

VCES Woes – I

(G. Natarajan, Advocate, Swamy Associates)

Question : We are a construction contractor. We have been constructing a school building for a charitable trust running the educational institution. A show cause notice was issued, demanding service tax from us for this activity, under commercial or industrial construction service, covering the period 2008-09 to 2011-12. We are contesting the demand and the issue is currently pending before the Tribunal. After 01.07.2012, construction of educational establishment is exempted, only if the construction is done for Government, local authority or Government authority under S.No. 12 of Notification 25/2012 and hence we are liable to pay service tax from 01.07.2012, but we have not paid the same. Can we declare our liability from 01.07.2012 to 31.12.2012 under VCES scheme, while contesting the demand for 2008-09 2011-12?

Section 106 (1) of the Finance Act, 2013 is reproduced below:

106. Person who may make declaration of tax dues. — (1) Any person may declare his tax dues in respect of which no notice or an order of determination under section 72 or section 73 or section 73A of the Chapter has been issued or made before the 1st day of March, 2013 :

Provided that any person who has furnished return under section 70 of the Chapter and disclosed his true liability, but has not paid the disclosed amount of service tax or any part thereof, shall not be eligible to make declaration for the period covered by the said return :

Provided further that where a notice or an order of determination has been issued to a person in respect of any period on any issue, no declaration shall be made of his tax dues on the same issue for any subsequent period.

(2) Where a declaration has been made by a person against whom,—

(a) an inquiry or investigation in respect of a service tax not levied or not paid or short-levied or short-paid has been initiated by way of —

(i) search of premises under section 82 of the Chapter; or

(ii) issuance of summons under section 14 of the Central Excise Act, 1944 (1 of 1944), as made applicable to the Chapter under section 83 thereof; or

(iii) requiring production of accounts, documents or other evidence under the Chapter or the rules made thereunder; or

(b) an audit has been initiated,

and such inquiry, investigation or audit is pending as on the 1st day of March, 2013, then, the designated authority shall, by an order, and for reasons to be recorded in writing, reject such declaration.

The following clarification issued under Circular 170/5/2013 Dt. 08.08.2013 is also relevant.

9	Whether an assessee , who, during a part of the period covered by the Scheme, is in dispute on an issue with the department under an erstwhile provision of law, can declare his liability under the amended provisions, while continuing to litigate the outstanding liability under the erstwhile provision on the issue?	In terms of the second proviso to section 106 (1), where a notice or order of determination has been issued to a person in respect of any issue, no declaration shall be made by such person in respect of "tax dues" on the same issue for subsequent period. Therefore, if an issue is being litigated for a part of the period covered by the Scheme, i.e., Oct, 2007 to Dec 2012, no declaration can be filed under VCES in terms of the said proviso on the same issue for the subsequent period.
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Hence, it appears that the answer to the poser above is in negative. Is it so?

It will be so, if the "issue" for the period 2008-09 to 2011-12 and the "issue" after 01.07.2012 are "same". In the instant case, what was same before 01.07.2012 and after 01.07.2012 is the facts, i.e construction of an educational institution. Prior to 01.07.2012, there is a reasonable ground to argue that there is no service tax liability, as the construction is not for a commercial or industrial purpose and the said issue is now sub judice. After 01.07.2012, the definition of the term "service" has been introduced, which is an all-encompassing one and the current activity would be a "service" as defined under section 65 B (44) of the Act. It is neither covered in the negative list, nor exempted under notification 25/2012, which is not in dispute.

The meaning of the term "issue" as per Black's Law Dictionary is "A point in dispute between two or more parties"; "A plea (often a general denial) by which a party denies the truth of every material allegation in an opposing party's pleading". According to P. Ramanatha Aiyer's Lax Lexicon, "An issue in a pleading is a question, either of fact or of law, raised by the pleadings, disputed between the parties and mutually proposed and accepted by them as the subject for decision". It may be observed that prior to 01.07.2012, the issue in the present case is whether the activities would constitute taxable service "commercial or industrial construction service" under section 65 (105) (zzq) of the Act, read with Section 65 (25b) and would be liable to service tax under section 66 of the Act and the said issue is now under dispute with the department. After 01.07.2012 the issue is as to whether the same activities would amount to "service" as defined under section 65 B (44) of the Act and attract service tax under section 66 B of the Act. There is no dispute on this issue. Hence, the second proviso under section 106(1) is not at all applicable to the present case, in as much as the "issue" before 01.07.2012 and the "issue" after 01.07.2012 are not the "same".

Hence, the clarification of the CBEC reproduced above, appears to be contrary to the legal provisions and it is felt that the answer to the initial poser is in the affirmative.