

November 14, 2013

To,
The Revenue Secretary
Ministry of Finance, North Block,
New Delhi.

Dear Sir,

Subject: Voluntary Compliance Encouragement Scheme (VCES), 2013

- This is in connection with the Service tax Voluntary Compliance Encouragement Scheme, 2013 ('the Scheme'), which intends to motivate Assesseees to voluntarily disclose tax dues for the period October 07 to December 12, which has remained unpaid till 1 March 2013.
- We really congratulate the genuine efforts made by the Central Board of Excise and Customs by issuing Circular No. 169/4 /2013 - ST dated 13 May 2013 and Circular No. 170/5 /2013 - ST dated 8 August 2013 (collectively referred as 'Circulars') for clarifying various issues with regard to the scope of the scheme, thereby encouraging tax payers to opt for the scheme.
- We specifically seek your kind attention to serial no #1 of Circular No. 170/5/2013 - ST dated 8/8/2013, in which, following was clarified.

“Question: Whether the communications, wherein department has sought information of roving nature from potential taxpayer regarding their business activities without seeking any documents from such person or calling for his presence, while quoting the authority of section 14 of the Central Excise Act, 1944, would attract the provision of section 106 (2) (a)?

Clarification: Attention is invited to clarification issued at S. No. 4 of the circular No. 169/4/2013-ST, dated 13.5.2013, as regards the scope of section 106 (2) (a) of the Finance Act, 2013, wherein it has been clarified that the provision of section 106 (2)(a)(iii) shall be attracted only in such cases where accounts, documents or other evidence are requisitioned by the authorized officer from the declarant under the authority of a statutory provision.

A communication of the nature as mentioned in the question would not attract the provision of section 106 (2)(a) even though the authority of section 14 of the Central Excise Act may have been quoted therein.”

- On a practical note, the service tax department is limiting the benefit of this clarification only in such cases where any document (not being Summons) has been issued quoting the authority of Section 14 for a roving inquiry. However, the department is not extending the benefit to Summons where personal presence has been sought/ additional documents has been sought, **even though the Summon is of 'roving nature'.**

- There are cases where the department issues Summons to a Company (and in some cases, to various companies of an industry) under Section 14, to gather generic information about the business operations, about the revenue streams/ expense streams/ contracting arrangements/ status of tax payments by the Company/ Industry. For that purpose, personal presence of a person/ additional documents is also sought.
- Such Summons, are clearly 'roving' in nature, and no specific issue is being investigated by the department. In other words, the Summons is not for an **'inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid'**, and hence, should not be covered under Section 106 (2) (a) of the Service tax Voluntary Compliance Encouragement Scheme 2013.
- This issue has profound implications, especially in the context of real estate industry in the state of Maharashtra, due to a specific trail of proceedings that had happened in the past, which is being explained in detail below:
 - The activity of developing the residential units was, for the first time subjected to service tax, with effect from 1 July 2010.
 - The constitutional validity of the levy of service tax on development of residential units, was challenged before Bombay High Court (vide Writ Petition 1456 of 2010) and post the negative order of Bombay High Court, the said matter was referred to Supreme Court and remains pending before the Apex Court.
 - Pending the Bombay High Court decision, the industry members followed different practices, some deposited service tax with the service tax department, while some deposited the service tax with the Bombay High Court.
 - In order to understand the industry's business practice and the amount of taxes being deposited by the developers with the Bombay High Court and/ or the Service tax department, there was exercise by the department seeking information of "roving nature" from various industry players, sometime in fag end of 2011, to check the status of tax payments consequent to the writ petition that was filed before Bombay High court.
 - The said exercise was not specific to a particular company, but was general in nature, given to various industry players. A generic questionnaire was issued to all the real estate developers, requiring them to furnish general information and documents like trial balance, financial accounts, details of projects being executed, billings and collections, service tax collected from customers, service tax deposited etc.
 - To hasten the above exercise steps were taken either by authorizing the visit of the service tax officials, under Rule 5A of the Service tax Rules, 1994 or vide the issuance of a summons under section 14 of the CEA.
 - The Summons under Section 14 of the CEA had been issued to specific entities in some cases (eg - ABC Private Limited) and **in many cases the Summons have been issued generally in the name of the group, without naming a particular entity (eg - XXX Group of Cos, XXX Group of Cos. - 20 cos.)**.

- Since the objective was to understand the business transactions in the real estate industry, authorized representative of the developers were summoned under section 14 of the Central Excise Act, 1994 ('CEA'), to explain the same to the service tax department. Documents like trial balance, financial accounts etc were also called for.
- It may be noted that such Summons issued under Section 14 were clearly 'roving' in nature, and no specific issue of non-payment or short payment or non-levy or short levy of service tax was being investigated by the department. In other words, the Summons was not for an **'inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid'**, but an **activity for collation of information/ data from the developers** and hence, should not be covered under Section 106 (2) (a) of the Service tax Voluntary Compliance Encouragement Scheme 2013.
- While the decision of the Apex Court is awaited, the real estate developers have been paying service tax with the service tax department, and have always intimated the tax payments to the service tax department.

However, due to various change in law (like introduction of 'Point of Taxation Rules'; Trade notice issued on the treatment of 'PLC', 'Floor rise'; introduction of negative list based service tax regime), there have been certain cases of short payment of service tax. Short payment of service tax has also occurred due to IT related transitioning issues etc.

The real estate developers now wish to avail benefit of the Scheme, thereby declaring the 'tax dues', which had remained unpaid because of the aforesaid reasons.

- It has been the experience of various developers, that the designated officers have expressed their views of possibility of rejecting the VCES scheme declarations, if filed by the real estate developers, as 'summons issued under Section 14', though roving in nature, was issued seeking personal presence and information of generic nature like trial balance, financial accounts, details of projects being executed, billings and collections, service tax collected from customers, service tax deposited etc.
- In the above background, we, on behalf of the real estate developers in Maharashtra, submit that:
 - In case of a Summon, there would necessarily be a requirement of personal presence or submission of document. Therefore, the test for allowing the benefit should not be whether it is a Summon or any other document (not being Summon) issued under Section 14. The test should also not be whether any personal presence or additional document has been called for.
 - The test for allowing the benefit should be whether the Summon issued under Section 14 is of **general/ roving in nature** or whether it is for a **specific issue** being investigated by the department, and whether the information sought is specific to an entity or whether identical information has been sought from various companies of the same industry.

- In cases where the department issues Summons under Section 14, to gather generic information about the business operations of the company and for that purpose, seeks personal presence of a person, such Summons, being clearly 'roving' in nature, and not for an 'inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid', should not be covered under Section 106 (2) (a) of the Service tax Voluntary Compliance Encouragement Scheme 2013.

Suggestion

- We suggest that it should be clarified that:
 - The benefit of Circular dated 8 August 2013 should not be read as if it is applicable to only such documents issued under Section 14 that are not "Summons".
 - The benefit of the scheme should be extended even to "Summons" issued under Section 14, where personal presence/ additional documents have been sought, if the same is roving in nature.
 - The benefit of the scheme should be extended wherein Summons under Section 14 have been issued to various companies of the industry, for collation of information of roving nature pertaining to the business operations, and not for a specific Company for any specific issue.
- It may be noted that our members are committed to passing on the benefit (i.e. immunity from interest and penalty) to millions of common people "*aam aadmi*" who have purchased houses from the developers for living. The positive clarification shall indeed impact millions of families residing in Mumbai.

Given that the deadline to file the VCES application is approaching, an immediate clarification, permitting assesses to opt for the VCES scheme would be extremely forthcoming in meeting the objectives of the VCES scheme.

We request you to kindly provide us an opportunity to meet and express the concerns in person.

Thank you

Yours Sincerely,
For **MCHI-CREDAI**

Vimal Shah
President

CC:

- A) The Chairperson, the Central Board of Excise and Customs
- B) The Member (Service Tax), the Central Board of Excise and Customs
- C) The Member (TRU - II), the Central Board of Excise and Customs