TRU's PPT on service tax changes – the good, the bad and the ugly – July 24, 2012

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By S Sivakumar, CA

THE Tax Research Unit, working under the mighty Finance Ministry, needs to be heartily congratulated for bringing out, a PPT on the changes in service tax, brought about by the Budget 2012. It is heartening to see that the TRU resorting to issuing a PPT to explain the Budgetary changes… I haven't come across an earlier similar attempt. Let's heartily congratulate the bright officers who have issued this PPT.

In Slide No.7, the PPT talks of a beggar not being liable to service tax when he plays music on the road even while soliciting money. The PPT also says that the same beggar is liable to service tax, if he performs at a function, for consideration. One is not able to understand this logic… in both examples, the beggar is clearly performing for a consideration. Of course, if the beggar is allowed to perform in a function, he might net more income. But, can this be the bas is for determining the taxability of the 'activity' which is, 'performing' for an audience. The logic that the beggar is under no obligation to 'perform' while accepting alms and hence not taxable, while still 'performing' on the street, which is 'activity' under the new law, seems extremely shaky. If this is the basis that the Department would interpret the new law, we are in for big trouble.

Be that as it may… the TRU should be complimented, for taking this example of the Indian beggar, being a likely service tax payer. This kindles a lot of hope amongst us and is great positive news… coming, especially, at a time, when there is so much of negativism all around us, with no less than the TIME Magazine carrying a highly negative write up on our beloved PM.

Going forward…the PPT unequivocally states that the employer would be taxable in respect of to and fro transportation, training charges, charges for private use of car, etc. This is an important statement, not contained in the Education Guide, which corporates need to take note of. One question that could arise here is, whether, the employer would be taxable, even when he does not recover any charges from the employee? In other words, is a distinction possible between free transportation provided to employees and concessional transportation facility provided to employees, wherein, the employees bear a portion of the cost.*Per se* , it would seem that service tax could get levied on free as well as, concessional facilities provided to employees. Taking this forward…can a view be taken that,the employer is under no obligation to provide these facilities and consequently, no service tax can be levied (remember the 'beggar' example)? In other words, can it be said that, BPOs who are statutorily required to provide transportation facilities to employees who work in the night shifts are only liable, while the other employers are not liable, not being under the obligation to provide this service? Similar issues could crop up in respect of canteen facilities provided to factor workers, as mandated under the Factories Act, etc. as contrasted to employers, who provide canteen services We are in for a lot of confusion, in this area, for sure.

In Slide No. 21, the PPT states that, payments made to all kinds of Directors except of government regulatory bodies, in the nature of director's fee, commission/bonus, company car/travel reimbursements would be subject to levy of service tax. The PPT ought to have made a distinction between Managing/Whole-time Directors, who are employees and non Managing/Whole-time Directors. Managing /Whole-time Directors are treated as employees, as they receive salaries and consequently, any payment of fees, commission/bonus and travel costs would form part of the employment contract and consequently, outside of the service tax levy. Of course, these payments, when effected to non-Managing/Whole-time Directors could be subjected to the service tax levy, in the absence of an employee-employer relationship. The TRU would urgently need to clarify this, as the Department, could otherwise, subject all such payments made to 'all kinds of Directors' to service tax levy.

- In terms of the levy of service tax on 'Information Technology', the PPT has the following Slide No. 26:

- Sale of pre-packaged software or canned software is sale of goods

- A mere transfer of license to use such canned software, which is not transfer of “right to use” is a provision of service

- On-site development of software is service

- Internet downloads also service

The TRU, it would seem, has now magnanimously conceded that, sale of pre-packaged or canned software, is a sale and not a service. One another fact to be considered here is that, the Central Excise Department is demanding central excise duty on the ‘manufacture of pre-packaged or canned software’ and, this issue is already before the Appellate Forums. It is important that the Board takes an overall view of the matter and clarifies on the levy of central excise duty and service tax, taking into account, the views of the Central Excise Department, as well. In terms of the law that existed prior to July 1, 2012, exemption had been provided, in respect of the value representing the license of packaged/canned software from the levy of central excise duty, so long as service tax had been paid. It looks like that this exemption is no longer available post 1-7-2012. Of course, given a choice, most pre-packaged software sellers would, of course, be better off, paying service tax than central excise duty, though. In the ultimate analysis, it would need to be ensure that, both central excise duty and service tax are not demanded from packaged software players.

The PPT further states that, a mere transfer of a license to use pre-packaged software without a ‘transfer of right to use’ such software, is a service. As a clear delineation between licensing and the transfer of right to use software is difficult, in most practical situations, (despite that legally speaking, these two are two different concepts), I would presume that, most licensors of software would want to collect and pay service tax, rather than take a risk, especially, when the PPT states that, on-site development of software and Internet downloads are to be considered as ‘service’. Given the fact that, in most cases, licensing of packaged software is effected thro’ internet downloads, one must assume that, the law related to service tax levy on electronic download of shrink wrapped/packaged software has not undergone a change, post 1-7-2012, at least, as aforesaid, from a practical viewpoint. In terms of clarifications on the levy of service tax on licensing of pre-packaged software, the PPT brings in, some amount of welcome clarity, not found in the Education Guide.

While talking of ‘consideration without activity’, in Slide No. 11, the PPT makes a good reference to personal obligations like pocket money, pure gifts, tips and ex gratia payments and donations without consideration. Can I now assume that, the money that I give to my wife for running the family is outside of the service tax net?

Before concluding …

The PPT is a very good attempt from the TRU, as aforesaidand could very well form the basis for the Department to levy service tax, post 1-7-2012, along with the Education Guide, notwithstanding the customary disclaimer. The TRU officers also need to be complimented for organizing interactive sessions with the Industry. I had the good opportunity in participating in one of these sessions, very recently.

The PPT also makes a welcome mention of the error that had crept in Point 7.11.18 of the Education Guide, in which, a view had been expressed that, individuals are liable to service tax on import of services for non-business/commercial use. The PPT has, thankfully, prevented the damage that could have arisen out of this error in the Education Guide.

The Industry should be extremely worried about the documentation requirements arising out of the service tax on services rendered to employees. Think of the nightmare of the requirement of raising invoices for canteen facilities provided to employees… are the invoices required to be raised employee wise or for employees as a whole? Since the PPT talks of the employee being able to avail of cenvat credit, if registered with the Department, it seems that the Board is expecting that invoices would have to be raised on the individual employees. Imagine the plight of large companies having thousands of employees, where services such as canteen, transportation services, etc. are provided.

As a revenue augmentation measure…. should the Government think of bringing the services rendered by beggars under the "Reverse Charge Mechanism", given the fact that, most beggars don't earn Rs 10 lakhs in a financial year and even if they do, they do not disclose such income and maintain books of accounts.

A very common reaction from the Revenue officials, that one can hear, in these interactive sessions, is that, GST is the panacea for double taxation of software and other transactions. Non-implementation of the GST is cited as '*the*' reason, justifying the dual levy of service tax and VAT on several transactions. In my view, GST could combine the worst of the central indirect tax laws and the VAT law. While there is no harm in hoping for a better tomorrow, the focus should be on removing the double taxation, even under the existing indirect tax regime. Let's handle the 'known devil', i.e. the current service tax regime, while continuing to hope that the GST, the 'unknown devil' would, perhaps, remove the current evils including the double taxation.
I must reiterate my deep appreciation of the knowledge and the enthusiasm level of the TRU officers, who participate in these interactive sessions. It is no wonder that service tax collections are growing at an amazing speed and I would not be surprised, if service tax becomes the single largest tax to be collected by the Government, whether under the direct taxes basket or under the indirect taxes basket, in the new few years.

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