POST–BUDGET MEMORANDUM, 2015

INDIRECT TAXES

POST-BUDGET MEMORANDUM-2015

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 Bill, 2015 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 Bill 2015, 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 case any further clarifications or data is considered necessary, we shall be pleased to furnish the same.

The contact details are:

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POST BUDGET MEMORANDUM, 2015

SERVICE TAX

1. Clarification regarding definition of Government

Finance Bill 2015 vide clause 105 has introduced the definition of the term 'Government' by insertion of Clause 26A under Section 65B of the Finance Act (to be made effective after enactment of the Finance Bill, 2015) which reads as "Government" means the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder.

Issue

The definition specifically provides State Governments and Union Territories to include their departments. However, in respect of Central Government, only Departments of the Central Government are covered under the ambit of the term 'Government' and not the term CENTRAL Government.

Suggestion

- *It is suggested that a suitable clarification be issued as to whether the Central Government would form part of the 'Government' or not while interpreting definition of the term 'Government' in order to determine taxability of a service under the Finance Act.*

2. Exemption to Service provided by Government to Business Entity

Section 66D of Finance Act, 1994 provides that service by Government or a local authority excluding support services provided to business entities is exempt from service tax.

Finance Bill, 2015 has proposed to extend the exclusion to cover ***any*** service provided to business entities. This means the business entity receiving such service would be person liable to pay service tax under reverse charge.

Issue

Charges/ Fess/ amount charged by DGFT, MCA for various services provided to business entities have been inadvertently proposed to be made liable to Service Tax. This also leads to the conclusion that sovereign functions of the Government will also be liable to service tax which cannot be the intention of the legislature.

Suggestion:

- *It is suggested that appropriate amendment be made to exclude such services provided by the Government.*

3. Exemption to Entry to entertainment events or access to amusement facilities

Finance Bill, 2015 has proposed to amend section 66D "Negative List" to make admission to entertainment events or access to amusement facilities taxable with effect from such date as the Central Government may, by notification in the Official Gazette specify.

Service Tax shall be levied on the service provided by way of access to amusement facility providing fun or recreation by means of rides, gaming devices or bowling alleys in amusement parks, amusement arcades, water parks and theme parks. Also Service Tax is payable on services by way of admission to entertainment event of concerts, pageants, musical performances concerts, award functions and sporting events other than the recognized sporting event, if the amount charged is more than Rs. 500 for right to admission to such an event. Certain lists of activities are exempted under Mega Exemption Notification 25/2012.

Issue

Article 246 of Constitution of India empowers State Government under List II- State List vide Entry 62 to levy taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.

Further, Article 246 of Constitution of India which empowers Central Government under List I- Union List vide Entry 97 to levy tax on "any other matter not enumerated in List II and List III including any tax not mentioned in either of those lists".

Suggestion

- *It is suggested that constitutional validity for levying tax on admission to entertainment events or access to amusement facilities needs to be checked as it is covered under Entry 62 of List II- State List of Article 246 of Constitution of India.*

4. Exemption of Production of alcoholic liquor for human consumption

Finance Bill, 2015 has proposed to amend section 66D "Negative List" and made services by way of carrying out any process amounting to manufacture or production of alcoholic liquor for human consumption taxable with effect from such date as the Central Government may, by notification in the Official Gazette specify.

Issue

Article 246 of Constitution of India empowers State Government under List II- State List vide Entry 51 to levy duties of excise on alcoholic liquor for human consumption manufactured or produced in a state.
Further, Article 246 of Constitution of India which empowers Central Government under List I- Union List vide Entry 97 to levy tax on "any other matter not enumerated in List II and List III including any tax not mentioned in either of those lists". This may be deduced to mean that Central Government can levy tax on activities not enumerated in List II and List III.

Suggestion

- *It is suggested that constitutional validity for levying tax on manufacture or production of alcoholic liquor for human consumption needs to be checked as it is covered under Entry 51 of List II- State List of Article 246 of Constitution of India.*

5. Filing of Return without payment of Service Tax

Finance Bill, 2015 has proposed to amend section 73 of Finance Act to provide that in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, ***without service of notice under sub-section (1).***"

Existing provisions requires serving of a show cause notice to the assessee wherein he is given a chance to explain as to why the tax has not been paid by him.

Issue

This omission of practice of serving show cause notice will work against the interest of assessees as it provides the assessee an opportunity of being heard and is also in lines of Principles of Natural Justice.

Also, it is not clear as to what would happen in a situation where the assessee needs to rectify a wrongly filed ST-3 Return. Rule 7B of the Service Tax Rules, 1994, provides that an assessee can submit a revised return to correct a mistake or omission within 90 days of filing the original return. Therefore, recovery could be initiated under Section 73(1B) even before the expiry of 90 days from filing the return and thus the assessee may not be given a chance to fully utilize the period of 90 days provided for filing a revised return to rectify any unintentional mistakes.

Further, since the recovery can be made at any point of time in the future without limitation and unless otherwise provided for, the assessee would not be left with any remedy of rectifying even a clerical error in the return once the period of 90 days has expired.

Suggestions:

- *It is suggested that the provision of serving show cause notice under Section 73 be restored*

6. Waiver from penalty if duty and interest paid before service / issue/ receipt of Show cause notice under different statue

The Finance Bill, 2015 has proposed to grant complete waiver from penal provisions in cases not involving fraud, collusion, willful misstatement, suppression and contraventions of provisions with the intention to evade duty in the following manner:

Section 76 of the Finance Act as proposed to provide where service tax has not been levied or paid, or has been short levied or short paid, or erroneously refunded, for any reason, other than the reason of fraud or collusion or willful misstatement or suppression of facts or contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax, the person who has been served notice under sub-section (1) of section 73 shall, in addition to the service tax and interest specified in the notice, be also liable to pay a penalty not exceeding ten per cent. of the amount of such service tax:

Provided that where such service tax and interest is paid within a period of thirty days of–
(i) the date of **service** of notice under sub-section (1) of section 73, no penalty shall be payable;"

Section 11AC(1) of Central Excise Act, 1944 is proposed to be amended as….(a) where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent. of the duty so determined or rupees five thousand, whichever is higher:

Provided that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of **issue** of show cause notice, no penalty shall be payable…."

Section 28(2) of Customs Act, 1962 is proposed to be amended to provide that where notice under clause (a) of subsection (1) has been served and the proper officer is of the opinion that the amount of duty along with interest payable thereon under section 28AA or the amount of interest, as the case may be, as specified in the notice, has been paid in full within thirty days from the date of **receipt** of the notice, no penalty shall be levied and the proceedings against such person or other persons to whom the said **notice is served** under clause (a) of subsection (1) shall be deemed to be concluded.";

Issue:

With regards to show cause notice the usage of the word 'service' in Service tax, 'issue' in Central Excise and 'receipt' in Customs, will lead to interpretational disputes and frivolous litigation which does not seem to be the intention of the Government. This is evident from the TRU Letter II annexed to the Budget documents, wherein these words have been used interchangeably.

The difference between the meaning of the terms 'issue' and 'service' of notice cannot be ignored. In legal parlance distinction exists and its significance is high. 'Issue' of notice cannot be same as the 'service' of notice. The 'service' of notice ideally means the time when the delivery of notice is complete in the hands of the Noticee. On the other hand, 'issue' of notice would happen when its delivery is merely initiated. There may be a situation that a notice may be issued today, but may be served 2-3 years later.

Suggestion:

- *The provisions under the three statue be harmonized so as to provide complete waiver from penal provisions where tax/ duty and interest is paid within 30 days of the **'receipt'** of the notice rather than 'issue' of notice.*

7. Section 78B(2):Transitory provisions for cases pending under section 73(4A)

Finance Bill, 2015 has proposed to rescind the provisions of section 73 (4A) which provides that if during the course of audit/ verification/ investigation 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 of transactions are available in the specified records, the person may pay the service tax in full or in part along with interest payable thereon under section 75 and penalty equal to 1% of such tax, for each month, for the period during which the default continues, up to a maximum of 25% of the tax amount. This amount shall be paid before the service of notice and such payment shall be informed to the concerned officer in writing who shall not issue Show Cause Notice to the assessee and proceedings in respect of the said amount of service tax shall be deemed to have been concluded.

Further transitional provision has been proposed under section 78B (2) as follows:

"Notwithstanding anything contained in sub-section (1), in respect of cases falling under the provisions of sub-section (4A) of section 73 as was in force prior to the date of coming into force of the Finance Act, 2015, where no notice under the proviso to sub-section (1) of section 73 has been served on any person or, where so served, no order has been passed under sub-section (2) of section 73, before such date, the penalty leviable shall not exceed 50% of the service tax"

Suggestion

- *It is suggested that the penalty provided upto 50% under proposed transitional provision be limited to 25% only as provided in the existing provision under section 73(4A).*

8. Reinstatement of Section 80: Provisions allowing non-payment of Penalty

Finance Bill, 2015 has proposed to rescind the provisions of Section 80 of Finance Act, 1994 which provides that no penalty shall be imposable on the

assessee for any failure if the assessee proves that there was reasonable cause for the said failure, irrespective of provisions of section 76.

Issue

It is against the Principle of Natural Justice, an opportunity to being heard must be provided to assessee.

Suggestions

It is suggested that the provisions of Section 80 be reinstated as the reasonable causes may be considered on case to case basis.

9. Provisions of Section 86 be reinstated

Finance Bill 2015 has proposed to amend section 86 of the Finance Act, 1994 in the following manner:

(a) for the words "Any assessee", the words "Save as otherwise provided herein, an assessee" shall be substituted;

(b) the following provisos shall be inserted, namely:–

"Provided that where an order, relating to a service which is exported, has been passed under section 85 and the matter relates to grant of rebate of service tax on input services, or rebate of duty paid on inputs, used in providing such service, such order shall be dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944:

Provided further that all appeals filed before the Appellate Tribunal in respect of matters covered under the first proviso, after the coming into force of the Finance Act, 2012, and pending before it upto the date on which the Finance Bill, 2015 receives the assent of the President, shall be transferred and dealt with in accordance with the provisions of section 35EE of the Central Excise Act, 1944."

Issue

Under the provisions of the Central Excise Act, 1944 or the Customs Act, 1962, certain orders passed by the Commissioner (Appeals) are appealable before the Revisionary Authority viz., the Central Government under section 35EE or section 129DD. However, against the orders passed by the Revisionary Authority under the above provisions there is no specific appellate remedy provided. Presently, the persons are required to approach the High Court for writ remedy under Article 226 or 227 or approach the Supreme Court under Article 136 of the Constitution. This creates inconvenience to the assessee as well as to the Revenue. Further the jurisdiction of the Supreme Court and/or High Courts under Articles 136 or 226 or 227 are extra-ordinary jurisdiction and is discretionary. Hence, the above remedy is not an effective remedy apart from being time consuming.

Further, the cost of litigation goes up considerably for most assessees who are located far from New Delhi, which will further delay settlement of pending cases.

Suggestion

- *It is, therefore, suggested to restore the provisions of section 86 whereby an appeal lies to the CESTAT in all matters.*

10. Exemption to Food Stuffs limited to Food grains

Central Government vide *Notification No. 6/2015-Service Tax, dated* 6th March 2015, has provided that services by way of transportation, by rail or a vessel or a goods transportation agency from one place in India to another, of only milk, salt and food grain including flours, pulses and rice; is exempt from Service Tax. Prior to this amendment transportation of tea, coffee, jaggery, sugar, milk products and edible oil, excluding alcoholic beverages were also exempt from Service Tax.

Issue

Withdrawal of exemption from tea, coffee, jaggery, sugar, milk products and edible oil will cause undue hardship to the poor and needy as the prices for procuring these items will go up.

Suggestion

- *It is suggested that exemption on transportation of tea, coffee, jaggery, sugar, milk products and edible oil be reinstated.*

11. Abatement on services of a Goods Transport Agency

Finance Bill, 2015 has amended Abatement Notification 30/2012 dated 20.06.2012 w.e.f. 1st April 2015 to reduce the abatement available on service of transportation by Goods Transport Agency from 75% to 70%, subject to a uniform condition of non-availment of CENVAT Credit on inputs, capital goods and input services. This will increase the cost of transportation and will add to the hardships of the assessee as he is the ultimate person to bear tax burden.

Suggestion:

- *It is suggested that the abatement in respect of services of goods transport agency be retained at 75% only.*

12. Swachh Bharat Cess

Finance Bill 2015 has proposed to empower the Central Government to impose a Swachh Bharat Cess on all or any of the taxable services at a rate of 2% on the value of such taxable services. This cess shall be levied from such date as may be notified by the Central Government after the enactment of the Finance Bill, 2015.

Suggestions

- *If Swachh Bharat Cess is implemented, the total rate of service tax would be 16%. Therefore, it is suggested that the Swachh Bharat Cess be levied only on Service Tax payable rather than the value of taxable services.*
- *It is suggested that levy of Swachh Bharat cess should be made CENVATable for its effective implementation.*

CENVAT CREDIT

13. Set Off of EC and SHEC for CENVAT Credit

Finance Bill, 2015 has increased the basic rate of Excise Duty to 12.5% from 12.36 % (including EC & SHEC) and proposed to increase the rate of Service Tax to 14% from 12.36 % (including EC & SHEC). The present charge of Education Cess @ 2% and Secondary & Higher Education Cess @ 1% has been exempted under the revised rate of excise @ 12.5% and has been subsumed under proposed revised rate of service tax @ 14%.

Proviso to Rule 3 of CENVAT Credit Rules, 2004 provides that the credit of the education cess/ secondary & higher education cess on excisable goods and on taxable services can be utilized, either for payment of the education cess/ secondary & higher education cess on excisable goods or on taxable services respectively.

Issue

On account of exemption/subsumation of EC & SHEC under new rate structure proposed by Finance Bill, 2015, the old credit of EC & SHEC with the assessee will remain unutilized and would cause undue hardship to the assessees. Also there is no clarity as to what would be the treatment for excisable goods in transit on 1st March 2015, which involves an element of Cess in the billing.
Further there is a disparity between effective dates of withdrawal of Cess under the Service Tax and the Central Excise which will lead to accumulation of credit in the hands of the manufacturer as there would be no cess on excise duty but only on Service Tax.

Suggestion

- *It is suggested that appropriate amendment be made so that available credit balance of EC and SHEC be allowed to be utilized for payment of Excise Duty and Service Tax under revised rates.'*

14. Refund of CENVAT Credit for Sales made to 100%EOU/ SEZ

Finance Bill, 2015 has amended Rule 5 of CENVAT Credit Rules, 2004 to provide that the 'Export goods' means any goods which are to be taken out of India to a place outside India for the purpose of claiming the refund.

Issue

The proposed amendment denies the Refund available under Rule 5 to local manufacturer for the sales made to 100% EOU/ SEZ. This denial of refund will increase the cost of inputs for 100% EOU/ SEZ as the local manufacturer/ service provider will not be able to claim the refund of CENVAT Credit for sales made to 100% EOU/ SEZ. This will also defy the government's initiative of "Make in India'.

Suggestion:

- *It is suggested that appropriate modification be made to provide the benefit for sales made to 100% EOU/ SEZ by local manufacturer.*

15. Recovery of CENVAT credit wrongly taken or erroneously refunded

Finance Bill, 2015, w.e.f. 1st March 2015, vide *Notification No. 6/2015 –CE(NT) dated 01.03.2015* has amended Rule 14 of CENVAT Credit Rules to provide that where the CENVAT credit has been wrongly taken or utilised / has been erroneously refunded, the same along with interest shall be recovered from the manufacturer or the provider of the output service.

Also a new sub-rule 2 has been inserted which provides that all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilisation thereof shall be deemed to have occurred in the following manner, namely: -

(i) the opening balance of the month has been utilised first;
(ii) credit admissible in terms of these rules taken during the month has been utilised next;
(iii) credit inadmissible in terms of these rules taken during the month has been utilised thereafter.

Issues:

- Rule 14 was amended to substitute the word "or" with "and" w.e.f. 01.04.2012 making both irregular availment and utilization necessary to attract interest and penalty. Merely taking of CENVAT credit wrongly cannot be constituted as an offence which leads to a case of revenue loss to the Exchequer.

- It has been provided that all credits taken during a month shall be deemed to have been taken on the last day of the month and the utilisation thereof shall be deemed to have occurred in the prescribed manner. Now, the opening balance of CENVAT credit shall be automatically deemed to be utilised first. Hence, in cases where the CENVAT has been taken but not utilised due to interpretational issues, the assessee shall not be able to plead that such CENVAT was only availed and not utilised. Also, the unutilized inadmissible CENVAT credit of this month will become the opening balance of the next month. The order being opening balance of CENVAT first, the utilization of inadmissible credit is automatic. Even if sufficient credit balance is maintained, there is no protection for inadmissible credit in the succeeding month.

Suggestions:

- *It is suggested that no interest or penalty be levied for merely taking the credit erroneously as that will only add to assessees hardships rather than increasing compliance.*
- *It is suggested that the changes brought in Rule 14 be rolled back to make it beneficial for the assessees.*
- *It is suggested that suitable clarification be issued to the effect that in cases where the assessee is able to prove non utilization of wrongly availed CENVAT Credit by showing sufficient balance in credit, no interest would be payable.*