

Publication of names of 'offenders' : One more intimidating tool for Service Tax Department? – Mar 20, 2008

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By S Sivakumar, CA

THE Government has come out with Circular No. 100/3/2008-ST dated March 12, 2008, containing the guidelines for publication of names under Section 73D of the Finance Act 1994, read with the Service Tax (Publication of Names) Rules, 2008. As is known, the said Section authorizes the Government to publish, inter alia, the names of the so called 'offenders' in circumstances specified in the Rules.

Let's try and take a logical and legal view of these Rules, which would mean a lot to the service tax payers....

Section 73D of the Finance Act 1994 reads as under:

SECTION [73D. Publication of information in respect of persons in certain cases. — (1) If the Central Government is of the opinion that it is necessary or expedient in the public interest to publish the name of any person and any other particulars relating to any proceedings under this Chapter in respect of such person, it may cause to be published such names and particulars in such manner as may be prescribed.

(2) No publication under this section shall be made in relation to any penalty imposed under this Chapter until the time for presenting an appeal to the Commissioner (Appeals) under section 85 or the Appellate Tribunal under section 86, as the case may be, has expired without an appeal having been presented or the appeal, if presented, has been disposed of.

Now, in terms of Rule 3 of the Service Tax (Publication of Names) Rules, 2008, published pursuant to Section 73D, for a person to be labelled an 'offender', so as to get his name published in the offenders' list, he should either have been **adjudged** under the provisions of the Chapter V of the Finance Act, 1994 to have contravened any of the provisions of the Chapter or the rules made hereunder, with intent to evade payment of service tax or he should have been **adjudged** to pay but has not paid any amount, payable under the provisions of section 73A of the Finance Act, 1994.

Of course, such publication cannot happen until the time for presenting an appeal to the Commissioner (Appeals), under section 85, or the Appellate Tribunal, under section 86, as the case may be, has expired without any appeal having been presented or the appeal, if presented, has been disposed of.

An Explanation has also been provided for 'removal of doubts', of course, that in case the person is a firm, company or other association of persons, the names of the partners of the firm, directors, managing agents, secretaries, treasurers or manager of the company, or any member of association, as the case may be, may also be published if, in the opinion of the Central Government, circumstances of the case justify it. While one may debate as to whose doubts the Government is trying to remove, one cannot but appreciate the fact that Directors and officers who occupy important positions in corporates would indeed feel intimidated by these Rules.

Now, the most important word used in these Rules is 'adjudged'. There can be no publication of the names, etc. unless the person concerned has been 'adjudged'. In terms of P Ramanatha Aiyar's Advanced Tax Lexicon, edited by Hon'ble Mr Y V Chandrachud, Retd Chief Justice, Supreme Court of India, '**to adjudge' is to decide or pass upon or determine judicially; to settle; decree; to determine in the exercise of judicial power; to decide or determine judicially; to adjudicate**'. I feel that these Rules cannot be invoked unless and until adjudication proceedings have been initiated by the Department which would essentially involve issuance of SCNs, hearings, etc.

As is known, Section 73D of the Finance Act 1994 is based on Section 37E of the Central Excise Act 1944 which was brought into the statute book by the Taxation Laws (Amendment) Act of 2006, dealing with publication of the names of offenders under the central excise law. It is interesting to note that in terms of the Circular No. **Circular No.849/07/2007-CX** contained in F.No.201/51/2004-CX-6 issued by the Board, dated April 19, 2007, the word 'adjudged' is not used.

By implication, though both the sections, viz. 73D of the Finance Act 1994 and 37E of the Central Excise Act are very similarly worded, in terms of the Rules and the Notifications issued there under, it seems clear that under the service tax law, the provisions related to publication of names, etc. can be resorted essentially to only in the case of adjudication proceedings involving penalties and that too, after the period of appeal is over, in the case of penalties. Hence, issuance of SCNs and adjudication proceedings is a necessary pre-requisite for these Rules to be applied.

I sincerely hope that the important difference between the service tax law and the central excise law, in terms of publication of the names of the 'offenders' is understood and appreciated by the officers of the Service tax Department, who in most cases, are from the Central Excise Department. I read with interest, Mr Vijay Kumar's DDT on TIOL this Friday morning, where he has mentioned of the efforts of some of the Service Tax Commissioners to publish the names in a rather hasty manner, which is not approved by the law. This happens essentially due to the ignorance of the Service Tax Departmental officers, who tend to blindly apply their knowledge of the central excise provisions in the service tax arena.

Needless to say, the power to publish names is a very powerful tool which should be sparingly used, considering the fact that the service tax law is yet to evolve. Let's not forget that, even in the case of the central excise law, which is about 64 years old, there are still cases pending before the courts on what constitutes 'manufacture' which is very core concept around which the excise law revolves. Remember... the central excise law is a fairly evolved law with clear definitions, notwithstanding the recent effort of the Government to tinker with the very basis of this law. If this is the case with a law with a 'proven' track record of 64 years, what to talk of the service tax law, which in all its seriousness, is only about five years old.... After all, though the Finance Act 1994 levied service tax for the first time, it was only in the mid 2000s that the power and reach of this levy was realized. With "service" not being defined, the service tax law continues to be a largely unsystematic and uncodified law and I don't know if the law makers have consciously ensured that this situation continues. The service tax law does not even have a dedicated Act, despite that it is expected to collect over Rs 60,000 crores for the Government in 2008-09.

I'd have been happy if there had been a mechanism of giving an opportunity to the 'offender' to be heard, before a decision is taken by the jurisdictional Commissioner to recommend his name to the Board, as part of the procedure prescribed. The right to be heard is a fundamental right and the absence of such a right in the Rules relating to publication of names, etc. which will seriously jeopardise the standing of the person concerned, might not stand the judicial scrutiny, in my view.

I am also concerned with the efforts of the Government to assume 'extra judicial powers' in terms of issues involving 'mens rea', which is evident in these Rules which talks of cases having material evidence to show that fraud, collusion, wilful mis-statement or suppression of facts has been committed with intent to evade payment of tax /duty. Wouldn't it have been much simpler, logical and legal if the Government had assumed powers to publish names of the offenders etc. in cases involving confirmation of penalties by the Appellate Commissioners or the CESTAT under Section 78 of the Finance Act which as aforesaid, deals with cases involving 'mens rea' in a comprehensive manner, more so, considering the fact that the service tax law remains a loosely defined law.

I sincerely hope that the power to publish the names, etc. is not used as a harassing or intimidating tool by the Department against the tax payers and their Directors and senior officials, in order to meet revenue collection and other objectives.

