax Rules, 1994 has been substituted with effect from October 1, 2014 vide *Notification No. 9/2014 -ST dated 11.07.2014* with a view to make e-payment of Service Tax mandatory for every assessee.

However, proviso to aforesaid Rule 6(2) provides that jurisdictional Assistant Commissioner of Central Excise or jurisdictional Deputy Commissioner may allow the assessee to deposit the Service Tax by any mode other than internet banking. Before this amendment, e-payment of Service Tax was not mandatory if the amount of duty to be paid was less than Rs. 1 lac.

Issues

The above amendment may cause undue hardship for small service providers. Small Service Providers, mainly in unorganized sectors, are uneducated and it is a possibility that they may not be able to make e-payment of Service Tax due to lack of facilities. In case of default, Interest and Penalty would also be levied.

Suggestion

It is suggested that appropriate limit for the e payment be prescribed according to the data available with the ministry in order to support the small service providers.

3. Increase in value of service portion in respect of certain works contracts

Notification 11/2014- ST dated 11-07-2014 amends taxability of Service Portion of Works Contracts related to maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property with effect from 1st October 2014. Taxable Value will be 70% of Total Amount Charged for the works contract other than original works.

Before Amendment, Service Portion in respect of Works Contracts

related to maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property was 60% of Total Amount Charged for the works contract

Issue

Most of the States provide standard deduction to the extent of 30% in case of works contract related to maintenance, repair, reconditioning or restoration or servicing of any goods or maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property. Rest 70% is chargeable to VAT considering the sale of material in case of works contract. In case of aforesaid services it may be noted that, cost of material used is on a higher end.

70% is already chargeable to VAT and with this amendment another 70% is chargeable to Service Tax. This leads to payment of Taxes on 140% of the value which in itself is a hardship.

Suggestion

It is suggested that the entry given in sub-clause B & C of Rule 2A (ii) be merged to 60% instead of 70%.

4. Interest on delayed payment of service tax

In exercise of the powers conferred by Section 75 & in supersession of the *Notification No. 26/2004-ST dated 10.09.2004*; the Central Government vide *Notification No. 12/2014-ST dated 11.07.2014* has fixed the following rates of simple interest per annum for delayed payment of Service Tax with effect from 01.10.2014

S. No (1)	Period of delay (2)	Rate of Simple Interest (3)
1.	Upto Six Months	18%
2.	More than six months and upto one Year	18% for the first six months of delay and 24% for the delay beyond 6 Months
3.	More than One Year	18% for the first six months of delay; 24% for the period beyond six months upto one year and 30% for any delay beyond one year

Issue

In order to have better understanding of the aforesaid interest rates, the following illustration has been provided:

For Instance: M/s ABC Ltd discharges its Service Tax Liability amounting to Rs 1,00,000 for the Month of April 2014 on 6th Nov 2015. In that case, amount of interest required to be paid by M/s ABC Ltd shall be computed as under:

The due date of discharging Service Tax Liability in the aforesaid case shall be 06th May 2014. Thus, interest shall be computed as under:

Period	Days for Interest	Computation of amount of interest (As by Amended	Computation of amount of interest (Old Provision)	comparison
Interest for the period 07.05.2014 to 06.11.2014	184 Days	=100000*18% *184 / 365 = 9074	=100000*18%* 184/365 = 9074	NO EFFECT
Interest for the period 07.11.2014 to 06.05.2015	181 Days	=100000*18%* 181/365= 8,926	=100000*24%*181/365= 11,901	INCREASE BY 33.33%
Interest for the period 07.05.2015 to 06.11.2015	184 Days	=100000*18%* 184/365= 9,074	=100000*30%*184/365= 15,123	INCREASE BY 66.67%
Total Interest payable by ABC Ltd.		27,074	36,099	

The interest rate slab is very harsh for the assessee as delay of 3 years means interest of almost 100%.

Additionally, a penalty under section 76 of the Finance Act, 1994 is imposed on non-payment of service tax at the rate of Rs. 100/- per day of default or 1% per month, whichever is higher.

Thus, another 12% for the year will be imposed for the same default i.e. if the default is beyond one year then highest slab of interest will be applicable plus the penalty under section 76 will be imposed thereby accumulating the interest and penalty together to 42%, which is very high.

Suggestion

- *It is suggested that this amendment should be applicable for those assesses who have collected the tax but not remitted to the government. The assessee making delay in payment of tax due to other reasons be not penalized in parity with the evaders.*
- *It is suggested that the rates of interest be restored to the original rate at 18% irrespective of the period of delay as from the aforesaid calculation effective rate of interest comes to 36% per annum or 3% per month which is very huge. It may be noted that under the Income-tax Act, delay in payment of tax only attract interest that too at the much lower rate of 12% per annum (after return date 18% P.A) and there is no penalty provisions for delay in payment of income tax.*
- *Without prejudice to above, it is suggested that a higher rate of interest rate may be charged according to slab rate of the tax demanded to protect the small service providers.*
- *The interest rates for both the demand of the duty/tax and the refund of the duty/tax be made uniform. There is need for fairness and equity in the rates at which interest is paid by the department and that is charged from tax payer.*
- *Further, uniformity be also ensured in respect of date of charging interest on duty/tax demands vis-à-vis date of paying interest on refund of duty/tax. Interest on delayed refunds be also paid by the Department from the date on which duty/ tax was actually paid.*

5. Proposed amendment in Section 80(1) –No waiver of penalty even when complete details of the transactions are available in the specified record

Section 80(1) is proposed to be amended to exclude reference of first proviso to Section 78(1). The aforesaid proposed amendment removes the power to waive 50% penalty imposed in cases where Service Tax has not been levied or paid or has been short levied or short paid or

erroneously refunded by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of Chapter V of the Finance Act, 1994 or the rules made there under but true and complete details of transactions are available in the specified records. Thus, penalty levied under section 78(1) cannot be dropped on the basis of reasonable cause.

Issue

The reason for the said amendment of the section is to safeguard the revenue against loss, if any. The penalty has been provided in addition to interest. Mere fact that without mens rea, any can be punished or a penalty could be imposed is not a blanket power without providing for any justification. In the Indian Constitutional scheme, power of legislature is circumscribed by fundamental rights. Judicial review of legislation is permissible on the ground of excessive restriction as against reasonable restriction which is also described as proportionality test. Section 37 of Central Excise Act, which is the rule making power, is clear that penalty can be imposed only when the assessee is guilty of intending to evade the payment of duty, the penalty cannot be imposed without such intention.

For any penal proceedings, the following conditions laid down in Hindustan Steel, 83 ITR 26 (SC) should be applied :

- *Penalty can be levied only if assessee acted deliberately, i.e., mens rea, guilty mind is essential before penalty can be levied,*
- *Power to levy penalty is discretionary and penalty cannot be levied merely because it is lawful to do so,*
- *No penalty can be levied for technical or venial breach of the provisions, and*
- *No penalty can be levied where breach of provisions flows from bona fide belief of the assessee.*

When the *assessee acts with the bona fide belief, there cannot be any intention to evade duty and penalty cannot be levied. (i) Akbar Badruddin Jiwani v. Collector of Customs 1990 (47) ELT 161 (SC); (ii) Tamil Nadu Housing Board v. Collector 1990 (74) ELT 9 (SC)*

Suggestion

It is suggested to drop the proposed amendment in Section 80(1)

6. Services received by Educational Institutes

The Mega Exemption *Notification No. 25/2012 ST dated 20.06.2012* has been amended in respect of providing services of renting of immovable property to educational institutions stands withdrawn with effect from 11th July, 2014 vide Notification No. 06/2014-ST dated July 11, 2014. The government has therefore limited the scope of exemption in lieu of renting of immovable property and through specification of auxiliary services.

Issue

The levy of service tax on renting of immovable property provided to the educational institutions will substantial increase the cost to the education.

Further to remove the ambiguity, the auxiliary services has been defined where in the scope has not covered the services provided by Guest Faculty / teachers and IT lab services.

Suggestion

- *It is suggested that Renting of Immovable property service provided to Education Institutions continue to be exempted.*
- *It is also suggested that scope of exempted services to be enhanced by covering guest faculty / teachers, and computer / IT lab / software services. (Or All services directly relating to the delivery of education or training to students)*

7. Proposed Amendment in Section 83 Proposed -Application of Section (2A) of the Central Excise Act, 1944

It is proposed to include Sub-section (2A) of Section 5A of the Central Excise Act, 1944 under section 83 of Finance Act, 1994. As a result, Central Government would be able to add and give retrospective effect to the explanations to any notification or orders issued earlier subject to the condition that such explanation must have been added within a year from the date of issue of such notification.

Issue:

The proposed change is against the policy statement of Finance minister regarding retrospective amendment in Tax Laws.

Suggestion

It is suggested not to apply Section 5A(2A) of the Central Excise Act, 1944 in Service Tax by amending Section 83 of the Finance Act, 1994.

8. Non-removal of condition of payment in case of partial reverse charge Credit Mechanism

Notification No. 21/2014 –CE dated 11th July, 2014 has inserted a proviso in Rule 4(7) which state that in respect of an input service, where the service recipient is liable to pay a part of service tax and the service provider is liable to pay the remaining part, the CENVAT Credit in respect of such input service shall be allowed on or after the day on which payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

Due to above proviso, the service recipient would not able to take credit in the case of partial reverse charge unless he has made payment of input service and service tax paid or payable there on.

However, in the case of 100% reverse charge, credit is available to the service recipient once he made the payment of tax to the Government. Also in other than reverse charge cases, service recipient or manufacturer can take credit of input or input service on receipt of invoice without making any payment.

Issue

In the case of partial reverse charge, proposed amendment has put undue hardship to the recipient of service which mandate to make payment of input service and service tax thereon to avail the CENVAT Credit on such services. The proposed amendment is against the industry norms, which provide credit period to the vendor for making payment of services and may cause working ccapital problem for the service recipient.

Suggestion:

It is suggested that appropriate amendment be made so that service recipient of partial reverse charge be made at par with service recipient of 100% reverse charge cases.

9. Definition of Intermediately Services

Notification No. 14/2014 –ST dated 11th July, 2014 has amended the definition of "intermediary" to mean a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service or supply of goods, between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.

Issues

Due to the said new definition, the foreign inflow would become chargeable to service tax.

Suggestion:

- *It is suggested that intermediary of services and intermediary of goods can be covered under rule 3 itself.*
- *Alternatively, it is suggested that appropriate amendment be made so that foreign exchange earnings from both commission on services and goods be zero rated.*

10. Time Limits for Completion of Adjudication

Section 73 is proposed to be amended for providing time limits for completion of adjudication as follows:

The Central Excise Officer shall determine the amount of service tax due under subsection (*2*)—

(*a*) within 6 months from the date of notice, where it is possible to do so, in respect of cases of Service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded whose limitation is specified as 18 months in sub-section (*1*);

(*b*) within one year from the date of notice, where it is possible to do so, in respect of cases fraud, collusion etc. where extended period of limitation of 5 years is invoked or cases where during the course of any audit, investigation or verification it is found that any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded but the true and complete details are available in the specified records falling under the proviso to sub-section (*1*) or the proviso to sub-section (*4A*).";

Issue

The proposed amendment is use of the phrase "where it is possible to do so", which make it the provision recommendatory rather than mandatory.

Suggestion

It is suggested that the words use "where it is possible to do so" need to be omitted to make it mandatory. It may be noted that in the Income Tax Act, 1961 assessments has to be completed by the assessing officer with in the specified time limit.

B. CENTRAL EXCISE

11. Pre-deposit for Appeal

Existing Section 35F provides that where an appeal is to be preferred before Commissioner (Appeals) or before Tribunal, duty, interest or penalty shall be deposited prior to filing appeal. However, the Commissioner (appeals) or CESTAT may waive deposit of such adjudicated levies. Further, in terms of Section 35C(2A), the stay granted by the CESTAT stands vacated where the appeal is not disposed off within 365 days from the date of order of the stay.

Section 35F is proposed to be substituted with a new section to prescribe a mandatory pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing the appeal before the Commissioner (Appeals) or the Tribunal at the first stage, and 10% of the duty demanded or penalty imposed or both for filing second stage appeal before the Tribunal. However, the amount of pre-deposit payable shall be subject to a ceiling of Rs. 10 Crore. It is also pertinent to add here that all pending appeals or stay applications shall be governed by the statutory provisions prevailing at the time of filing such applications or appeals.

Issue

The proposed substitution of Section 35F is likely to prove highly detrimental to the interest of genuine assesses who might get wrongly implicated by the Revenue Authorities for evasion of taxes/duty. Further, such substitution will only lead to empower Revenue Authorities, since initiation of any proceedings against an assessee, will ultimately lead to depositing of a certain percentage of amount, by an assessee, with the treasury even if it not a legitimate due to the Government. To say it simply, proposed amendment is likely to adversely affect genuine assesses' Right to appeal before the higher authorities.

Furthermore, taking away the right of dispensing of Pre-deposit and making it mandatory to deposit a certain percentage of duty demanded before filing an appeal, would cause undue-hardship to small entrepreneurs/ manufacturers/service providers. It is noteworthy that a small entrepreneur, as per the present amendment, will first have to make a pre-deposit of 7.5% of the duty demanded or penalty imposed or both for filing an appeal before Commissioner (Appeals) and if, the assessee doesn't get a favorable order, then again he will have to make a mandatory pre-deposit of 10% of the duty demanded or penalty imposed or both, if he approaches the Hon'ble Tribunal. Therefore in totality, the assessee will have to pay a total of 17.5% of pre-deposit of

duty demanded and equivalent percentage of penalty [which works out to be 35% of duty demanded] which will only lead to causing undue hardship and harassment to small entrepreneurs at the hands of the Revenue.

Further, if the assessee succeeds in its appeal, then the prescribed percentage of amount deposited with the Government will have to obtained by way of refund, which itself is a daunting task for an assessee to obtain from the Department.

On the other hand, such proposed substitution is likely to benefit tax evaders, as by depositing a prescribed percentage at the time of appeal, the matter could be prolonged till the appeal comes up for regular hearing before the Hon'ble Courts.

Additionally, in the Finance Minster Speech he said that " to expedite the process of disposal of appeals, amendment have been proposed in Custom and Central Excise Act with a view to freeing appellate authorities from hearing Stay application and to take up regular appeals for final disposal" It is not clear as to whether after the mandatory pre deposit Stay application would still need to be filed by assessee to avoid the proceedings of recovery of demand / penalty raised.

In addition, TRU Letter further states that another 10% of Pre-deposit in case of second stage of appeal in addition to the 7.5% of the demand and /or Penalty totaling to 17.5%, however language of the section 35F is different.

Further, it is submitted that in most of the cases unconditional stay has been granted by the tribunal to the assessee.

Suggestions

- *It is suggested that, Pre-deposit of only 1% be demanded at first stage and second stage appeal or 2% be demanded at first appeal to CESTAT.*
- *Alternatively, it is suggested that a Bank Guarantee be provided as an alternative to pre deposit to safeguard the working capital of the assessee.*
- *Without prejudice to the above, it is suggested that a Slab system may be introduced to safeguard the small scale industries, small service providers or BIFR industries.*

- *It is also suggested that the relevant provisions be suitably clarified such that on payment of mandatory pre-deposit, the balance demand stands automatically stayed and no recovery proceeding thereof would be initiated by the department to meet the intention beyond the proposed provision.*
- *It is suggested that in case pre deposit is mandated and obligated then the interest on duty/tax demanded should not be charged for the period till the appeal is disposed off.*
- *It is suggested that said pre deposit should only be in respect of duty/ tax demanded and not on the penalty amount as pre-deposit on penalty cannot be levied unless its cause is proved.*
- *Subject to above, appropriate clarification may be inserted to avoid the interpretation of TRU Letter.*
- *It is suggested that appropriate clarification be provided in respect of the cases remanded back to Commissioner for re-assessment and what would happened to deposition of pre deposited against original order and whether again pre deposit needs to be paid to appeal for re-assessed order.*
- *It is suggested that appropriate clarification be provided in respect of appeal to assessment order passed against duty paid under protest.*

12. Appeal to the Supreme Court

Under section 35L(1) of Central Excise Act, 1994 (b) an appeal lies to the Supreme Court from —

any order passed by the Appellate Tribunal relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment.

Finance (No.2) Bill, 2014 has proposed to insert sub-section(2) in section 35L to provide that the determination of any question having a relation to the rate of duty shall include the determination of taxability or excisability of goods for the purpose of assessment

Issue

The above amendment would practically lead to a situation where a major chunk of the cases will be appelable to the Supreme Court by-passing High Court. As is well known that Supreme Court is already

flooded with pending matters, centralization of appeals to the Supreme Court will lead to delay in disposal of appeals.

Further, accessibility of Supreme Court is very difficult for remote area assesses which will lead to increase in the cost of litigation to the assessee.

Suggestion:

It is suggested that disposal of appeals pertaining to all cases be also routed through High Court as it is easily accessible from various parts of the Country.

13. Amendment in rule 6 of Central Excise (Determination of Price of Excisable Goods Rules), 2000

Rule 6 of the above rules has been amended so as to provide that in cases where excisable goods are sold at a price below the manufacturing cost and profit and there is no additional consideration flowing from the buyer to the assessee directly or from a third person on behalf of the buyer, value for the assessment of duty shall be deemed to be the transaction value.

Issue

Rule 6 operates only if price is not the sole consideration. In the case mentioned above, goods are deliberately sold at less than cost price and no additional consideration is flowing from the buyer to the assessee directly or from a third person on behalf of the buyer. Hence, rule 6 need not be applied in this situation.

Suggestion

In case, where goods are sold at price less than the cost, the transaction is at arm's length and invoice price constitutes transaction value. Therefore, it is suggested that transaction value would be the assessable value when goods are sold at a price less than the manufacturing cost.

C. CENVAT CREDIT RULES, 2004

14. Availment of Cenvat Credit on Input and Input Service

With effect from 1st September 2014 Rule 4(1) and Rule 4(7) of Cenvat Credit Rules, 2004 are amended vide *Notification No. 21/2014 – Central Excise (N.T.) dated 11.07.2014.*

Rule 4(1) provides that the CENVAT credit in respect of inputs may be taken immediately on receipt of the inputs in the factory of the manufacturer or in the premises of the provider of output service. The new proviso provides that the manufacturer or the provider of output service shall not take CENVAT credit after six months from the date of issue of any of the documents specified in Rule 9(1).

Similarly, Rule 4(7) provides that the CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 is received. Fifth proviso to Rule 4(7) of the Cenvat Credit Rules, 2004 provides that where the Cenvat credit has already been taken on receipt of invoice but has to be paid because of non-payment to the input service provider within 3 months then the same is available later on payment to the input service provider. The new Proviso provides that the manufacturer or the provider of output service shall not take CENVAT credit after six months from the date of issue of any of the documents specified in Rule 9(1).

Prior to this amendment the availment of Cenvat credit was not barred by any time limit.

Issue

If the payment is not made to input service provider or manufacturer within 6 months of issuance of invoice, then the receiver' of input or input services will stand to lose the CENVAT credit with the insertion of proposed proviso.

On reading of the amended provision, it is not clear if the time limit of 6 months would be applicable only for the invoices issued on or after 1st September 2014 or even for invoices which are eligible for credits prior to 1st September 2014 but assessee has not availed the credit till date.

Sometimes the assessee is not able to avail the credit due to unawareness/lack of clarity or wrong accounting in the books. The newly inserted proviso could lead to loss of credit.

Suggestions

- *It is suggested that the said new proviso should not be made applicable as it is not in sync with principles of Value Added Tax/ CENVAT Credit. Also, this is not in line with international trade and practices.*

  Further, in case the payment to provider of services/ manufacturer is not made within the period of 3 months then the receiver of input or input service is required to reverse the CENVAT credit so availed and he is allowed to avail the same only when the payment is made to the vendor. With this amendment, the receiver of input or input service is compelled to make the payment within 6 months to avail the credit which leads to blockage of working capital.

- *There could be instances wherein the date of CENVAT invoice would be dated much earlier than the date of actual receipt of goods. In this scenario, the assessee loses substantial time. It is suggested that it would have been better if six months time period is allowed from the date of receipt of goods instead of issue date/invoice date.*

- *In case of interpretational issues and extended period is invoked, then there will be demand of 5 years whereas credit of the same period will not be allowed which is against the spirit of law and will cause hardship to assessee. To illustrate, an assessee is rendering 100 Rs. services and outsourcing the same in 80 Rs. Now in case of old period investigation on some interpretational issue or based on some judgment form apex court, he is obliged to pay tax on Rs. 100 but will not be allowed to claim credit on Rs. 80. We may have live example where different judgment suggests to pay tax after a substantial period pass over.*

- *Without prejudice to above, it is suggested that an appropriate clarification be provided in respect of retention money retained by the service provider or manufacturer as per the terms of contract.*

15. Transfer facilities to LTU

Rule 12A of the Cenvat Credit Rules, 2004 was introduced to centralise assessment of taxes and give certain facilities to the LTU. One such facility was transfer of CENVAT credit from one unit to another unit.

Issue

By amendment to the Cenvat Credit Rules, 2004, transfer of credit from one registered premises to another registered premises is being withdrawn wef 11.7.2014.

Suggestion

One of the main attractions to the LTU scheme was the flexibility given to such LTU's. Such flexibility was desirable given the contribution of the LTU to the exchequer. Withdrawal of facilities would only make the scheme unattractive and give doubts in the mind of the tax paying LTU. Therefore, it is suggested that this amendment be withdrawn forthwith.

D. COMMON ISSUES

16. Creation of additional posts

Vide Clause 72, 73, 88 and 89 of the Finance Bill 2014 additional posts of Principal Commissioner and Principal Chief Commissioner have been created.

Suggestion

It is suggested that creation of additional posts at the higher levels should be done only where the statute clearly provides for specific functions and after discussion with stake holders. It should not be seen that posts are created where there is no additional benefit to the taxpayer. It also militates against the very principle of "maximum governance minimum Government".

ABOUT ICAI AND INDIRECT TAXES COMMITTEE OF ICAI

The Institute of Chartered Accountants of India (ICAI) is a statutory body established under the Chartered Accountants Act, 1949 to regulate the profession of Chartered Accountants in India. During its more than six decades of existence, ICAI has achieved recognition as a premier accounting body not only in the country but also globally, for its contribution in the fields of education, professional development, maintenance of high accounting, auditing and ethical standards. ICAI now is the second largest accounting body in the whole world.

The Council of ICAI functions through various Standing and Non-Standing Committees. Indirect Taxes Committee is one of the most important non-Standing Committees of ICAI. The main function of the Indirect Taxes Committee is to examine the indirect tax laws, rules, regulations, circulars, notifications, etc., which may be enacted or issued by the Government from time to time and to send suitable memoranda containing suggestions for improvements in the respective legislation. The Indirect Taxes Committee actively facilitates the process of formulation of budget by offering pre-budget and post-budget suggestions/comments to simplify tax laws and their administration for the purpose of making it more responsive to tax payers.

Another important function of the Committee is to enhance the awareness/ knowledge of the members of the ICAI relating to indirect taxes and the potential opportunities offered by this area by organising workshops, certificate courses, seminars, e-learnings and interactive programmes independently as also with trade and industry.

INDIRECT TAXES COMMITTEE
THE INSTITUTE OF CHARTERED ACCOUNTANTS OF INDIA
(Set up by an Act of Parliament)
ICAI Bhawan, A-29, Sector - 62, NOIDA (U.P.) India
Telephone Board : +91 120 3045 900 Ext. 954
E-mail : idtc@icai.in; Website : http://www.icai.org