Government needs to do a complete rethink of prosecution provisions under service tax law – Mar 3, 2011

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ONE major Budget related negative development has been the re-introduction of the provisions related to prosecution, under the service tax law. As we know, the Finance Act, 1994, as originally passed and amended, did contain provisions related to prosecution, in Sections 89, 90 and 91. These provisions were deleted with effect from 16-10-1998 by the Finance Act (No.2), 1998.Now, the Finance Bill, 2011, has proposed to bring back the prosecution related provisions into the statute book, in an expanded and obnoxious form.

In terms of Section 89(1), as proposed in the Finance Bill, the prosecution proceedings can be initiated against anybody, who-

++ provides any taxable service chargeable to service tax under sub-section (1) of section 68 or receives any taxable service chargeable to tax under sub-section (2) of the said section, without an invoice issued in accordance with the provisions of this Chapter or the rules made thereunder; or

++ avails and utilizes credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

++ maintains false books of account or fails to supply any information which he is required to supply under this Chapter or the rules made thereunder or (unless with a reasonable belief, the burden of proving which shall be upon him, that the information supplied by him is true) supplies false information; or

++ collects any amount of service tax but fails to pay the amount so collected to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due…..

It would be very useful to refer to the rather mild prosecution provisions, which existed in the Finance Act, 1994, prior to 16-10-1998, which are reproduced below and to compare these, with the new obnoxious provisions:

False statement in verification, etc.

89. If a person makes a statement in any verification under this Chapter or any rule made thereunder, or delivers an account or statement, which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable with imprisonment for a term which may extend to three years and with fine.

Abetment of false return, etc.

90. If a person abets or induces in any manner another person to make and deliver an account or a statement or declaration relating to any taxable service which is false and which he either knows to be false or does not believe to be true or to commit an offence under section 87, he shall be punishable with imprisonment for a term which may extend to seven years and with fine.

Certain offences to be non-cognizable.

91. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under section 87 or section 88 or section 89 or section 90 shall be deemed to be non-cognizable within the meaning of that Code.

It is now clear the basis on which prosecution proceedings can be initiated has been considerably widened, as aforesaid, and this could be a major worrying factor for the service providers.

Here are some of my immediate reactions…

The prosecution can be launched even in respect of transactions covered under Section 68(2). Consequently, even an importer of services can be prosecuted for 'providing' a taxable service, without an invoice. How can an importer be expected to generate an invoice, for import of serviceswhich is accordance with the statutory provisions? Is he required to raise an invoice on himself?

Most of the provisions contained in Section 89(1) seem to have been borrowed from Section 9 of the Central Excise Act, 1944. The Government does not seem to appreciate the difference and distinction between goods and services and the attempt to do a cut and paste of Section 9, could lead to a lot of unintended issues, cropping up in service tax matters.

How can the service receiver prove the actual receipt of taxable input service, as any availment without such receipt, could lead to prosecution? Shouldn't the Government distinguish between goods and services and appreciate the fact, it is not possible to prove the receipt of services, unlike goods? A lot of litigation is going to flow from this particular provision.

Per se , the new Section seems to cover even the small service providers, who are exempted from payment of service tax up to a certain limit. When the service tax is exempted, where is the need to issue an invoice?
It seems rather obnoxious that, prosecution can be initiated against service providers when they don't issue invoices. Invoice is only a document, based on which, the service tax liability is computed, in certain circumstances. The penalty provisions can be tweaked to penalize the service providers who do not issue invoices, but, there seems to be no justification to invoke the prosecution proceedings for what are essentially, administrative lapses.

These provisions would also include the exporting community. Many exporters haven't thought of registering themselves. Now, they would need to register themselves and also start issuing invoices containing the information required by the statutory provisions, as otherwise, the Department could invoke the prosecution proceedings against them.

MensRea , is not necessary, for prosecution proceedings to be initiated, in terms of the present draft of Section 89(1). The section uses the words "shall". This is a very worrisome development. If *mensrea* is a necessary ingredient for imposition of penalty in terms of Section 80, under which, penalty can be waived if the assessee proves that there was reasonable cause for the failure, one cannot understand as to how, prosecution proceedings can be initiated in cases where, no *mensrea* , is involved.
Company officials would now have to be extra careful about statements, etc. given to the Departmental officials, as these statements can form the basis for initiation of prosecution proceedings.

That the prosecution can be launched only with the approval of the Chief Commissioner, is unlikely to give comfort. Given the track record of the Government, one should expect this power to get diluted in the coming days, with junior officers being provided with this power.

Of course, there is no power to arrest, under the current service tax law. The TRU Circular issued post Budget, makes a proud mention of this fact. This is no solace, of course. We have seen that the Department is contesting practically, each and every claim of the assessee, whether it is related to the levy of service tax or to cenvat credit. Now, the Department will also use the power to prosecute, to achieve its goals and surely, the threat of prosecution would be another factor that the hapless assessee has now got to live with.

The new Section 89 dealing with prosecution powers is loosely worded. One can contrast this, with the Sections that are applicable under the VAT laws, under which, prosecution proceedings can be initiated only in respect of transactions undertaken, "with an intent to defraud". The absence of such a wording in Section 89(1) could make the prosecution provisions extremely obnoxious and dangerous, as aforesaid.

One doesn't see a provision, similar to that existed under Section 91 of the Finance Act, 1994, as is existed prior to 16-10-1998, under which, the o ffences were deemed to be non-cognizable within the meaning of the Code of Criminal Procedure, 1973. Most VAT laws clearly provide that offences which attract prosecution are also bailable. Even if the Government wants to retain the prosecution related provisions, a provision similar that what existed in the erstwhile Section 91, would need to be inserted, if at all, the Government wants to retain Section 89(1) in any form.

One hopes that the Government does a complete rethink of the prosecution related provisions contained in Section 89(1) and ideally, this Section would need to be considerably diluted, if not, deleted.