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INCOME TAX

GUIDELINES FOR COMPOUNDING OF OFFENCES UNDER DIRECT TAX LAWS, 2014

Contributed by CA Ram Prasad

Compounding of Offences Under Income Tax:

According to provisions of Section 279(2) any offence under the Chapter XXII (Offences and Prosecutions) may, either before or after institution of proceedings is compounded by the Principal Chief Commissioner or Chief Commissioner or a Principal Director General[1] or Director General.

Compounding of offences is not a matter of right. However, offences may be compounded by the competent authority on his satisfaction of the eligibility conditions prescribed in these guidelines keeping in view factors such as conduct of the person; nature and magnitude of the offence and facts and circumstances of each case.

Competent Authority for Compounding:

The CCIT/DGIT(CCIT includes Principal CCIT and DGIT includes Principal DGIT) having jurisdiction over the person, seeking compounding of an offence, is the competent authority for compounding of all Category 'A' and Category 'B' offences.

However, an order in case of an application for compounding of an offence appearing in Category 'B', involving compounding charges in excess of Rs.10,00,000 (Rs. ten lakhs) shall be passed by the CCIT/DGIT concerned only on the recommendation of a committee comprising of 3 officers of the region concerned, namely (i) Principal CCIT, (ii) DGIT (Inv.) and (iii) CCIT/DGIT having jurisdiction over the case. In case such officers are not available within the region, the nearest DGIT or CCIT may be co-opted as Member.

Where Principal CCIT / DGIT (Inv) is the CCIT/DGIT having jurisdiction over the case, then another officer of the rank of CCIT may be co-opted as a member of the Committee. The CCIT/DGIT having jurisdiction over the case will act as the Member Secretary who will also co-opt such other member as the case may be, and convene the meeting, as well as maintain its minutes.

Compounding Procedure:

On receipt of the application for compounding, the same shall be processed by the Assessing Officer or Assistant or Deputy Director concerned and submitted promptly to the authority competent to compound.

In supersession of theguidelines issued vide F.No. 285/90/2008-IT(Inv.)/12 dated 16th May 2008 Inserted by the Finance Act (No.2) Act, 2014 w.r.e.f 01/06/2013

The competent authority shall duly consider and dispose of everyapplication for compounding through a speaking order in the prescribedformatwithin the time limit prescribed by the Board fromtime to time.

In absence of such a prescription, the application should bedisposed of within 180 days of its receipt. However, while passingorders on the compounding applications, the period of time allowed to

theassessee for paying compounding charges shall be excluded from thelimitation specified above.

Where compounding application is found to be acceptable, the competentauthority shall intimate the amount of compounding charges to theapplicant requiring him to pay the same within 60 days of receipt of suchintimation.

Under exceptional circumstances and on receipt of a writtenrequest for further extension of time, the competent authority may extendthis period up-to further period of 120 days. Extension beyond this periodshall not be permissible except with the previous approval of the Member(Inv), CBDT on a proposal of the competent authority concerned.

However, wherever the compounding charges paid beyond 60 days as extended by the competent authority, the applicant shall have to pay additional compounding charges @ 2% per month or part of the month of the unpaid amount of compounding charges.

The competent authority shall pass the compounding order within 30days of payment of compounding charges. Where compounding charge isnot deposited within the time allowed, the compounding application maybe rejected after giving the applicant an opportunity of being heard. Theorder of rejection shall be brought to the notice of the Court immediatelythrough prosecution counsel in the cases where prosecution had beeninstituted.

The prescribed compounding charges shall be applicable while compounding any offence. However, in extreme and exceptional cases of genuine financial hardship, the compounding charges may be suitably reduced with approval of the Finance Minister.

The compounding charges shall include compounding fee, prosecution establishment expenses and litigation expenses including Counsel's fee. Prosecution establishment expenses will be charged at the rate 10% of the compounding fees subject to a minimum of Rs.25,000/- in addition to litigation expenses including Counsel's fees paid/payable by the Department in connection with offence(s) compounded by a single order.

In a case where the litigation expenses are not readily ascertainable, the competent authority may arrive at litigation expenses, inter alia, on the basis of rates prescribed by the Government and on the basis of available records with the government and the counsels.

Classification of Offences:

The offences under Chapter-XXII of the Act are classified into two parts (Category 'A' and Category B') for the limited purpose of compounding of theoffences.

Category A:

Section	Remarks
276	(Prior to 01/04/1976)- Failure to make payment or deliver returns or statements or allow inspection
276B	(Prior to 01/04/1989)- Failure to deduct or pay tax (From 01/04/1989 and up to 30/05/1997)- Failure to pay tax deducted at source under Chapter – XVII- B (From 01/06/1997)- Failure to pay tax deducted at source under Chapter- XVII-B or tax payable under section 115-O or 2nd proviso to section 194B to the credit of the Central Government.
276BB	Failure to pay the tax collected at source
276DD	(Prior to 01/04/1989)- Failure to comply with the provisions of section 269SS
276E	(Prior to 01/04/1989)- Failure to comply with the provisions of section 269T
277	False statement in verification etc... with reference to Category 'A' offences
278	Abetment of false return etc... with reference to Category 'A' offences

Category B:

Section	Remarks
275A	Contravention of order made U/S 132(3)
275B	Failure to comply with the provisions of section 132(1)(iib)
276	Removal, concealment, transfer or delivery of property to thwart tax recovery
276A	Failure to comply with the provisions of sections 178(1) and 178(3)
276AA	(Prior to 01/10/1986) – Failure to comply with the provisions of section 269AB or Section 269I
276AB	Failure to comply with the provisions of sections 269UC,269UE and 269UL
276C(1)	Wilful attempt to evade tax etc.
276C(2)	Wilful attempt to evade payment of taxes etc.
276CC	Failure to furnish return of Income
276CCC	Failure to furnish return of income in search cases in block assessment
276D	Failure to produce accounts and documents
277	False statements in verification etc... with reference to Category 'B' offences
277A	Falsification of books of account or documents etc.
278	Abetment of false return etc. with reference to Category 'B' offences

Eligibility for Compounding:

The following conditions should be satisfied for considering compounding of an offence:-

- The person makes an application to the CCIT/DGIT (CCIT includes Principal CCIT and DGIT includes Principal DGIT) having jurisdiction over the case for compounding of the offence(s) in the prescribed format

- The person has paid the outstanding tax, interest, penalty and any other sum due, relating to the offence for which compounding has been sought

- The person undertakes to pay the compounding charges including the compounding fee, the prosecution establishment expenses and the litigation expenses including counsel's fee, if any, determined and communicated by the CCIT/DGIT(CCIT includes Principal CCIT and DGIT includes Principal DGIT) concerned.

- The person undertakes to withdraw appeal filed by him, if any, in case the same has a bearing on the offence sought to be compounded. In case such appeal has mixed grounds, some of which may not be related to the offence under consideration, the undertaking may be taken for appropriate modification in grounds of such appeal.

Offences generally not compounded:

- A Category 'A' offence sought to be compounded by an applicant in whose case compounding was allowed in the past, in an offence under the same section for which the present compounding has been requested, on 3 occasions or more.

- A Category 'B' offence other than the first offence.

Note: First offence means offence under any of the Direct Tax Laws committedprior to (a) the date of issue of any show-cause notice for prosecution or (b)any intimation relating to prosecution by the Department to the personconcerned or (c) launching of any prosecution, whichever is earlier; OR

Offence not detected by the department but voluntarily disclosed by a personprior to the filing of application for compounding of offence in the case underany Direct Tax Acts. For this purpose, offence is relevant if it is committed bythe same entity. The first offence is to be determined separately withreference to each section of the Act under which it is committed.

first offence is to be determined separately withreference to each section of the Act under which it is committed.

- Offences committed by a person who, as a result of investigation conducted by any Central or State agency and as per information available with the CCIT/DGIT concerned, has been found involved, in any manner, in anti-national/terrorist activity

- Offences committed by a person who, was convicted by a court of law for an offence under any law, other than the Direct Taxes laws, for which the prescribed punishment was imprisonment for two years or more, with or without fine, and which has a bearing on the offence sought to be compounded

- Offences committed by a person which, as per information available with the CCIT/DGIT concerned, have a bearing on a case under investigation (at any stage including enquiry, filing of FIR/complaint) by Enforcement Directorate, CBI, Lokpal, Lokayukta or any other Central or State agency

- Offences committed by a person for which he was convicted by a court of law under Direct Taxes laws

- Offences committed by a person for which complaint was filed with the competent court 12 months prior to receipt of the application for compounding.

- Offences committed by a person whose application for 'plea-bargaining' under Chapter XXI-A of 'Code of Criminal Procedure' is pending in a Court or a Court has recorded that a 'mutually satisfactory disposition of such an application is not worked out'

- Any other offence, which the CCIT/DGIT concerned considers not fit for compounding in view of its nature and magnitude

Notwithstanding anything contained in these Guidelines, the FinanceMinister may relax restrictions mentioned above for compounding of an offencein a deserving case, on consideration of a report from the Board on the petitionof an applicant.

These guidelines shall come into effect from 01.01.2015 and shall be applicable to all applications for compounding received on or after the aforesaid date. The applications received before 01.01.2015 shall continue to be dealt with in accordance with the guidelines dated 16.05.2008.

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SERVICE TAX

Complete Study on Works Contracts – Service Tax

Contributed by CA Sri Harsha

The aim of the series of articles is to give a bird's eye view on the impact of service tax on the various transactions pertaining to the real estate industry. The complications involved in the real estate industry are myriad and often confusing for the trade as regards to the impact of service tax. The confusion prevalent is further accelerated by the stands and interpretation taken by the authorities who are always pro-revenue. Further, the other reason for the confusion is rapid amendments taking place in law pertaining to real estate industry which also makes the lives of the professionals involved in guiding the trade and industry miserable.

We are glad to release theseries of articles with an intention that the same shall be helpful to the trade, industry and other fellow professionals for provision of effective service to the clients, trade and industry.

There will be a series of articles which covers the following concepts pertaining to the service tax impact on real estate industry. In this article, we wish to cover the following aspects pertaining to works contracts:

Works Contract including Construction of Residential/Commercial Complexes/Villas:

a. Evolution of service tax on construction industry – A glance;

b. Understanding the Works Contract;

c. Rationale for Entries under Declared Services;

d. Applicability of Service Tax – Construction of Complex:

i. Services Provided to the Ultimate Customers;

ii. Services Provided to the Land Owners in Joint Development Agreement;

iii. Preferential Location and other Services;

iv. Valuation thereof;

e. Valuation under Service Tax – Works Contract other than Construction of Complex;

f. Impact of Cenvat Credit;

g. Reverse or Partial Charge Mechanism

Construction of Residential/Commercial Complexes/Villas:

Evolution of service tax on construction industry – A glance:

The applicability of service tax on the construction industry has been introduced with effective from 10.09.2004. Only such constructions which were in the nature of commerce or industry were taxed initially vide Commercial or Industrial Construction. From 16.06.2005, the construction of residential complex has been brought into the ambit of service tax. Only such complexes which have more than 12 residential units were subjected to service tax vide Construction of Residential Complex. From 01.06.2007, the taxable category of works contract has been brought into the tax net covering the above two said different services along with other three notified services in its ambit. From 01.07.2010, builder's special services were also brought into the ambit of service tax.

Apart from the introduction of said taxable services at different points of time, there were circulars judicial precedents, instructions from the CBEC and trade notices which has added to the ambiguity of the tax positions to this particular industry. As a result of the above and given the nature of the industry being mostly unorganised, the reluctance of paying service tax was high and has led to the huge litigation.

Only from 01.07.2012, with the introduction of the negative list, the majority of the disputes pertaining to the classification of the services and with the withdrawal of composition scheme for works contract, the litigation is expected to come down when compared to the law position prior to 01.07.2012.

This hand book aims to understand the concept of works contract, the intricacies involved therein only post 01.07.2012. The issues that existed in the old law that is prior to 01.07.2012 are dealt by way of FAQ's.

Understanding the Works Contract – Post 01.07.2012:

The phrase 'works contract' has been defined in the Finance Act, 1994 vide Section 65B(54) as under:

(54) "works contract" means a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

From the above, it is evident that the following are the pre-requisites for treating a service as a works contract under service tax law:

a. There shall be transfer of property in goods from one person to another vide a contract and

b. Such transfer of goods is leviable to tax as sale of goods and

c. Such contract is for the purpose of carrying out the following activities construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration or for carrying out any other similar activityand

d. Above services shall be carried on a movable or Immovable property or a part thereof any in relation to such property.

It is very important to note that all the above conditions have to be met cumulatively to call a particular

There shall be transfer of property in goods from one person to another vide a contract:

In order to constitute a service as works contract, there shall be transfer of property of goods from one person (service provider) to another (service receiver). Consider a situation where A Pvt Ltd places an order on Mr B for construction of compound wall. As per the contract, A Pvt Ltd provides all the materials required for such construction and Mr B is only obliged for provision of labour services. In such a case, the said transaction cannot be called as works contract, since there is no transfer of property in goods from service provider Mr B to service receiver A Pvt Ltd. Since, there is no transfer of property in goods from one person to another, the first condition fails and the service cannot be called as works contract services for the purposes of service tax.

Assuming that as per the contract, A Pvt Ltd is required to supply major materials and Mr B is obliged to provide remaining materials, then there shall be a transfer of property in goods from one person to another person and can be called as works contract.

Such transfer of goods is leviable to tax as sale of goods:

Apart from there being a transfer of property in goods from one person to another person, the said transfer shall be leviable to tax as sale of goods. It is important to note that the value added tax is not required to be paid for treating such transaction as works contract. If the transaction is leviable to tax as sale of goods, it would suffice, even under such local state tax law, the said transaction is exempted from payment of VAT. Levy is important and not the actual payment of value added tax.

Let us understand the said condition with the help of an example. H Pvt Ltd has entered a contract with Mr S for construction of residential complex consisting of 50 flats. As per the said contract H Pvt Ltd provides the land and Mr S provides construction services. After completion of the construction, H Pvt Ltd would be entitled for 20 flats and Mr S shall be entitled for remaining.

Now, there is a transfer of property in goods (which are involved in the construction of 20 flats pertaining to the H Pvt Ltd) from Mr S to H Pvt Ltd, however the said transaction is not taxable as sale of goods since there is no consideration flowing from H Pvt Ltd to Mr S and hence not taxable as sale of goods. In such a case, even though there is a transfer of property in goods from one person to another person, the transaction cannot be called as works contract in absence of levy of tax on such sale of goods.

Such contract is for the purpose of carrying out the following activities construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration or for carrying out any other similar activity:

The transfer of property in goods from one person to another and such transfer is subject to tax as sale of goods shall be for the purposes of carrying out the activities of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration or for carrying out any other similar activity. The said activities are laid down in an illustrative manner and any activities which are in such nature shall stand to be included in the definition of works contract. It is very important to note that the phrase 'manufacture' has not been included in the list of activities mentioned herein since the activity of manufacture is under the ambit of central excise law and not under the service tax law.

Above services shall be carried on a movable or Immovable property or a part thereof any in relation to such property:

Under the earlier law, only services in relation to immovable property are covered under the ambit of works contract. However, post 01.07.2012, the services in relation to immovable property and movable property are covered. Hence, the above services namely construction, erection, commissioning and other activities of similar nature carried in relation to movable or immovable property or on a part thereof stand covered under the ambit of works contract services.

Rationale for Entries under Declared Services:

Under the negative list era, the phrase 'service' has been defined. The phrase 'service' includes 'declared services' as listed vide Section 66E of Finance Act, 1994. The declared services has two entries relevant to the construction industry which are entry (b) and (h).

Entry (b) deals with a situation where the construction of a complex, building, civil structure or a part thereof (for brevity 'structures') is taxable except where the entire consideration pertaining to such structures is received after issuance of completion certificate by the competent authority. This is similar to the explanation introduced to Section 65(105)(zzzh) under the earlier law with effective from 01.07.2010. Without the subject entry in the new law, it would not be possible for fixing a liability on the builder when he receives an advance before completion of the project. Hence, the entry under declared service has come into existence.

Entry (h) deals with the declaring the service portion in execution of works contract as service. The sale portion involved in the execution of works contract has been deemed to be sale under Article 366(29A) of the Constitution. In a similar manner, the service portion involved in execution of works contract is declared as service for the purposes of levying service tax. These were the intention to list the said services under the ambit of declared services.

Applicability of Service Tax – Construction of Complex:

Services Provided to the Ultimate Customers:

Applicability of Service Tax:

As discussed earlier, by virtue of the entry (b) in the declared services list, any amount received from the ultimate customer prior to obtaining completion certificate, shall be taxable in the hands of the builder. However, there shall not be any service tax impact if the entire consideration is paid by the ultimate customer to the builder after builder obtaining occupation certificate from the competent authority.

There shall not be any change in the taxability irrespective of the number of agreements/mode of agreements entered with the ultimate customer. The concept of usage of such residential flat for personal use and hence thereby obtaining exemption from service tax is no longer available to the ultimate customer.

Valuation:

The builder/developer has two options to remit service tax on the amounts received from the ultimate customer on the occasion of sale of flats. The methodology for arriving the valuation for the purposes of service tax is as under:

- Value as per Rule 2A of Service Tax (Determination of Value) Rule, 2006
- Value as per Notification No. 26/2012-ST dated 20.06.2012

Value as per Rule 2A of Service Tax (Determination of Value) Rule, 2006:

a. The transaction entered by the builder with the ultimate customer involves transfer of materials and labour vides execution of construction of immovable property that is residential flat. Since the contracts involve transfer of property in goods and labour from builder to the customer and such contract is for construction of immovable property, the contract has satisfied the definition of 'works contract' as laid down in Section 65B (54) of the Act.

b. As discussed above, there shall be a tax at the rate of 12% on the value of services alone. However, in the instant case the gross amount charged from the member includes the value towards both materials and labour. Hence, the value for calculation of service tax has to be reckoned with the help of Service Tax (Determination of Value) Rules, 2006.

c. Rule 2A of the Service Tax (Determination of Value) Rules, 2006 deals with the determination of the service portion in the execution of works contract. Hence, the value has to be reckoned in the methodology laid as under:

   If the contract entered with the customer specifically mentions the value towards the material and labour separately, then the service tax has to be paid at the full rate on the full value pertaining to the service portion. For example, if the contract entered with the customer is for Rs. 50 lakhs and states that for supply of material, the value is Rs. 30 lakhs and for supply of labour, the value is Rs. 20 lakhs. Then the service tax liability shall be amounting to Rs. 2.472 lakhs (Rs. 20 lakhs*12.36%).

d. However, the above methodology is available only when the value of materials can be determined. If the value cannot be determined as above, the valuation prescribed in sub-clause (ii) of Rule 2A would not operate. As per sub-clause (ii), the value of service portion involved in the execution of works contract has to be arrived as under:

If the work is in the nature of the original works – 40% of the total amount charged for the works contract

If the works is in the nature of completion and finishing services such as glazing, wall tiling, plastering and similar activities – 70% of the total amount charged for the works contract

e. The phrase 'original works' has been defined vide explanation to the said Rule, which states that all new constructions, all types of additions and alterations to damaged and abandoned or damaged structures and erection, commissioning or installation of plant, machinery or equipment or structure shall fall under 'original works'.

f. Since in the instant case, builder is engaged in construction of a new immovable property, the same shall be classified under 'original works' and hence service tax is required to be paid on 40% of the total amount charged for such construction. The phrase 'total amount' has also been defined to include the fair market value of goods and services received from the service receiver. As discussed above, this methodology is available only if the value of material cannot be determined as per sub-clause (i) of the Rule 2A.

Value as per Notification No. 26/2012-ST dated 20.06.2012:

g. As per Entry No. 12 of the said notification, the value of the taxable service is 25% of the gross amount charged from the service receiver subject to a condition that the gross amount charged shall include the value of land and no cenvat credit of inputs used for providing such taxable service has been taken. For example, if a flat is sold for Rs. 50 Lakhs (which also includes the value of undivided share of land), then service tax has to be charged on Rs. 12.5 lakhs (50*25%). Hence, the service tax shall be of Rs. 1.545 lakhs (12.5*12.36%). The cenvat credit on inputs shall not be availed; however the cenvat credit of input services and capital goods can be availed and utilized for discharging the above service tax liability.

h. Further to the introduction of Finance Bill for 2013-14, it is notified vide Notification No. 2/2013-ST dated 01.03.2013, that the rate of abatement for residential units having carpet area more than 2000 square feet or where the amount charged is more than Rs. 1 Crore, is 70% and hence the taxable portion is 30% as instead of 25%. For example, if a flat is sold for Rs. 1.50 Crore (which also includes the value of undivided share of land), then service tax has to be charged on Rs. 45 lakhs (1.50*30%). Hence, the service tax shall be of Rs. 5.56 lakhs (45*12.36%). The cenvat credit on inputs shall not be availed; however the cenvat credit of input services and capital goods can be availed and utilized for discharging the above service tax liability.

60% is substituted with 70% with effective from 01.10.2014 vide Finance Act, 2014.

Services Provided to the Land Owners in Joint Development Agreement:

Brief of on Joint Development Agreements:

It is very common that the builder/developers enter a development agreement with the land owners for construction of residential/commercial apartments. This would be a win-win situation both for the land owner and builder/developer since the said arrangement would save huge cash flow for the builder, since he is not required to purchase the land. For the land owner, the exploitation of the land shall be the blessing with builder/developer having construction expertise, which the land owner generally lacks.

The land owner parts his rights in the land to the builder/developer and such builder/developer guarantees certain portion of the built up area to the land owner in consideration of the land obtained for exploitation. With the above major benefits, there are number of JDA's entered for majority of the infrastructure projects.

Applicability of Service Tax:

The taxability of services provided to the land owner in a Joint Development Agreement is a part of huge on-going litigation in this industry. The entire issue has come up before the service tax authorities and trade after the judgment passed by the Honourable Apex Court in the case of Faqir Chand Gulati vs Uppal Agencies Pvt Ltd 2008 (12) STR 401 (SC), where in the apex court has stated in the light of the facts mentioned therein, that the builder is a service provider and land owner is a consumer and deficiency in construction service provided by the builder will fall under the ambit of Consumer Protection Act, 1986.

From the above judgment, where in it was stated that the association of builder and land owner cannot be regarded as a Joint Venture and naming the builder as service provider and land owner as customer, has given a clue for the service tax authorities taxing the services provided by the builder to the land owner.

The trade has displayed huge resistance in accepting the said transaction subjected to service tax. However, as time evolved, the trade is now fighting the valuation method prescribed by the Board and accepting the taxability of the transaction. Till this point of time, there was only one judgment delivered by the Chennai CESTAT in the case of LCS City Makers Pvt Ltd vs Commissioner of Service Tax, Chennai 2013 (30) STR 33 (Tri-Chennai) = 2012-TIOL-618-CESTAT-MAD, where it was held that transaction between the builder/developer and land owner falls under the ambit of service tax since there is no difference between the land owner and ultimate customer once joint development agreement is entered into.

Valuation:

Even assuming the transaction is taxable right from the inception of the taxable services category, there is no valuation methodology prescribed for payment of service tax on the services provided by the builder/developer to the land owner. It was only in 2012, the Board has come up with a Circular 151/2/2012-ST dated 10.02.2012, laying down the methodology for valuation of service component in the services provided to the land owner in the light of JDA.

Leaving apart from the validity of the circular, let us understand the methodology enshrined over there. Before approaching the circular, let us understand the basic valuation section in the Finance Act, which is Section 67. The said section deals with the valuation of the taxable service. As per Section 67 of the Act, the value for the service shall be determined as under:

- Where consideration is in money - the gross amount charged for the service provided or to be provided;
- Where consideration is not wholly or partly in money – such amount in addition to the service tax charged, is equivalent to the consideration;
- Where consideration is not ascertainable – the amount as may be determined as per the rules namely, Service Tax (Determination of Value) Rules, 2006.

Since, in the transaction between the land owner and builder/developer, the later shall not receive the consideration either in the form of money or partly in money and partly in kind. However, the question now to be answered is whether the consideration is ascertainable or not. If the consideration is not ascertainable, the resort to valuation rules has to be made. The answer to the availability of the consideration is purely dependent on the terms and conditions set out in the JDA. Even in certain instances where consideration is not clearly spelt, an effort has to be made to adopt the value of land or development rights involved for calculation of service tax. Only when the value of land or developmental rights are not available then a resort has to be made to the valuation rules. The value of land can be arrived by adopting an independent valuer so as to represent the true value of the land. However, the service tax authorities might not accept such value but the same has to be on reasonable grounds and not a mere rejection.

Assuming the value of land or developmental rights are not ascertainable, then as discussed, the resort has to be - Rule 3 of Service Tax (Determination of Value) Rules, 2006 deals with the valuation of the when consideration of the service is not ascertainable. As per the said Rule, the value has to be determined as per the procedure laid under:

- Value shall be equal to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of business – where gross amount charged is the sole consideration.
- Where the value cannot be determined as per above - the service provider shall determine the equivalent money value of such considerationwhich shall, in no case be less than the cost of provision of such taxable service.

As discussed above, the Board's Circular 151/2/2012 – ST dated 10.02.2012, wherein the valuation as prescribed is as under:

- In case the prices of flats/houses undergo a change over the period of sale (from the first sale of flat/house in the residential complex to the last sale of the flat/house), the value of similar flats as are sold nearer to the date on which land is being made available for construction should be used for arriving at the value for the purpose of tax.

However, it has to be kept in mind that the valuation prescribed by the Board has to be resorted as a final measure since the board circular has presumed that the value of land/development rights are not ordinarily ascertainable and hence a direct resort to the similar value as laid down in Rule 3 of the Service Tax (Determination of Value) Rules, 2006 has been taken.

Preferential Location and other Services:

Applicability of Service Tax:

Preferential location services were brought into the ambit of tax net with effect from 01.07.2010. After the introduction of negative list, there was no specific mention about the same and hence it can be carefully concluded that the said services provided by builder/developer are taxable. The nature of services provided by builder/developer shall be normally the preferential location cost, east/north facing, floor rise and legal charges etc..,

Valuation:

Generally these kinds of services do not involve any material and hence the said services shall be charged at full rate of service tax. Whenever, there is an involvement of materials, the valuation as discussed earlier shall be applicable.

Valuation under Service Tax – Works Contract other than Construction of Complex:

The valuation method prescribed under Rule 2A of Service Tax (Determination of Value) Rules, 2006 shall be applicable to all the works contracts. The composition scheme that existed in the earlier law is rescinded with effective from 01.07.2012. Hence, now all works contracts shall fall under the valuation methodology as specified in Rule 2A, ibid. The detailed study of the same has been done in the earlier part of this hand book vide 'Services provided to the Ultimate Customers- Applicability of Service Tax –Valuation' which can be adopted hereunder.

Impact of Cenvat Credit:

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

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

such definition, which shall be discussed in detail in the later part of the article.

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

1st Part – 100% nexus with the provision of the output services provided by service provider;

2nd Part – Irrespective of the Nexus theory, the credit stand eligible;

3rd Part – Specifically Excluded from the ambit of the definition.

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

One of such services mentioned in the third limb is pertaining to the works contract services. The service portion in the execution of a works contract and construction services are excluded in so far as they are used for construction or execution of works contract of a building or civil structure or a part thereof or laying of foundation or making of structures for support goods except for the provision of one or more above services.

From the above, it is clear that credit of works contract services and other construction services shall be available only if the service provider is engaged in provision of such services. Hence, all service receivers who are not engaged in the provision of works contract or construction services are not eligible for availing the service tax paid on such services.

Issue for consideration:

The question whether the said exclusion shall be applicable only for 'original works' in the works contract services or 'all works contract services'?

Let us take an example of a service provider who is engaged in provision of chartered accountant services. The chartered accountant wishes to renovate/repair his office for provision of effective services and thus hires a contractor for renovating/carrying the repairs works of his office. The contract was awarded with material and labour to the account of the contractor and thus making the contract as 'works contract'

On the detailed examination of the definition of the 'input service', the second limb allows the credit of service tax pertaining to the renovation of the premises of the service provider. The relevant part of the second limb states as 'and includes services used in relation to modernisation, renovation or repairs of a factory, premises of provider of output service or an office relating to such factory or premises'. As stated above, once the service falls under the second limb, there is no question of looking for nexus and stands eligible. However, the third limb specifically excludes the credit of the 'works contract' services except the service provider is a 'works contracts' service provider, which is not the fact in the instant case. Hence, there is a contradiction between the 2nd limb and 3rd limb. When 2nd limb specifically includes repair/renovation services, the 3rd limb allows such credit to only works contract service providers.

It can be argued that the 2nd limb only covers such services where material is not involved that is to say if the contract is purely for labour, then the credit of such services is eligible vide 2nd limb and if the contract is for both material and labour, then it does not fit into 2nd limb and gets excluded by virtue of 3rd limb since the later uses the phrase 'works contract' which means material and labour in the same contract. In my view, the above argument is not logical since the credit of services procured shall be decided to be eligible or not depending upon the definition of the 'input service' and not based on the method of agreement/contract entered in the context.

Hence, I am of the view that when the 2nd limb specifically allows the credit of service tax paid on services pertaining to the modernisation, renovation or repairs of a premises of provider of output service provider or an office relating to such premises, there cannot be an exclusion carved out in 3rd limb. If the intention of the legislature is to exclude such services then there shall not be in any mention of the same in the 2nd limb. Hence, the credit of such services stands eligible for the chartered accountant.

Then that leads us to a question, what are the services that are covered under 3rd limb of the definition to stand out of the definition of the 'input services'. In my view, the 3rd limb covers services in the nature of 'original works' namely the new constructions or substantial constructions and not the petty works. Let us assume that Chartered Accountant instead of renovation/repairs to his office intends to construct a new office, in such a case whether the credit of service tax paid to the contractor is eligible? The answer is no, since the 3rd limb covers such instances and also the above reasoning is in alignment with the intention of the legislature because of the removal of phrase 'setting up' from the 2nd limb of the definition of 'input service' with effective from 01.04.2011.

To conclude, the 3rd limb covers contracts which are in the nature of the original works and not the petty works or other than original works which stands includible in the 2nd limb. It is very important to note that all credits of work contract services are not strightly ineligible or eligible. It has to be carefully examined in the light of definition of 'input service' before availment and pre-utilisation.

Reverse or Partial Charge Mechanism:

The service tax on partial charge mechanism was introduced for works contract services when received by a body corporate from an individual, firm and other notified service providers with effect

from 01.07.2012. Let us understand the conditions to be met for complying with the obligations under partial or reverse charge mechanism.

For falling under Works Contract:

a. There shall be a contract wherein transfer of property in goods involved in execution of such contract from the service provider to service receiver and;

b. Such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

For Partial Charge:

c. The service provider shall be a person other than a body corporate namely individual, partnership firm, Hindu undivided family, Body of Individuals others to attract the obligation under Partial charge mechanism.

There shall be an obligation under partial charge mechanism only if all the above three conditions are simultaneously satisfied. For example:

d. Painting Contract:

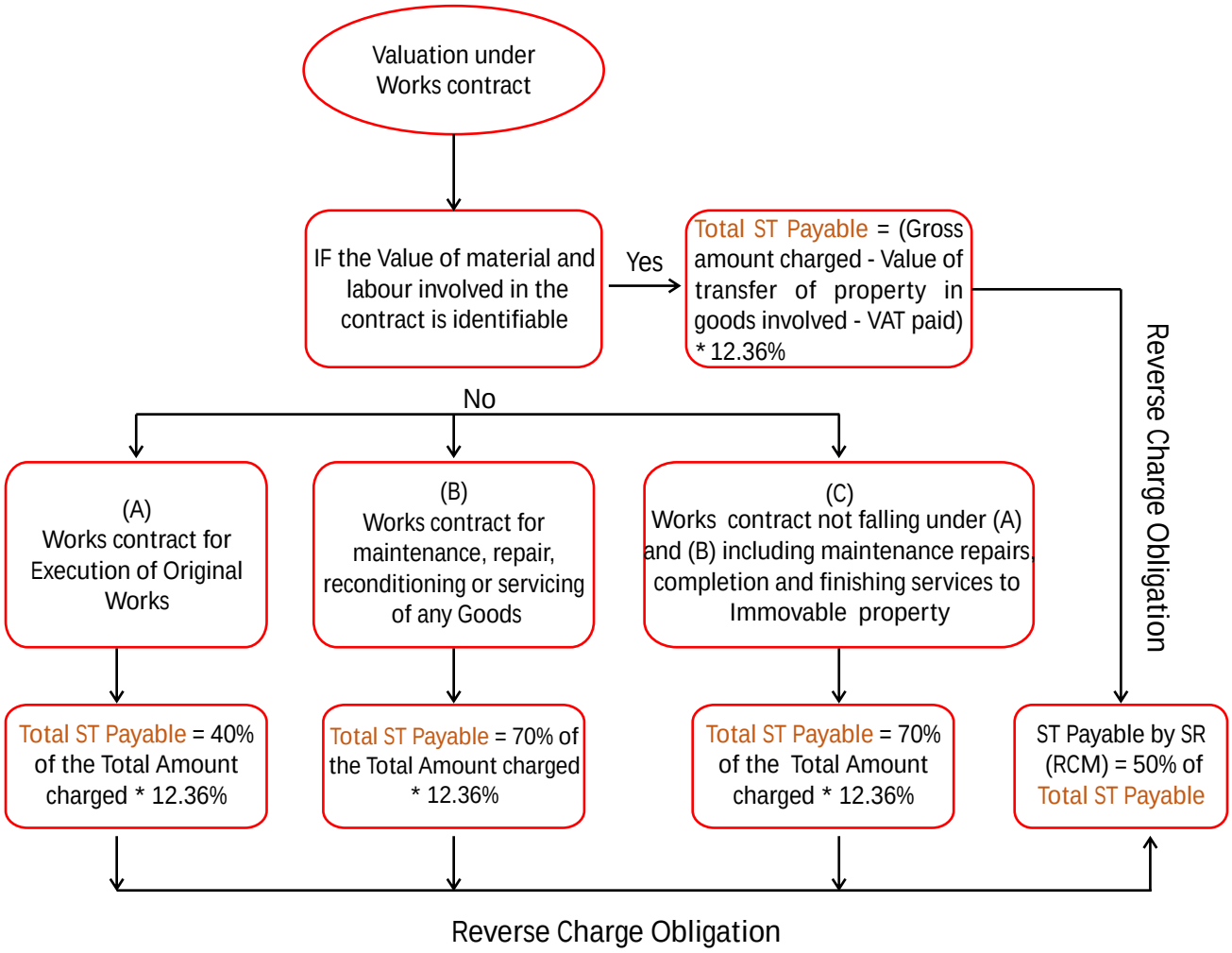
Let us consider the painting contract given by A Ltd to individual service provider. In such contract, the paint (goods) are supplied by A Ltd, the contractor is obliged only to paint the buildings or machinery as the case may be, but during the course of provision of such service, there is no transfer of materials from the painting contractor to A Ltd. Hence, this servicecannot be classified as works contract service since the condition pertaining to transfer of property in goods from service provider to service receiver has not been satisfied. This shall be a pure labour service, where the painting contractor is obliged to charge service tax and A Ltd has to pay the same in entirety to the painting contractor,

e. Repair Contract:

Let us consider the repair contract given for winding of the motors by other than body corporate service provider to B Ltd. In this case, the service provider transfers the copper wire (goods) and such a contract is for maintenance or repair of machines. Hence, in this case all the three conditions as to transfer of property from service provider to B Ltd, being copper wire and such a transfer is during the execution of contract for repair or maintenance of the machines and the constitution of the service provider is other than body corporate. In this case, the service tax has to be charged on the 70% of the value of the bill and on such service tax, 50% has to be remitted to the credit of central government. Consider the service provider has raised an invoice for Rs. 18,000/-. Then service tax liability for B Ltd under partial charge mechanism shall be Rs. 778/- ([18,000*70%]*12.36%*50%).

Further, the taxability would be same, even if the service provider raises two different invoices i.e., one for the material supplied and the other for services provided. However, the valuation would not remain same. In such a scenario, B Ltd has an option to pay 50% of the service tax charged on the services invoice. Assuming the service provider has raised invoice for the material supplied as to Rs. 8,000/- and for the service provided as to Rs. 10,000/-. Then service tax liability for B Ltd under partial charge mechanism shall be Rs. 618/- ([10,000*12.36%]*50%).

In the above case, assuming service provider to be a company (either limited or private limited) the obligation under partial charge does not apply and B Ltd is relived from the burden of the compliance.



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TECHNICAL SESSIONS:

S.No.	Event	Date	Speaker	Venue
1	Overview of GST	13-Feb-2015	CA Sri Harsha	SBS - Hyd
2	Compounding of offences under Companies Act, 1956 & 2013	20-Feb-2015	CS Phanindra DVK	SBS - Hyd
3	Tax maters relating to HUF	27-Feb-2015	CA Suresh Babu S	SBS - Hyd
4	How to handle numbers - Analysis and Interpretation	03-Mar-2015	CA Saran Kumar U	SBS - Hyd

Comprehensive Study on Works Contract - CA Sri Harsha

Companies Amendment Bill, 2014 - Amendments Asked For vs Amendments Given- CS Phanindra D V K

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

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