

Service Tax on TDS (Import of Services)

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Different practices are being followed with respect to payment of service tax on TDS portion in respect of import of services. It is not clear for the assessee whether to pay service tax including TDS or to pay net of TDS. In this article, brief analysis of relevant provisions has been made to clear the confusion which exist in minds of assessee.

In case of few specified services, service receiver has been made liable for payment of service tax as per Section 68(2) of Finance Act 1994 read with Rule 2(1)(d)(G) of Service Tax Rules 1994. As per Rule 2(1)(d)(G), in relation to any taxable service provided or agreed to be provided by any person located in a non-taxable territory and received by person located in the taxable territory, the recipient of service is liable for service tax.

Section 67 is clear that for the purpose of payment of service tax, the consideration that is payable for the taxable services provided or to be provided shall be considered. Earlier, as per Rule 7 of Service tax (Determination of Value) Rules 2006 which was omitted with effect from 01.07.2012, value of taxable service received under the provisions of section 66A (old charging Section for import of services), shall be amount equal to actual consideration charged for services provided or to be provided. In normal circumstances wherein only monetary consideration is involved, invoice value shall be the value considered for service tax.

Based on the agreement / contract entered, the service receiver could either pay full invoice value or pay invoice value after deducting tax (TDS) under the income tax provisions. For instance, if the value of services as per invoice is Rs.5,00,000/-, the payment by the service receiver could be Rs.5,00,000/- wherein TDS portion would be borne by the service receiver. Other scenario could be payment of Rs.5,00,000/- less applicable TDS. In either of the scenarios, confusion arises as to treatment of TDS for service tax payment.

In the first scenario, it is clear that there is a need to pay service tax on Rs.5,00,000/- and no need to pay service tax on TDS portion which over and above Rs.5,00,000/- paid for the service portion. This view is supported by a tribunal judgment in case of *Mainetti (India) Pvt. Ltd- 2012 (27) S.T.R. 534 (Com. A)*. In this case, the tribunal held that as the Income Tax element was paid directly to the Government of India by the appellant, such income tax (TDS) should not form part of the gross amount for the calculation of service tax. In *In Re: Sundaram Auto Components Ltd. reported in 2012 (28) STR 545 (Commr. Appl.)* also similar view as held.

However, in the second scenario, non payment of service tax may not be acceptable as the amount charged for the services is Rs.5,00,000/- and the TDS is deducted from this amount and paid to Government on behalf of the service provider. The service provider outside the country would be able to get credit of this TDS under the DTAA (Double Taxation Avoidance Agreement). Therefore, such TDS would be treated as part of consideration for the taxable services.

The CBEC vide FAQ published by CBEC in September 2011 has also clarified this aspect as follows:

“Service Tax is to be paid on the gross value of taxable service which is charged by a Service Tax assessee for providing a taxable service. Income tax deducted at source is includible in the charged amount. Therefore, service Tax is payable on the gross amount including the amount of Income Tax deducted at source also”.

Even the tribunal in case of *TVS Motors Co. Ltd. v/s CCE, Chennai-II - 2012 (28) STR 150* upheld this view. The property tax paid on building, VAT paid on materials is being allowed as deduction under the service tax provisions. Similarly, the Government should have allowed for deduction of even TDS under income tax. However, clarity is awaited in this regard. It is also interesting to note that the Supreme Court has remanded TVS Motors case referred earlier for fresh hearing and granting relief, if any. One could only hope for some relaxation in this regard.

Conclusion: It is advisable in the interest of the assessee to discharge the service tax when TDS is part of total consideration charged by service provider. Such service tax paid would also be eligible as Cenvat credit where the imported services are used for providing taxable services or used in relation to manufacturing of dutiable goods. If the TDS is borne by the assessee which is over and above the invoice value, then there maybe be no requirement to treat such TDS as part of service value for payment of service tax.