

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

Service Tax Circular 1611

Lingsheng Yao

A red circular graphic with a gradient, appearing as a stylized arrow or a partial circle, located to the right of the name bar.

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