

Voluntary Payment Before SCN - Impact on Credit To customer.

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Introduction:

The tax payer [service provider as well as receiver in some cases] under service tax finds difficulty in complying with the numerous changes and amendments in service tax law and it involves more technical interpretations. There may be scenario where, the assessee would not be in a position to identify and pay the applicable / appropriate tax on the activity carried out by him due to lack of knowledge/ incorrect interpretation, poor guidance etc.

Assessee may make such short payment/non-payment from consultants/internal audit party / departmental officers. If assessee comes to know the liability by either by himself or visiting officers or audit parties, he can pay voluntarily along with interest and the same can be intimated to the department by way of RPAD to close the issue. This avoids the demands , adjudication and more importantly the normal penalty of 100 percent .

OR

In case, where liability is found by the department during audit, the assessee is required to consult his consultant to confirm whether the liability found is in accordance with law or not. If not liable he may go for litigation. In case, the liability is acceptable assessee is required to pay the service tax liability along with interest to the department to get the benefit of [Section 73\(3\)](#) of [Finance Act, 1994](#).

Once department finds out any liability, first they will issue an audit note and assessee is required to reply for the same. In case department is not satisfied with explanation provided, they may issue notice under [section 73\(1\)](#) of the [Finance Act, 1994](#), such recovery can be done for a period of 18 months from the relevant date. In case fraud, collusion, wilful mis-statement, suppression of facts etc., found the recovery can be extended for a period upto 5 years from the relevant date.

In case where the demand made is proper the assessee may pay the service tax along with interest and avail the benefit of [Section 73\(3\)](#).

Such payment can be made on the basis of own ascertainment or on the basis of ascertainment of CEO before service of notice under [section 73\(1\)](#) by CEO and such payment is required to be intimated in writing to CEO, once the payment is made before issue of notice, the CEO shall not serve any notice under [section 73\(1\)](#). Further it is also made clear in the explanation provided in the [Section 73\(3\)](#) **clarifies that no penalty shall be imposed under any of the provisions of [Finance Act](#),**

[1994](#) once the payment of service tax under this section along with interest is paid.

What is [Section 73\(3\)](#)?

[Section 73\(3\)](#) is applicable only where the assessee has short levied or short paid or not paid by **other than reason** of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the [Finance Act](#), rules made thereunder with intent to evade payment of service tax.

Case law with regard to [73\(3\)](#) provision:

The Hon'ble Tribunal in the case of [M/s Tejas Agency Vs CCE & ST, Bhavnagar 2013 \(7\) TMI 667 - CESTAT AHMEDABAD](#) and [Adecco Flexione Workforce Solution Ltd 2011 \(9\) TMI 114 - KARNATAKA HIGH COURT](#) has held that "where an assessee has paid both service tax and interest before issuance of SCN under the Act, [sub section 3 of section 73](#) of the [Act](#) prohibits initiation of proceedings for recovery of penalty."

That means no need to pay penalty.

[Section 73\(4A\)](#)

In case where ingredients of fraud, collusion etc., as per [section 73\(4\)](#) exists, then the assessee can pay the service tax along with interest and penalty equal to 1 percent of the tax for each month for the period which default continues, up to maximum of 25 percent . In case the assessee have paid service tax, interest and penalty under [section 73\(4A\)](#) and if the assessee recover service tax amount from the service receiver by raising supplementary invoice, then **the service receiver is not eligible** to avail the cenvat credit of the same as per [Rule 9](#) of the [Cenvat Credit Rules, 2004](#).

This can be a serious problem as many times the revenue officers suggest to pay the 25 percent and buy peace. The ST being an indirect tax, the cost of the same is borne by the consumer/ receiver of the service.

Conclusion:

Where the assessee liable to pay service tax makes payment of short levied or short paid or not – levied service tax along with interest and penalty if applicable and intimates such payment to the CEO, CEO shall not issue the SCN.

However, it is the responsibility of the assessee to prove that there was no element of suppression / intent to evade payment of tax and they are eligible for the benefit provided under [section 73\(3\)](#). Even in the case of default may be by reason of fraud, collusion, wilful misstatement, suppression of facts or contravention of any of the provisions of the Finance Act, rules made thereunder with intent to evade

payment of service tax. It may be noted if the service tax along with interest is not deposited before issuance of SCN, the benefit under [section 73\(3\)](#) is not eligible. Accordingly the penalty proceedings under [section 76](#), [77](#) & [78](#) may be imposed.

When the assessee is able to recover the amount of service tax, he may avoid the 25 percent penalty as payment of that presupposes ingredients of fraud suppression etc leading to denial of credit to the customer. For doubts please host on pdicai.org.