Why this intolerance towards the apex and High Courts? – Feb 27, 2010

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By S Sivakumar, CA

IF there is one thing which comes out loud and clear from this Budget, it is this…. the growing intolerance of the Government towards the Hon'ble Apex Court.

Consider these….

Putting an end to the controversies related to the levy of service tax on 'Renting of Immovable Property' services, the Government is bringing a retrospective amendment holding that 'Renting' by itself is a service. This amendment is effective from June 1, 2007. This retrospective amendment will nullify the impact arising out of the decision of the Delhi High Court in the Home Solutions case and the appeal which is pending before the Supreme Court. There is also a statutory amendment proposed according to which, all action taken by the Department for collecting service tax on renting of immovable property services from the period June 1, 2007 cannot be challenged in a court of law. In my view, this would probably end all controversies surrounding the levy of service tax on renting services. This amendment comes, even before the ink that was used by the Delhi High Court, to pull up the Government on the controversial Circular exhorting its field force to collect service tax, despite the Delhi High Court's decision, has dried. Couldn't the Government have waited for the Supreme Court to deliver its judgment on the Home Solutions case?

Another instance of intolerance, is the retrospective amendment, effective June 1, 2006, to Section 9(1) of the Income tax Act, on the taxability of the income of Non-Residents in India. As we know, the Government had brought about a retrospective amendment to Section 9(1)(vi) by inserting an Explanation, thro' the Finance Act of 2007, to undo the impact arising out of the decision of the Supreme Court in the Ishikawajma Harima Heavy Industries case, wherein it had been held that, for income to be charged in India, the twin condition of the services being rendered in India and the services being used in India must be met. The Karnakata High Court had held, in a case involving Jindal Thermal Power, that the law laid down by the Supreme Court in the Ishikawajma case was still good, despite the amendment to Section 9(1)(vi) effected in 2007. To overcome this decision, the Government has, once again, effected a retrospective amendment to Section 9(1)(vi) by introducing an amendment to the effect that, the services of the Non-Resident need not be rendered in India for purposes of being taxed under the Income tax Act. Now, this amendment is effective from June 1, 1976 and imagine the kind of chaos, this would create, in the field of taxation of Non-Residents.

And, here is the third instance of the intolerance towards the Courts. 'Construction of Complex' services and the 'Works Contractor's' services are now expanded to provide that, all amounts received by the Builder/Developers prior to the date of the Completion Certificate shall be treated as having been received towards providing the taxable service. This amendment, which is prospective, would effectively nullify the impact of Circular No. 108/02/2009-ST dated January 29, 2009. It would no longer be relevant for Builders to enter into agreements of sale. All agreements, whether single or double, whether for construction or for sale of flats, etc. would now be covered under service tax levy, so long as monies are received before the date of the Occupancy Certificate. In fact, on the face of it, even agreements for sale of ready-made flats, entered into prior to the OC date, would be covered under service tax. As we know, the Supreme Court is already hearing a case involving L & T Ltd, wherein, it has been submitted that an agreement of sale of a flat, cannot be treated as a works contract for VAT purposes, under the Karnataka Value Added Tax Act, 2003 hand that, the Supreme Court's decision in the K Raheha Development Corporation case should be distinguished, in the case of a contract for sale of immovable property. If the Supreme Court had held that an agreement of sale is not a works contract, the same reasoning could have been applied for service tax purposes also, as, the definition of a 'works contract' under

the service tax law mirrors the definition under the VAT law. Now, it is clear that the decision of the Supreme Court in the L & T case will not have an impact on service tax matters.

Why this growing intolerance with the decisions of the Supreme Court and the High Courts, Mr FM?