

**-COPY OF-  
SERVICE TAX CIRCULAR  
NO. 140/9/2011-  
DATED 12-5-2011**

**Sub:-Prosecution provision in Finance Act, 1994 – regarding.**

With the enactment of Finance Act, 2011 (No.8 of 2011), Section 89 which provides for prosecution of specified offences involving service tax, becomes a part of Chapter V of Finance Act, 1994.

2. Prosecution provision was introduced this year, in Chapter V of Finance Act, 1994, as part of a compliance philosophy involving rationalization of penal provisions. Encouraging voluntary compliance and introduction of penalties based on the gravity of offences are some important principles which guide the changes made this year, in the penal provisions governing service tax. While minor technical omissions or commissions have been made punishable with simple penal measures, prosecution is meant to contain and tackle certain specified serious violations. Accordingly, it is imperative for the field formations, in particular the sanctioning authority, to implement the prosecution provision keeping in view the overall compliance philosophy. Since the objective of the prosecution provision is mainly to develop a holistic compliance culture among the tax payers, it is expected that the instructions will be followed in letter and spirit.

3. In the following paragraphs, some important aspects of the prosecution provision are explained, to guide the field formations:

4. Clause (a) of section 89(1) of Finance Act, 1994, is meant to apply, *inter alia*, where services have been provided without issuance of invoice in accordance with the prescribed provisions. In terms of rule 4A of the Service Tax Rules, 1994, invoice is required to be issued inter-alia within 14 days from the date of completion of the taxable service. Here, it should be noted that the emphasis in the prosecution provision is on the non-issuance of invoice within the prescribed period rather than non-mention of the technical details in the invoice that have no bearing on the determination of tax liability.

5. In the case of services where the recipient is liable to pay tax on reverse charge basis, similar obligation has been cast on the service recipient, though the invoices are issued by the service provider. It is clarified that the date of provision of service shall be determined in terms of Point of Taxation Rules, 2011. In the case of persons liable to pay tax on reverse charge basis, the date of provision of service shall be the date of payment except in the case of associated enterprises receiving services from abroad where the date shall be earlier of the date of credit in the books of accounts or the date of payment. It is at this stage that the transaction must be accounted for. Thus the service receiver, liable to pay tax on reverse charge basis is required to ensure that the invoice is available at the time the payment is made or at least received within 14 days thereafter and in the case of

associated enterprises, invoice should be available with the service receiver at the time of credit in the books of accounts or the date of payment towards the service received.

**6.** Further, invoice mentioned in section 89(1) will include a bill or as the case may be a challan, in accordance with the Service Tax Rules, 1994. Invoice, bill, or as the case may be, challan, shall also include "any document" specified in respect of certain taxable services, in the provisos to Rule 4A and Rule 4B of Service Tax Rules, 1994.

**7.** Clause (b) of section 89(1) of Finance Act, 1994, refers to the availment and utilization of the credit of taxes paid without actual receipt of taxable service or excisable goods. It may be noted that in order to constitute an offence under this clause the taxpayer must both avail as well as utilize the credit without having actually received the goods or the service. The clause is not meant to apply to situations where an invoice has been issued for a service yet to be provided on which due tax has been paid. It is only meant for such invoices that are typically known as "fake" where the tax has not been paid at the so called service provider's end or where the provider stated in the invoice is non-existent. It will also cover situations where the value of the service stated in the invoice and/or tax thereon have been altered with a view to avail Cenvat credit in excess of the amount originally stated. While calculating the monetary limit for the purpose of launching prosecution, the value shall be the amount availed as credit in excess of the amount originally stated in the invoice.

**8.** Clause (c) of section 89(1) of Finance Act, 1994, is based on similar provision in the central excise law. It should be noted that the offence in relation to maintenance of false books of accounts or failure to supply the required information or supplying of false information, should be in material particulars have a bearing on the tax liability. Mere expression of opinions shall not be covered by the said clause. Supplying false information, in response to summons, will also be covered under this provision.

**9.** Clause (d) of section 89(1) of Finance Act, 1994, will apply only when the amount has been collected as service tax. It is not meant to apply to mere non-payment of service tax when due. This provision would be attracted when the amount was reflected in the invoices as service tax, service receiver has already made the payment and the period of six months has elapsed from the date on which the service provider was required to pay the tax to the Central Government. Where the service receiver has made part payment, the service provider will be punishable to the extent he has failed to deposit the tax due to the Government.

**10.** Certain sections of the Central Excise Act, 1944, have been made applicable to service tax by section 83 of Finance Act, 1994. Section 9AA of the Central Excise Act provides that where an offence has been committed by a company, in addition to the company, every person who was in charge of the company and responsible for conduct of the business, at the time when offence was committed, can be deemed guilty of an offence and can be proceeded against. A person so charged, however has an option to

establish that offence was committed without his knowledge or he had exercised all due diligence to prevent the commission of offence.

**11.** Section 9C of Central Excise Act, 1944, which is made applicable to Finance Act, 1994, provides that in any prosecution for an offence, existence of culpable mental state shall be presumed by the court. Therefore each offence described in section 89(1) of the Finance Act, 1994, has an inherent mens rea. Delinquency by the defaulter of service tax itself establishes his 'guilt'. If the accused claims that he did not have guilty mind, it is for him to prove the same beyond reasonable doubt. Thus "burden of proof regarding non existence of 'mens rea' is on the accused".

**12.** It may be noted that in terms of section 89(3) of Finance Act, 1994, the following grounds are not considered special and adequate reasons for awarding reduced imprisonment:

- (i) the fact that the accused has been convicted for the first time for an offence under Finance Act, 1994;
- (ii) the fact that in any proceeding under the said Act, other than prosecution, the accused has been ordered to pay a penalty or any other action has been taken against him for the same act which constitutes the offence;
- (iii) the fact that the accused was not the principal offender and was acting merely as a secondary party in the commission of offence;
- (iv) the age of the accused.

On the above grounds, sanctioning authority cannot refrain from launching prosecution against an offender.

**13.** Sanction for prosecution has to be accorded by the Chief Commissioner of Central Excise, in terms of the section 89(4) of the Finance Act, 1994. In accordance with Notification 3/2004-ST dated 11th March 2004, Director General of Central Excise Intelligence (DGCEI), can exercise the power of Chief Commissioner of Central Excise, throughout India.

**14.** Board has decided that monetary limit for prosecution will be Rupees Ten Lakh in the case of offences specified in section 89(1) of Finance Act, 1994, to ensure better utilization of manpower, time and resources of the field formations. Therefore, where an offence specified in section 89(1), involves an amount of less than Rupees Ten Lakh,

such case need not be considered for launching prosecution. However the monetary limit will not apply in the case of repeat offence.

**15.** Provisions relating to prosecution are to be exercised with due diligence, caution and responsibility after carefully weighing all the facts on record. Prosecution should not be launched merely on matters of technicalities. Evidence regarding the specified offence should be beyond reasonable doubt, to obtain conviction. The sanctioning authority should record detailed reasons for its decision to sanction or not to sanction prosecution, on file.

**16.** Prosecution proceedings in a court of law are to be generally initiated after departmental adjudication of an offence has been completed, although there is no legal bar against launch of prosecution before adjudication. Generally, the adjudicator should indicate whether a case is fit for prosecution, though this is not a necessary pre-condition. To launch prosecution against top management of the company, sufficient and clear evidence to show their direct involvement in the offence is required. Once prosecution is sanctioned, complaint should be filed in the appropriate court immediately. If the complaint could not be filed for any reason, the matter should be immediately reported to the authority that sanctioned the prosecution.

**17.** Instructions and guidelines issued by the Central Board of Excise and Customs (CBEC) from time to time, regarding prosecution under Central Excise law, will also be applicable to service tax, to the extent they are harmonious with the provisions of Finance Act, 1994 and instructions contained in this Circular for carrying out prosecution under service tax law.

**18.** Field formations may be instructed accordingly.

**19.** Please acknowledge the receipt of the Circular. Hindi Version to follow.

**F. No. 354/45/2011-TRU**

**(J M Kennedy)**  
**Director, TRU**