

Board's latest googly, the Education Guide – What an idea, Sirji – June 26, 2012

Board's latest googly, 'Education Guide' : What an Idea, Sirji?

JUNE 25, 2012

By S Sivakumar, CA

AT the outset, one must congratulate the Board for having come out with a very comprehensive write-up on the new service tax law. Though, much of this is based on the earlier write-up issued on March 17, 2012, the 'Education Guide' looks more organized and more importantly, seems to handle most of the issues that one might have, vis-à-vis the new law, albeit, from the Board's side. The Board would seem to have scored a major strategic objective of significantly expanding the reach of the new service tax law, through this Education Guide, though. Even while the statutory definitions seem simple and limited, the Education Code would seem to give highly expanded meanings and interpretations, in terms of this so called 'Education Guide'... Consider these...

The most important element of the new service tax law, viz. the term 'activity' is not defined under the new law. However, the Education Guide says that, even not undertaking an activity, is an 'activity' liable to service tax. Whether, a passive act or forbearance to act could also be termed as 'activity', as the Guide claims, is something that can only be decided by the Courts.

The new law does not directly define the second most important element of the new service tax law, viz. the term 'consideration' except to indirectly state in Explanation (a) to Section 67 that, consideration includes any amount that is payable for the taxable services provided or to be provided. The Education Guide massively expands the meaning of the term 'consideration' to mean that, this term would have to be interpreted in terms of Section 2(d) of the Indian Contract Act, 1872. In the absence of this ingenious explanation contained in the Guide, how is one to assume that, the Legislature has indeed intended the term 'consideration' to be interpreted in the light of the provisions contained in the Indian Contract Act, 1882.

The Education Guide also gives a lot of examples, virtually expanding the realm of the new law, into unthinkable situations. The Board, it seems, has taken upon itself, the onerous responsibility of explaining and expanding the new service tax law, based on an 'Education Guide' which lacks legal status. The guide itself records this legal position, when it states as under, in Para 1.2, which is reproduced below:

1.2 What is the aim of this Guide? This guide is aimed at educating the tax payers and the tax administrators on various aspects of the new concept in order to assist them in gaining better understanding about the new system of taxation.

It is clarified at the outset that this guide is merely an educational aid based on a broad understanding of a team of officers of the issues. It is neither a Departmental Circular nor a manual of instructions issued by the Central Board of Excise and Customs. To that extent it does not command the required legal backing to be binding on either side in any manner. The guide is being released purely as a measure of facilitation so that all stakeholders obtain some preliminary understanding of the new issues for smooth transition to the new regime.

One wonders as to why, clarity has not been brought in the new service tax law, in terms of, at least, the basic definitions and elements of the new law. For instance, where is the justification for not defining the basic definitions like 'activity', 'consideration', in the main law itself, rather than have the Education Guide to provide detailed explanations for these terms.

How are taxpayers and the Courts to understand the intent of the Parliament, in the absence of detailed definitions and statutory provisions? In my view... cynical as I am, it would take some years for the new service

tax law to get into some shape, in terms of a legally sustainable clarity to emerge in terms of the new definitions, etc. Be that as it may...

The Board would seem to have killed two birds with one arrow, though... Being an Education Guide, nobody can challenge this Guide in a Court. Nevertheless, being a communication from the Board, notwithstanding the Board's pretensions that this Guide is meant to provide some "preliminary understanding of the new issues for smooth transition to the new regime", the Department would treat this Guide as a Bible. As we have seen, communications from the Board command more respect in the adjudication proceedings, than full Bench decisions of the Supreme Court.

Thus, the Education Guide would virtually define the manner in which the Department, seeking to significantly increase service tax collections, would interpret the new service tax and yet, the views expressed in the Guide cannot be challenged. A sure googly from the Board, which has left taxpayer completely bewildered.

What an idea, Sirji?

Before concluding...

The resultant chaos, vis-à-vis the new service law would greatly help the cause of Indirect Tax Practitioners, though. I couldn't but totally agree, when I heard, in a very recent gathering, one of the country's top, most respected and most revered Lawyers say that, his firm's practice is assured for the next ten years, thanks to the new service tax law.

(The Author is Director, S3 Solutions Pvt Ltd, Bangalore)

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of the new law. For instance, where is the justification for not defining the basic definitions like 'activity', 'consideration', in the main law itself, rather than have the Education Guide to provide detailed explanations for these terms. How are taxpayers and the Courts to understand the intent of the Parliament, in the absence of detailed definitions and statutory provisions? In my view... cynic as I am, it would take some years for the new service tax law to get into some shape, in terms of a legally sustainable clarity to emerge in terms of the new definitions, etc. Be that as it may... The Board would seem to have killed two birds with one arrow, though... Being an Education Guide, nobody can challenge this Guide in a Court. Nevertheless, being a communication from the Board, notwithstanding the Board's pretension that this Guide is meant to provide some "preliminary understanding of the new issues for smooth transition to the new regime", the Department would treat this Guide as a Bible. As we have seen, communications from the Board command more respect in the adjudication proceedings, than full Bench decisions of the Supreme Court. Thus, the Education Guide would virtually define the manner in which the Department, seeking to significantly increase service tax collections, would interpret the new service tax and yet, the views expressed in the Guide cannot be challenged. A sure goody from the Board, which has left taxpayer completely bewildered. What an idea, Sirji? Before concluding... The resultant chaos, vis-à-vis the new service law would greatly help the cause of Indirect Tax Practitioners, though. I couldn't but totally agree, when I heard, in a very recent gathering, one of the country's top, most respected and most revered Lawyers say that, his firm's practice is assured for the next ten years, thanks to the new service tax law. (The Author is Director, S3 Solutions Pvt Ltd, Bangalore)