SERVICE TAX – RECENT AMENDMENTS

I PROPOSED SERVICE TAX VOLUNTARY COMPLIANCE ENCOURAGEMENT SCHEME, 2013 ["Scheme"]

1.1 Date of Application of the Scheme

Scheme would come into force from the date of enactment of Finance Bill, 2013.

1.2 Period for which the benefit of the Scheme can be availed

The benefit of the Scheme can be availed in regard to the tax dues for the period beginning from 1/10/07 and ending on 31/12/12.

According to Section 70 of the Finance Act 1994 ("Act") read with Rule 7 of Service Tax Rules, 1994, ("ST Rules") Service tax return for the half year beginning from 1/10/07 and ending on 31/3/08 is required to be filed by 25/04/08. Thus, the Department cannot issue a Show Cause Notice (SCN) in respect of said half year after the expiry of five years from the relevant date in terms of proviso to Section 73(1) of the Act.

Additionally, tax dues for any period after 31/12/12, are required to be settled in accordance with normal applicable provisions of the Act and ST Rules.

1.3 "Tax Dues" under the Scheme

It means Service tax due under Chapter V of the Act, or any amount due or payable under Section 73A of the Act for the period 1/10/07 to 31/12/12 including cess leviable thereon under any other Act for the time being in force, but not paid as on 1/3/13.

1.4 Persons who cannot avail the benefit of the scheme.

a) Any person to whom a Notice or Order of Determination has been issued before 1/3/13[in respect of his tax dues for any period beginning from 1/10/07 and ending 31/12/12] under any of the following sections:

i) Section 72 of the Act (which empowers Central Excise officer to make the assessment of the value of taxable service to the best of his judgement and determine the sum payable by the assessee on the basis of such assessment - Provisions of Section 72 can be invoked only in those cases where any person liable to pay service tax fails to furnish the return under Section 70 of the Act or having made a return, fails to assess the tax in accordance with the provisions of the Act or rules made thereunder.)

ii) Section 73 of the Act (recovery of service tax not levied or paid or short levied or short paid or erroneously refunded)

iii) Section 73A of the Act (service tax collected from any person but not deposited with Central Government)

b) Any person who has furnished his Service Tax Return [in accordance with provisions of Section 70 of the Act, read with Rule 7(1) of ST Rules and disclosed his true liability but has not paid the disclosed amount of Service tax or any part thereof. In simple words, if any person truly discloses his service tax liability in his service tax return and submits such return to the Department but fails to pay the disclosed amount of service tax either fully or partially, he will become ineligible to avail the benefit of the Scheme. Further, such a person will not be eligible to claim the benefit of the Scheme for the period covered by the Return.

c) Any person to whom a Notice or Order of Determination has been issued [under any of the above mentioned specified sections i.e., Section 72, Section 73 and Section 73A of Act] in respect of any period on any issue, then such person can not take benefit of the Scheme on the same issue for any subsequent period.

1.5 Procedure for making declaration and payment of tax dues

a) Subject to the provisions of the Scheme, a person may make a declaration to the designated authority on or before 31/12/13 in the prescribed form and prescribed manner.

b) The designated authority shall acknowledge the declaration in the prescribed form and prescribed manner

c) The declarant shall, on or before 31/12/13, pay not less than 50% of the tax dues so declared and submit the proof of such payment to the designated authority. In simple words, it is necessary on the part of the declarant to pay at least fifty per cent of the tax dues by31/12/13.

The tax dues or part thereof remaining to be paid after the aforesaid payment shall be paid on or before 30/06/14.

However, if the declarant fails to pay remaining amount of tax dues on or before 30/6/14, then in addition to the amount of outstanding tax dues he will be required to pay interest at such rate as fixed under Section 75 of the Act or as the case may be, Section 73B of the Act for the period of delay upto the date of actual payment.

d) The declarant shall furnish to the designated authority details of payment of tax dues and interest (if any) made from time to time under this Scheme along with a copy of acknowledgement issued to him.

1.6 Issue of Acknowledgement of Discharge of Tax Dues

On receipt of the details of full payment of declared tax dues and the interest, if any, the designated authority shall issue an acknowledgement of discharge of such dues to the declarant in the prescribed form and in the prescribed manner

1.7 Circumstances under which Declaration shall be rejected

In case where inquiry or investigation has been initiated (as stated hereafter) and the same is pending as on 01/3/13, designated authority shall reject the declaration by passing an order in writing, giving reasons for such rejection:

a) Search have been conducted of the premises of a person in accordance with provisions of Section 82 of the Act; or

b) Summons has been issued under Section 14 of Central Excise Act, 1944; or

c) Any notice requiring production of accounts,documents or other evidence under the Act or ST Rules made thereunder, has been issued; or

d) Any audit has been initiated.

1.8 Immunity from Penalty, Interest and other proceeding

a) Notwithstanding anything contained in any provisions of the Act and ST Rules, the declarant shall get immunity from penalty, interest, or any other proceeding under the Act or ST Rules made thereunder, provided he makes payment of tax dues and interest (if any) in accordance with time-limits specified hereinbefore.

b) Nothing contained in the Scheme shall be construed as conferring any benefit, concession or immunity of the declarant other than benefit, concession or immunity mentioned above.

1.9 When the Declaration becomes conclusive

Barring a case where the declaration made by a declarant under the Scheme is found to be substantially false by the Commissioner of Central Excise ("CCE"), a declaration made by the declarant under the Scheme shall become conclusive upon issuance of Acknowledgment of Discharge by the designated authority. As a result, no matter shall be reopened thereafter in any proceedings under the Act before any Authority or Court, relating to the period covered by such declaration.

1.10 Issue of SCN by CCE under certain circumstances

As mentioned above, if the CCE has reasons to believe that the declaration made by a declarant under the Scheme was substantially false, he may, for reasons to be recorded in writing, serve notice on the Declarant in respect of such declaration,

requiring him to show cause why he should not pay the tax dues not paid or short-paid. The SCN can be issued by the CCE within one year from the date of Date of Declaration by the declarant. Moreover, the SCN shall be deemed to have been issued under Section 73 or, as the case may be, under Section 73A of the Act and the provisions of the Act shall apply accordingly.

1.11 Refund of Service tax paid under the Scheme

Any amount paid in pursuance of a declaration under the Scheme shall not be refundable under any circumstances.

1.12 Tax dues declared but not paid

Where declaration has been made by declarant under the Scheme, but fails to pay the tax dues, either fully or in part, as declared by him, then such tax dues along with interest thereon shall be recovered under the provisions of Section 87 of the Act.

1.13 Power to make Rules

The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of the Scheme. The foregoing Rules may provide for all or any of the following matters, namely:

a) The form and the manner in which a declaration may be made by the declarant;

b) The form and the manner of acknowledging the declaration by the designated authority;

c) The form and the manner of issuing the acknowledgment of discharge of tax dues by the designated authority;

d) Any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by Rules.

1.14 Power to remove difficulties

If any difficulty arises in giving effect to the provisions of the Scheme, the Central Government may, by order [which is not inconsistent with the provisions of the Scheme] remove the difficulty. However, no such order shall be made after the expiry of a period of two years from the date on which the provisions of the Scheme come into force. Further, every such order, after it is made, shall be laid before each House of Parliament as soon as possible.

IA **SOME ISSUES FOR DISCUSSION**

1 In regard to ST 3 Returns for the period 1/10/07 to 31/3/08 due for filing on 25/4/08, no SCN can be issued after 25/4/13 – Whether benefit of limitation can be availed.

2 Whether tax dues would cover the following :

- Service tax not paid due wrong / incorrect availment of CENVAT Credit.
- Reversals of Wrong availment of CENVAT Credits for any reasons.
- Refunds erroneously granted & received.

3 Whether benefit of Scheme can be availed, in cases where Service tax was being paid as per ST 3 returns filed upto a particular period, but subsequently filing of returns & payment has been discontinued.

4 Whether benefit of Scheme can be availed by persons registered with Service Dept but are filing "NIL" Returns with a Note setting out reasons [For eg no tax is paid pending final resolvement of dispute in regard to taxability of renting of immovable property]

5 In cases where a Service Provider is providing 3 services and has paid tax only for 2 services & disclosed 3rd service as non – taxable in the ST 3 Return:

- Whether benefit of Scheme can be availed in regard to service disclosed as non – taxable
- Whether benefit of scheme can be availed for a disclosed service, in regard to which a notice was issued for the period 2008-09, for a subsequent period (say 2010-11).

6 Whether persons who have came under the tax net wef 1/7/12 but have not filed their returns / nor paid taxes, can avail the benefit of Scheme for the period 1/7/12 to 31/12/12.

7 Whether benefit of Scheme can be availed by agents of Service providers

8 Whether filing of declaration should precede payment of tax.

9 What are the implications in cases where declaration is which is rejected but part tax has been paid.

10 Whether appeal remedy is available in cases where declaration is rejected.

11 Whether tax payable under the Scheme can be paid through debit in CENVAT Credit Account.

12 Whether, under the scheme, tax can be paid in Cash (unaccounted)

13 In cases of delay in payment, whether interest would be payable from 1/1/14 or 1/7/14.

14 Whether benefit of CENVAT Credit can be availed by a Service receiver in regard to Service tax paid under the Scheme by a Service Provider.

15 What would be regarded as a "Declaration which is substantially false"

2 SOME OTHER AMENDMENTS

2.1 Services by Air-conditioned Restaurants:

a) Background

Whether transaction for supply of food and/or beverages in a restaurant or a hotel is a contract for sale of food or a composite contract for sale and services was a subject of controversy vis-à-vis leviability of Sales Tax (now VAT) under the sales tax law in the States for many years. Consequently amendment was made in Article 366(29A) of the Constitution of India to provide for "the supply by way of or as a part of any service, of food or any drink for cash, deferred payment or other valuable consideration" as a deemed sale. The levy on the composite charges of food and services has been a matter of litigation under the Sales Tax regime for a long time. The Supreme Court in Northern India Caterers (India) Ltd. Vs. Lt. Governor of Delhi (1978) 42 STC 386 (SC) held that service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax but must be regarded as the rendering of a service in the satisfaction of a human need or ministering to the bodily want of human beings. It would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately. This led to the amendment in article 366(29A) of the Constitution, whereby the 46th amendment included within its scope "the supply, by way of or as part of any service, of food or any drink for cash, deferred payment or other valuable consideration" as a deemed sale.

Subsequent to the constitutional amendment, VAT is being paid on the sale of food in hotels. However, the question that arose was on what value of the consideration should be VAT be paid.

The five member Bench of the Supreme Court in the case of *K. Damodarasamy Naidu & Sons Ltd. vs. State of TN* (2000) 117 STC 1 (SC) interestingly held that the entire value should be deemed to be the

consideration towards the sale. While delivering its judgment, the Hon. Supreme Court observed as under:

> "In our view, therefore the price that the customer pays for the supply of goods in a restaurant cannot be split up as suggested by learned counsel. The supply of food by the restaurant owner to the customer though it may be a part of service that he renders by providing good furniture, furnishing and fixtures, linen, crockery and cutlery , music, a dance floor, and a floor show, is what is the subject of levy. The patron of fancy restaurant who orders a plate of cheese sandwiches whose price is shown to be Rs. 50/- on the bill of fare knows very well that the innate cost of the bread, butter, mustard and cheese in the plate is very much less, but he orders it all the same. He pays Rs 50/- for its supply and it is on Rs 50/- that the restaurant owner must be taxed."

It is interesting to note that the Supreme Court in Tamilnadu Kalyan Mandapam Assn. vs. UOI (2006) 3 STR 260 (SC) observed as under :

> "In case of catering contracts, service element is more weighty; visible and predominant and it cannot be considered as a case of sale of food and drink in a restaurant".

Admittedly, there was no question before the Hon. Supreme Court in this case to examine whether sale of food in a restaurant was a service or otherwise. Nevertheless, service tax on the service in relation to serving of food or beverage including alcoholic beverage was introduced with effect from 1/5/11. However, this remained restricted to air-conditioned restaurants which also had a license to serve alcoholic beverages. To justify the levy in this regard, the TRU in is letter dated 28/2/11 clarified that the tax is levied on the service element and it should not be confused with the sale of food. The levy is intended to be confined to the value of services contained in the composite contract and shall not cover either the meal portion in the composite contract or mere sale of food by way of pick up or home delivery as also goods sold at MRP. Subsequently on the onset of negative list based taxation of services with effect from 1/7/12, the list of declared services in section 66E of the Finance Act, 1994 in sub-clause (i) included, the service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity. However, the restaurants other than fully or partially air-conditioned/centrally heated and not having license to serve alcoholic beverages remained exempted as the Mega Exemption Notification No.25/2012-ST dated 20/6/12 ["ME"] provided for the same at Entry 19.

In many cases under the Service category of "Outdoor catering" it has been held that it is possible to take deduction of material component in terms of Notification 12/03, However, the Delhi CESTAT in the case of Sayaji Hotels (2011) 24 STR 177 has held that, in case of a composite contract of a "Mandap keeper" the hotel cannot artificially divide the contract and levy Service tax merely on the value of services so identified. In essence, the Delhi CESTAT rejected the theory of splitting between the value of services

and goods and held that the only option the appellant had was to pay tax on the abated value as provided for in Notification 1/06 dated 1/3/06.

It would appear that after the rescinding of notification 12/03 w.e.f. 1/7/12, the Service tax in relation to food contracts may have to be paid on the abated value as provided for or on the entire value of the contract inasmuch the new scheme of Valuation under Rule 2C does not provide for an option for claiming deduction of goods as it is provided for "Works Contract" under Rule 2A of the Valuation Rules.

However, the larger issue as to whether or not taxing entry (i) under Section 66E (Declared Services) which specifies service portion in an activity can include value of goods supplied at all, is a matter being extensively debated.

It needs to noted that Rule 2C refers only to a "Restaurant" and does not Specify "eating joint or mess". This appears to inadvertent.

In addition, other valuation issues like charge of VAT on Service tax component (and vice versa), charge on other service charges (due to introduction of definition of service w.e.f. 1/7/12 etc, are likely to be faced which would ultimately increase the final cost to the consumer substantially

b) <u>Implications of amendment with effect from 1/4/13</u>

Now, vide Notification No.3/13-ST, the said Entry No.19 in ME is amended to delete the condition for the restaurant to have a license to serve alcoholic beverages. Consequently, the amendment would have a tremendous impact as a large number of eating places including fast food chains, coffee shops, pizza places, ice-cream parlours, cafeteria in hospitals, educational institutions or corporate offices, airports, multiplex cinema houses, book shops, auditoria, canteens in factories, food courts in shopping malls, clubs etc. could get covered.

The said Entry No. 19 in ME describes a restaurant or eating joint other than those having the facility of air-conditioning or central heating in any part of the establishment, at any time during the year. This gives rise to inclusion of all the above stated illustrations including simple cafes or restaurants having a small portion or a mezzanine portion air-conditioned would be covered under the service tax net. Further even non air-conditioned portion of the café serving food would be subject to the levy. Even if a small ice-cream/yoghurt parlour having air-conditioner in any part of their premises would be subject to the levy. In large departmental/chain stores or book shops, small kiosks/bakeries/prepared food corners are often provided with a few tables and chairs. Since the book shop, the store or the mall has common area air-conditioned and even if the food or snacks, beverages or ice-cream are provided through "self-service" counters/desks in a tray and without the use of crockery, the exemption under Entry No 19 is not available as some part of the establishment is air-conditioned. Many or most of these contracts of providing food are predominantly 'sale' contracts as 'service' element is present in a negligible proportion. In India, we have system of 'thali' places serving only meals in thalis. They are known as Bhojanalayas and only lunch or dinner is served very quickly. These servings have a very

little 'service' element. Yet all and sundry could be come subject to service tax subject to available exemptions. [The value of service however in accordance with Rule 2C of the Service Tax (Determination of Value) Rules, 2006 is to be taken at 40% or in other words, after considering 60% presumptive abatement.]

However, the burning issue of dual taxation vis a vis VAT, would continue inasmuch as VAT would continue to be payable on the gross amount & not on 40% (presumptive value of goods).

So far as cafeteria/canteens in corporate offices or factories are concerned, it is relevant to note the views expressed in the Draft Circular dated 25/7/12 vide F. No.354/127/2012-TRU issued by Tariff Research Unit of Ministry of Finance. Relevant extracts are set out hereafter :

"8. A number of activities are carried out by the employers for the employees for a consideration. Such activities fall within the definition of "service" and are liable to be taxed unless specified in the Negative List or otherwise exempted.

9. One of the ingredients for the taxation is that such activity should be provided for consideration. Where the employees pays for such services or where the amount is deducted from the salary, there does not seem to be any doubt. However, in certain situations, such services may be provided against a portion of the salary foregone by the employee. Such activities will also be considered as having been made for a consideration and thus liable to tax. CENVAT credit for inputs and input services used to provide such services will be eligible under extant rules. The said goods or services would now not be construed to be for personal use or consumption of an employee per se and rather shall be a constituent to the taxable service provided to an employee. The status of the employee would be as a service recipient rather than as a mere employee when consuming such output service. The valuation of the service so provided by the employer to the employee shall be determined as per the extant rules in this regard.

10. However, any activity available to all the employees free of charge without any reduction from the emoluments shall not be considered as an activity for consideration and will thus remain outside the purview of the service tax liability (facilities like crèche, gymnasium or a health club which all employees may use without any charge or reduction from the salary will be outside the tax net). However the CENVAT credit for such inputs and input services will be guided by the extant rules."

The above comments are a part of the Draft Circular which is yet not finalized. However, in the context of a canteen facility extended by an employer and in a case when consideration for the food served in the canteen is recovered by the employer and if the canteen is in the

establishment, any part of which is air-conditioned may need to examine service tax liability depending on the facts of each case.

2.2 Construction Services

a) Background

Service of construction of complex, building or civil structure or any part thereof provided by a builder or a developer was notified as taxable service with effect from 1/7/10. This category is included as declared service in section 66E unless the entire consideration for the constructed unit is received post issuance of completion certificate. Vide Notification No.26/2012-ST dated 20/6/12 at Serial No.12, an abatement of 75% subject to prescribed conditions is provided.

b) Implications of amendment with effect from 1/3/13:

Alongside the budget proposals, amendment in the rate of abatement from 75% to 70% in certain cases vide Notification No.2/2013-ST is already effective from 1/3/13 and plain reading of the substituted entry no.12 in the said Notification No.26/12-ST reads as follows:

	Subject	Value chargeable to Service tax	Conditions
"12.	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority,- (i) for residential unit having carpet area upto 2000 square feet or where the amount charged is less than rupees one Crore; (ii) for other than the (i) above.	 25 30	(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004; (ii) The value of land is included in the amount charged from the service receiver."

A reading of the above Notification indicates Entry the following :

a) 75% abatement subject to fulfillment of conditions will continue in two cases viz:

i) Construction of residential unit having carpet area upto 2000 square feet or less

OR

ii) Construction of residential unit where the amount charged is less than rupees one Crore.

To put in simple words, for a flat of 2500 sq. feet, if the amount charged is 80 lakh rupees, it is entitled for abatement @75%. Conversely, even for a flat of 800 sq. feet, if the amount charged is rupees 3 Crore, the abatement is available @75%. In effect, only one of the conditions mentioned above is required to be fulfilled - either the area of the residential unit is less than 2000 sq. feet or the amount charged is less than rupees 1 Crore.

b) The abatement of 75% will no longer be available to complex, building, civil structure or part thereof not covered by the above two categories. As such, a distinction is now made for commercial and residential construction and abatement of only 70% is available for commercial constructions irrespective of the amount charged or the area. Even if the amount charged is less than rupees 1 Crore or the area is less than 2000 sq. feet, the abatement available is 70% and the effective rate of service tax is thus 3.708% in place of 3.09%.

2.3 Renting of immovable property and auxiliary education services provided by specified educational institutions

a) Background:

Entry No.9 in ME exempted service to or by an educational institution in respect of education exempted from service tax by way of renting of immovable property or education auxiliary service. The term “auxiliary educational service” is defined in the said ME itself as under :

> “(f) “auxiliary educational services” means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge – enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution”

Education in turn “which is not taxable” appears in the negative list in section 66D at entry (l) and reads as follows:

"(l) services by way of-

(i) pre-school education and education up to higher secondary school or equivalent;
(ii) education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;
(iii) education as a part of an approved vocational education course"

b) Implications of amendment with effect from 1/4/13:

Exemption will not continue for services provided by such institutes to other persons for the said services. However such other persons providing auxiliary educational services or renting of immovable property services to the educational institutes would continue to be exempt. Educational institutions imparting education recognized by law such as university affiliated colleges or any higher secondary school often provides its premises like halls, auditoria or ground on hire for any official, social, cultural or political functions. Prior to the introduction of negative list from 1/7/12, this service was covered under the category of mandap keeper. In the negative list taxable categories have ceased to exist and entry no.9 exempted renting of immovable property. Therefore letting off of institution's immovable property was declared exempt. Now again, this becomes taxable. Even when the schools provide small counters/place to banks in their premises for facilitating students/parents to pay school fees, this was taxable prior to 1/7/12 and again now. The definition of auxiliary educational services is such that generally services provided by others or those outsourced by the specified educational institutes would get covered. For instance, admission process outsourced by a university or the services of bus contractor etc. Nevertheless, if a school owns its transport vehicles and recovers charges from students of facilities, it now will attract service tax. Similarly, if a place for canteen is let out to a contractor, it will attract service tax. Similarly, if a training programme is conducted by a school for persons other than to specified education institutions, it will also become taxable as the scope of entry 9 is substantially narrowed. Further, educational institutions conduct a large number of extra curricular courses (in addition to basic education) which are usually charged separately. These could get hit unless they fall under Entry No. 8 of ME i.e. recreational activities in relation to arts, sports, etc.

2.4 Transportation of goods by rail and transportation of goods by road.

Exemption in respect of transportation of goods by rail and vessel is contained at Entry 20 and transportation of goods by road at Entry 21 of the ME. Amendments are made wef 1/4/13 in both these entries to bring exemption in respect of all the modes of transport at par. Transportation of petroleum or petroleum products, postal mail or mail bags and household effects by rail or vessel was exempted at Entry 20. This is now withdrawn. Therefore, transportation of petroleum/petroleum products, postal mail or household effects by any mode of transport is now liable for service tax.

Under Entry 21 for goods transportation by road, transportation of fruits, vegetable, eggs, milk, food grain and pulses only was exempt. Now in its place and like in the

case of rail or vessel transportation, the exemption is redefined and scope is expanded to include the following products:

- Agricultural produce
- Foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages.
- Chemical fertilizers and oilcakes
- Registered newspapers or magazines, relief material for victims of natural or man-made disasters
- Defence equipments.

The existing exemption in respect of consignment of single goods carriage for Rs.1,500/- or less and consignment for a single consignee for Rs.750/- or less continues to remain exempt.