

Circular on the issue of applicability of service tax on liquidated damages

The Central Board of Indirect Taxes ("CBIC") has issued Circular No. 214/1/2023-Service Tax dated 28.02.2023 ("Circular") clarifying the applicability of service tax on declared services.

Section 66E(e) of the Finance Act, 1994 ("Finance Act") deems 'Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act' as a declared service. It has long been a bone of contention whether service tax would be leviable on payments arising out of breach of contract in cases such as notice pay, forfeiture of earnest money etc. under Section 66E(e) of the Finance Act.

The CBIC vide the Circular has clarified as below:

The activities contemplated under Section 66E(e) of the Finance Act are the transactions where the agreement specifically refers to an activity and there is a flow of consideration towards the same. Sufficient nexus between the service and the consideration is necessary for an activity to qualify as a declared service under the said Section.

Adjudicating authorities must take note that while taxability in each case shall depend on facts of the case, the guidelines as above and jurisprudence that has evolved over time, may be followed in determining whether service tax on a transaction needs to be levied by treating it as a declared service.

The CBIC has decided not to pursue appeals in certain pending litigations wherein it has been held that service tax is not payable under Section 66E(e) of the Finance Act in the absence of nexus where payments were received on account of shortfall in lifting of coal, shortfall in quantity of supply agreed, non-adherence to the time schedule agreed etc.

ELP comments

It is relevant to refer to Circular No. 178/10/2022-GST dated 03.08.2022 issued under Goods and Service Tax ("GST") regime which inter alia provides clarification on applicability of GST on liquidated damages, compensation and penalty arising out of breach of contract or other provisions of law. The provisions

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Lingsheng Yao

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California. Court of Appeal (4th Appellate District). Division 2. Records and Briefs California (State)., **Monthly Catalogue, United States Public Documents** ,1941 **Catalogue of Publications Issued by the Government of the United States** United States. Superintendent of Documents,1941-07 February issue includes Appendix entitled Directory of United States Government periodicals and subscription publications September issue includes List of depository libraries June and December issues include semiannual index **Solar Age** ,1984 **Federal Tax Service** ,1926 **United States Government Publications Monthly Catalog** ,1941-07 Monthly Catalog of United States Government Publications ,2003 **PC** ,1983 **Press Summary - Illinois Information Service** Illinois Information Service,1992 The American Review of Reviews Albert Shaw,1915 MacUser ,1994 **Federal Taxation Practice and Procedure** Robert E. Meldman, Richard A. Petrie,1992 **Federal Register** ,1976 **The Parliamentary Debates (official Report)**. Great Britain. Parliament. House of Commons,1918 **Vermont Life** ,2000 **House of Commons Debates, Official Report** Canada. Parliament. House of Commons,1918 *Official Reports of the Debates of the House of Commons of the Dominion of Canada* Canada. Parliament. House of Commons,1918 **Macworld** ,1993 Parliamentary Debates Great Britain. Parliament. House of Commons,1914 Parliamentary Debates (Hansard). Great Britain. Parliament. House of Commons,1925 Contains the 4th session of the 28th Parliament through the session of the Parliament

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Table of Contents Service Tax Circular 1611

1. Understanding the eBook Service Tax Circular 1611
 - The Rise of Digital Reading Service Tax Circular 1611
 - Advantages of eBooks Over Traditional Books
2. Identifying Service Tax Circular 1611
 - Exploring Different Genres
 - Considering Fiction vs. Non-Fiction
 - Determining Your Reading Goals
3. Choosing the Right eBook Platform
 - Popular eBook Platforms
 - Features to Look for in an Service Tax Circular 1611
 - User-Friendly Interface
4. Exploring eBook Recommendations from Service Tax Circular 1611
 - Personalized Recommendations
 - Service Tax Circular 1611 User Reviews and Ratings
 - Service Tax Circular 1611 and Bestseller Lists
5. Accessing Service Tax Circular 1611 Free and Paid eBooks
 - Service Tax Circular 1611 Public Domain eBooks
 - Service Tax Circular 1611 eBook Subscription Services
 - Service Tax Circular 1611 Budget-Friendly Options

6. Navigating Service Tax Circular 1611 eBook Formats
 - ePUB, PDF, MOBI, and More
 - Service Tax Circular 1611 Compatibility with Devices
 - Service Tax Circular 1611 Enhanced eBook Features
7. Enhancing Your Reading Experience
 - Adjustable Fonts and Text Sizes of Service Tax Circular 1611
 - Highlighting and Note-Taking Service Tax Circular 1611
 - Interactive Elements Service Tax Circular 1611
8. Staying Engaged with Service Tax Circular 1611
 - Joining Online Reading Communities
 - Participating in Virtual Book Clubs
 - Following Authors and Publishers Service Tax Circular 1611
9. Balancing eBooks and Physical Books Service Tax Circular 1611
 - Benefits of a Digital Library
 - Creating a Diverse Reading Collection Service Tax Circular 1611
10. Overcoming Reading Challenges
 - Dealing with Digital Eye Strain
 - Minimizing Distractions
 - Managing Screen Time
11. Cultivating a Reading Routine Service Tax Circular 1611
 - Setting Reading Goals Service Tax Circular 1611
 - Carving Out Dedicated Reading Time
12. Sourcing Reliable Information of Service Tax Circular 1611
 - Fact-Checking eBook Content of Service Tax Circular 1611
 - Distinguishing Credible Sources
13. Promoting Lifelong Learning
 - Utilizing eBooks for Skill Development
 - Exploring Educational eBooks
14. Embracing eBook Trends
 - Integration of Multimedia Elements

- Interactive and Gamified eBooks

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