

Chapter 3 : Observance of Mechanism devised to implement VCES

We examined the observance of mechanism devised by the department to monitor implementation of VCES and found non-compliance to provisions prescribed in various stages right from registration of declarants to issue of final discharge certificates.

3.1 Verification of Registration of declarants

As per rule 3 of VCES Rules, 2013, any person, who wishes to make a declaration under the Scheme, shall, if not registered, take registration under Rule 4 of the Service Tax Rules, 1994 before filing declaration.

As per rule 4(1) of Service Tax Rules, 1994, every person liable for paying service tax shall make an application to the concerned Superintendent of Central Excise for registration within 30 days from the date on which liability for the service tax arises under Section 66B of the Finance Act, 1994, as amended.

Status of registration of declarants at the time of filing of VCES declaration was called for from 35 selected Commissionerates. The information was supplied only by 14 Commissionerates. On analysis of this information, the following observations were made:-

In 17 cases in nine Commissionerates, involving tax dues of ₹ 18.27 crore, though the declarants were registered with the department as on the date of making declarations, the services which were declared were not found included in the registration certificates as stipulated by Rule 4(5A)¹⁰.

When we pointed this out (between October 2015 and January 2016), the Ministry accepted the observation (May 2016) in three cases. In the remaining 13 cases it stated that non-inclusion of the specified services in registration appeared to be a technical lapse and had no revenue implication. In the remaining one case the reply was awaited.

The reply of the Ministry was not acceptable since one of the objectives of the Scheme was broadening of tax base. Registration of declarant under the specified service, would have enabled monitoring of the post-VCES compliance on the part of the declarant. Further, wrong mentioning of the

¹⁰ Rule 4(5A) stipulates that where there is a change in any information or details furnished by an assessee at the time of obtaining registration (in ST-1) or if he intends to furnish any additional information or detail, such change or information or details shall be intimated in writing by the assessee to the jurisdictional AC/DC of Central Excise within a period of thirty days of such change.

name of the service by the declarant would result in depiction of incorrect service tax collections across services.

A few illustrative cases are highlighted below:-

3.1.1 An assessee in Mumbai-VI ST Commissionerate, had declared (November 2013) tax dues of ₹ 3.76 crore towards Construction of Complex service for the period December 2010 to March 2012. From the Registration certificate (Form ST-2), it was observed that the declarant was not registered for the service (i.e. Construction of Complex) against which the declaration had been made.

3.1.2 An assessee in Mumbai-VII ST Commissionerate, had declared (June 2013) tax dues of ₹ 2.29 crore in respect of 4 services (viz. Business Support Services; Management, Maintenance and Repair Services; Consulting Engineer's Services; and Survey and Exploration of Oil, Mineral and Gas) for the period October 2007 to December 2012. We noticed that the declarant was registered for two services only (Consulting Engineer services and Renting of immovable property service).

3.2 Verification of whether period declared was in conformity with the period envisaged under the Scheme

As per section 105 of the Chapter VI of Finance Act, 2013, declarant may declare tax dues for period from 1 October 2007 to 31 December 2012.

We observed in 61 cases, in 16 Commissionerates, involving tax dues of ₹ 3.61 crore, either the period of declaration fell beyond the period stipulated under the Scheme or no year-wise breakup was given to ascertain whether the period declared was within the period stipulated.

When we pointed this out (between October and December 2015) the Ministry, while accepting the observation in 36 cases, stated (May 2016) that the remedial action was already taken. Reply in the remaining 25 cases was awaited.

3.3 Verification of payment of the amounts shown as paid in calculation sheets

We noticed in 19 cases, in five Commissionerates, the declarants declared tax dues of ₹ 14.66 crore, after deducting an amount of ₹ 9.31 crore, which was claimed to have already been paid before the Scheme came into effect. However, as no details were found on record to ascertain whether the department verified the above fact, audit could not check the correctness of the claim of the declarants.

When we pointed this out (between October and December 2015), the Ministry stated (May/June 2016) that in 15 cases the declarants details were verified. Reply in remaining four cases were awaited (June 2016).

3.4 Check of Eligibility Criteria in terms of proviso to Section 106

Section 106(1) and (2) of the Finance Act, 2013, limited the benefits under VCES, to the declarants against whom no notice was pending or inquiry/investigation/audit was initiated and the same is pending, as on 1 March 2013. Board clarified (August 2013) that the DA, on having sufficient reasons, can serve notice of intention to reject the declaration within 30 days of the date of filing of the declaration stating the reasons and that the declarant would be given an opportunity to be heard before any order is passed.

We noticed following types of discrepancies in 444 cases in 20 Commissionerates, involving tax dues of ₹ 85.97 crore:-

- a. Confirmation on status of cases pending against the declarants was not received from Anti Evasion Wing/Preventive/DGCEI, even after a lapse of stipulated period of one month for rejection of ineligible cases.
- b. There were instances of cases pending show cause notice/order in original (SCN/OIO) as on 1 March 2013 against the declarants for the same period as declared by them under VCES.
- c. VCES benefit was extended to the declarants against whom CERA had already made observations and the same was pending as on 1 March 2013.
- d. There were instances, where no proof of checklist or details of inter/intra-departmental correspondence were available on record.

When we pointed this out (between October 2015 and January 2016), the Ministry stated (June 2016) that Board prescribed a period of 30 days for issuing the SCN to ensure that the declarant was at least aware of the fate of his declaration.

The reply of the Ministry was silent on our audit observations regarding non-receipt of information from other wings, extension of ineligible benefits and non-availability of proof of checklist or correspondence regarding verification.

A few illustrative cases are given below:-

3.4.1 CERA had made an observation (October 2012) in respect of an assessee in Mumbai-VII ST Commissionerate regarding non-levy of service tax

of ₹ 26.21 lakh under the service category of Scientific or Technical Consultancy for the period 2010-11. **The issue appeared at Sl.No.7 of Appendix – II) of CAG of India's Audit Report No. 4 of 2015 (Service Tax)** and the fact that this was being considered for inclusion in the CAG audit report was in the notice of the Commissionerate from October 2012¹¹. The same assessee had declared (June 2013) tax dues amounting to ₹ 2.10 crore under various service categories including Scientific or Technical Consultancy for the period October 2010 to December 2012. An SCN was also issued (October 2013) for an amount of ₹ 1.76 crore, besides applicable interest.

The assessee paid (June/July 2013) the service tax amount demanded, including interest. We observed that tax dues declared (₹ 2.10 crore) included service tax dues of ₹ 1.50 crore in respect of scientific and consultancy services and other services pertaining to 2011-12 covered in the SCN. The department rejected the declaration partially for an amount of ₹ 38.86 lakh on the basis of audit observations raised (between October 2012 and March 2013) by EA 2000 allowing benefit of the Scheme for the balance amount of ₹ 1.11 crore. VCES-3 was issued (June 2014) for ₹ 1.72 crore. Further, it was also observed that same challans (for ₹ 1.46 crore) had been submitted in support of the payments of service tax in compliance with the above SCN as well as tax dues under VCES.

When we pointed this out (November 2015), the Ministry stated (May 2016) that while passing OIO the designated authority examined the matter in the light of Board's circular dated 25 November 2013 and the issues raised in the audit objection by EA 2000.

The reply of the Ministry was not acceptable in view of stipulation in Board's circular dated 8 August 2013 that declarant can declare the "tax dues" concerning an issue which was not a part of the audit para. The non-levy of service tax under the service category of Scientific or Technical Consultancy for the period 2010-11 was raised by CERA in October 2012 and admitted by the department (October 2013) and hence the application was liable for rejection.

3.4.2 An assessee in Kochi Commissionerate, declared (December 2013) tax dues of ₹ 1.76 crore towards broadcasting service for the period April 2011 to September 2012. We noticed that Service Tax Division, Kochi, initiated investigation in March 2011 and issued summons to the assessee in March 2012 and the same was pending on 1 March 2013. Further, internal audit observation on the same issue for the period October 2009 to July 2011 was also pending as on 1 March 2013. Hence the declaration filed by the assessee

¹¹ Vide Statement of Facts (SOF) issued

was ineligible for the benefit under VCES. However, VCES-3 was issued (January 2015).

When we pointed this out (November 2015), the Ministry stated (May 2016) that as SCN in pursuance of internal audit objection was issued in October 2013, no SCN was pending as on 1 March 2013 and that audit observation cannot be considered as pending as SCN was issued.

The reply of the Ministry proved that internal audit observation raised on same issue was pending on 1 March 2013 as SCN was issued in October 2013.

3.4.3 An assessee in Bengaluru-ST Commissionerate declared (December 2013) tax dues of ₹ 1.34 crore towards banking and other financial service, covering the period from October 2007 to December 2012. We noticed that five SCNs were issued during the period from 2008 to 2012 and an OIO was passed (January 2014) against the declarant, confirming the demand of service tax of ₹ 1.82 crore, covering the period from 1 June 2007 to 31 March 2012 for the same services as declared under VCES. Since SCNs were pending as on 1 March 2013, the declaration was liable for rejection.

When we pointed this out (December 2015), the Ministry stated (May 2016) that the VCES application was liable for rejection, as reported by commissionerate concerned.

3.4.4 An assessee in Patna Commissionerate, declared (December 2013) tax dues of ₹ 97.16 lakh. We noticed that summon against the declarant had been issued by DGCEI, Hyderabad on 2 July 2012 and an inquiry had also been initiated before 1 March 2013. The declarant was not eligible and the declaration was to be rejected by the DA, but it was not done. The Joint Commissioner (Service Tax), Central Excise & Service Tax Headquarters, Patna observed (March 2015) in the VCES file that the declaration made by the assessee should have been rejected and the issuance of VCES-3 in this case was not proper.

When we pointed this out (January 2016), the Ministry stated (May 2016) that since VCES-3 was not issued to the assessee due to pending SCN, declaration filed might be treated as rejected. But details of actual action taken were awaited.

3.4.5 An assessee in Raipur Commissionerate, declared (September 2013) tax dues of ₹ 25.25 lakh towards manpower recruitment and supply service and erection and commissioning services for the period April 2010 to December 2012. We noticed that CERA had observed (March 2012) that declarant had not charged service tax from an assessee though the latter had provided "Manpower supply and recruitment agency" service during 2009-10

and 2010-11. Since the audit observation was pending as on 1 March 2013, the declarant was not eligible under VCES.

When we pointed this out (November 2015) the department stated (November 2015) that the declarations were not to be rejected in a routine manner, however, information/document had been requisitioned from the declarant. But the Ministry in its reply stated (May 2016) that the assessee did not file any declaration under VCES.

The reply of the Ministry was not acceptable as the VCES application was received and Range Officer of ST Range IV, Raipur gave (October 2013) his remarks on the application. Final outcome of action initiated by the department was awaited.

3.4.6 An assessee in Lucknow Commissionerate, declared (December 2013) tax dues of ₹ 1.55 crore towards Security Services for the period April 2011 to December 2012, paid final installment (February 2014) and accordingly, VCES-3 was issued (April 2014). We observed that the Internal audit wing had made an observation regarding short payment of service tax of ₹ 61.70 lakh for the period from 2008-09 to 2010-11 on the same issue.

When we pointed this out (December 2015), the Ministry stated (May 2016) that the internal audit para on the same issue pertained to the period 2008-09 to 2010-11 whereas the declarant filed VCES declaration for the period from April 2011 to December 2012.

The reply of the Ministry is not acceptable since the audit observation raised by internal audit is pending and as such acceptance of VCES application is incorrect.

Ministry further quoted (June 2016) point No.4 of Board's circular dated 25 November 2013 which deals with tax dues paid by assessee after the date of the scheme coming into effect i.e. 10 May 2013.

The reply of the Ministry is not relevant to the audit objection.

3.4.7 In 99 cases, in Bhubaneswar-I Commissionerate, involving tax dues of ₹ 16.53 crore, verification reports for having exercised eligibility checks from Range Superintendents were not kept on record.

When we pointed this out (November 2015), the Ministry, while accepting (May 2016) that out of 99 cases only in 11 cases the eligibility checks from the Range Officer were on records, attributed non-traceability of records in the remaining 88 cases to restructuring of the department. Final reply on these 88 cases was awaited.

3.5 Non-initiation of action in terms of Section 111

Section 111(1) and 111(2) of Chapter VI of the Finance Act, 2013, empowers the Commissioner to serve notice on the declarant in respect of declarations found to be substantially false, within one year from the date of declaration.

3.5.1 We noticed that in 15 cases in eight Commissionerates, involving tax dues of ₹ 9.46 crore, even though there were sufficient reasons to believe that the declarations made were false, no action was initiated by the department.

When we pointed this out (between October 2015 to January 2016) the Ministry stated (May/June 2016) in nine cases that the VCES Scheme permitted the DA only to check arithmetical accuracy as per Board circular of December 2013. In one case the Ministry accepted the audit observation. In the remaining five cases reply is still awaited.

One such case is illustrated below:-

An assessee in Chennai-II ST Commissionerate, declared (December 2013) tax dues of ₹ 1.92 crore towards business auxiliary service (activation commission) for the period October 2007 to December 2012. We noticed that the assessee had calculated service tax on the transaction value of ₹ 3.98 crore for the year ended 31 March 2009, whereas the assessee had earned service income on business auxiliary services and other services of ₹ 5.40 crore, as per the profit and loss account. As such, there was reason to believe that declaration was substantially false.

When we pointed this out (November 2015) the Ministry stated (May 2016) that adequate care was taken by the verifying the correctness of declaration as per Board's circulars relating to VCES. It was further stated that the declarations were sent to all the divisions to check eligibility of the declarations and only after getting clearance, the declarations were processed.

The final reply of the Ministry regarding incorrect calculation of service tax on the transaction value was awaited (June 2016).

3.5.2 In Guntur and Hyderabad ST Commissionerates, we observed that 45 declarants under service category "construction of residential apartments" classified their service as Construction of Complex Service and discharged service tax liability. Audit observed that these services were classifiable under Works Contract Service. The misclassification resulted in short payment of service tax of ₹ 3.00 crore. In all the above cases the department issued discharge certificates between January 2014 and January 2015.

When we pointed this out (December 2015) the Ministry stated (May 2016) that the activity was more appropriately classifiable under Construction of

complex services, being a more specific description for which no specific abatement was available. It further stated that it was decided that amounts involving more than ₹ 25 lakh only were to be investigated with regard to the truthfulness as well as to classify under works contract services.

The reply of the Ministry was not acceptable in light of Board's letter dated 22 May 2007 which stipulated that the contracts treated as works contract for the purpose of levy of VAT/sales tax should also be treated as works contract for the levy of service tax. Out of above 45 cases the audit found the VAT registration in 22 cases. Hence these declarants were classifiable under works contract services. Moreover, no authority was quoted regarding decision to investigate only cases involving more than ₹ 25 lakh.

3.5.3 An assessee in Bengaluru ST Commissionerate, declared (October 2013) tax dues of ₹ 1.02 crore, for the period from October 2007 to December 2012. We noticed from the case file that an offence case had been registered by the ADGCEI, Bengaluru Zonal Unit for the service tax liability of ₹ 5.00 crore vide its letter dated 30 August 2013. From the above it was evident that, though there was reason to initiate action under Section 111, no action had been initiated by the department.

When we pointed this out (January 2016) the Ministry stated (May 2016) that (a) the declarant showed a total service tax amount as ₹ 2.98 crore pertaining to the period from 2007-08 to 2012-13 (upto December 2012), of which he has already paid an amount of ₹ 1.96 crore and filed VCES declaration for the remaining amount of ₹ 1.02 crore, (b) ADGCEI worked out tax liability for the past 5 years from Balance Sheet and the investigation covers upto 30 June 2013, and (c) As the figures arrived at by the declarant and the ADGCEI were not exactly for the comparable period, the declaration filed by the declarant was within the parameter of VCES.

The Ministry's reply was not acceptable as a difference of ₹ 2.02 crore (representing 40 per cent) in tax liability for a difference in period of just six months was a red flag, that Ministry should have investigated.

3.6 Acceptance of revised declarations, in contravention of Board's Circular

Board clarified (August 2013) that the declarant was expected to declare his tax dues correctly. In case, the mistake was discovered suo moto by the declarant himself, he might approach the DA, who after taking into account the overall facts of the case, might allow amendments to be made in the declaration. That too, provided that the amended declaration was furnished by declarant before the cut-off date for filing of declaration i.e. on 31 December 2013.

We noticed that revision of declarations consequent to departmental action or revisions beyond 31 December 2013 in contravention of Board circular cited *ibid* in the following cases:-

3.6.1 An assessee in Salem Commissionerate, declared (June 2013) tax dues of ₹ 1.60 crore, towards “Mining services” rendered, based on the action initiated by the DGCEI, Madurai Regional Unit, Madurai. Subsequently, the DA in letter dated 22 July 2013, stated that the declarant was liable for service tax towards mining services rendered as sub-contractors, which was omitted to be included in the declaration. Based on the above letter, the declarant filed revised declaration on 31 December 2013, declaring ₹ 2.33 crore, including the service tax payable on the services pointed out by the DA. The Department accepted the revised declaration and issued VCES-3 (February 2015) which was not in order as the assessee has not revised declaration *suo moto*.

When we pointed this out (December 2015), the Ministry stated (May 2016) that as long as revised declaration was filed before the due date, the same would be squarely covered by the VCES.

The declarant filed the revised declaration consequent upon initiation of action by DGCEI. The Ministry's reply proved audit point as they did not consider the primary condition of *suo moto* declaration and allowed revision of declaration by taking only the cutoff date.

3.6.2 Similarly in two other cases in Kochi and Chennai-II ST Commissionerates respectively have also revised the declaration filed consequent of action by DGCEI. Hence this was not in order as the assessee did not revise the declarations *suo moto*.

When we pointed this out (November 2015) the Ministry stated (June 2016) that as long as revised declaration was filed before the due date, the same would be squarely covered by the VCES.

The reply of the Ministry was not acceptable as the revision of declaration could not be considered as made *suo moto*.

3.6.3 An assessee in Ahmedabad ST Commissionerate, declared (December 2013) tax dues of ₹ 51.11 lakh. The same was revised for ₹ 20.51 lakh on 11 March 2014. The department issued the VCES-3 (October 2014). Since the revised declaration was submitted by the declarant after 31 December 2013, the action taken by the department was not in order.

Similarly, in two other cases in Jaipur Commissionerate revised declarations after 31 December 2013. However, discharge certificates were issued.

When we pointed this out (December 2015) the Ministry stated (May 2016) that in one case the declarant revised declaration on the instruction from the DA and hence the time limit prescribed for suo moto declaration was not applicable. They stated in respect of all the cases that as the delay was only procedural in nature and applications should not be rejected on such frivolous grounds.

The reply of the Ministry was not acceptable since the Scheme did not empower the DA to request the declarant to furnish revised declaration and prescribing a cut-off date for amending the application had no sanctity if non-adherence to the same was considered frivolous ground.

3.7 Monitoring of payment of first installment

As per Section 107(3) of the Finance Act, 2013, one of the conditions of the VCES was that the declarant shall pay at least an amount equal to 50 per cent of the declared tax dues under the Scheme, on or before 31 December 2013. Therefore, if the declarant fails to pay at least 50 per cent of the declared tax dues by 31 December 2013, he would not be eligible to avail the benefits of the Scheme. In cases where declarants fail to pay taxes within 31 December 2014, action has to be initiated under section 87 of the Finance Act, 1994. Also, such payments should be made in cash and not adjusted through Cenvat credit.

We noticed in 116 cases, in 11 Commissionerates, involving tax dues of ₹ 19.47 crore, the declarants had not paid their first installment i.e., 50 per cent of declared amount within the due date of 31 December 2013. Hence, all the above cases not eligible for consideration under VCES.

When we pointed this out (December 2015), the Ministry accepted the observation (May 2016) in 41 cases. In nine case it stated that that as per section 110 the declarant was eligible to pay the part payment with interest under section 87, since the section 110 deals with the situations where declarants fails to pay the tax dues, either fully or in part, as declared by him within prescribed limit. In 49 cases it stated that letters were issued calling for details in all such cases where proof of payment of the remaining 50 per cent of tax dues were not submitted by the declarants. In the remaining 17 cases reply is still awaited.

The reply of the Ministry was not relevant since the audit observation pertained to non- payment of first installment which within prescribed period, thereby making these declarations ineligible for VCES.

A few illustrative cases are given below:-

3.7.1 An assessee in Mumbai VII ST Commissionerate, declared (December 2013) tax dues of ₹ 85.43 lakh towards works contract service for the period April 2010 to December 2012. We noticed that the assessee had paid an amount of ₹ 43.25 lakh in two installments on 21 January 2014 and 8 March 2014, but had not paid the amount of ₹ 42.72 lakh towards first installment by 31 December 2013. However, no action was taken by the department to disallow the assessee under VCES.

3.7.2 An assessee in Jalandhar Commissionerate, declared (September 2013) tax dues of ₹ 75.98 lakh towards renting of immovable property service, for the period April 2008 to December 2012. We noticed that the assessee had paid an amount of ₹ 21.30 lakh only by 31 December 2013, as against 50 percent of ₹ 37.99 lakh payable. However, no action was taken by the department to disallow the assessee under VCES.

When we pointed this out (December 2015) the Ministry stated that a notice under section 87 has been issued to the assessee.

3.7.3 An assessee in Vadodara-I Commissionerate, declared (September 2013) tax dues of ₹ 23.52 lakh for the period January 2012 to December 2012. The declarant was liable to pay ₹ 11.76 lakh as first installment by 31 December 2013. However, only ₹ 4.63 lakh was paid by 31 December 2013. The DA issued (March 2014) SCN to the declarant, proposing rejection of claim. The declarant represented (March 2014) that due to acute financial crises, he could not pay the 50 per cent tax dues by 31 December 2013. Declarant further stated that if the first 50 *per cent* tax dues was not paid by 31 December 2013, the same could be paid with interest by 30 June 2014 and paid the interest of ₹ 6.48 lakh on entire tax dues from January 2012 (i.e. from actually payable date). Though the claim was liable for rejection, the DA issued (July 2015) VCES-3 to the declarant on the basis of declarant's representation, without even adjudicating the SCN issued.

When we pointed this out (November 2015) the Ministry stated (May 2016) that as per section 110 the declarant was eligible to pay the part payment with interest under section 87, since the section 110 deals with the situations where declarants fails to pay the tax dues, either fully or in part, as declared by him within prescribed limit.

In this regard, Ministry's attention is invited to the Gujarat High court judgement¹² where in it was held that if shortfall in the taxes could be accepted after charging interest under section 110, there was no need to

¹² In the High Court of Gujarat at Ahmedabad - Ramilaben Bharatbhai Patel Vs. Union of India and others {2014 (35) STR 695 (Guj.)}

make special proviso for extending time for depositing the remaining of the taxes under sub-section (4) of section 107. It was further held that section 110 pertains to compulsory recovery of taxes with interest, sub-sections (3) and (4) of section 107 refer to voluntary tax deposit by a declarant in terms of the Scheme and both these operate in separate fields. Thus the VCES declaration was liable for rejection as pointed out by audit.

Ministry further stated (June 2016) that this issue pointed out by audit was not generic but specific to certain Commissionerates only, where rectification measures were already taken.

3.8 Monitoring of payment of second installment

Section 107 stipulates that balance dues pending after paying first installment of not less than 50 per cent of tax dues declared, should be paid by the declarant before 31 June 2014. Declarants who fail to pay the balance before 31 June 2014 were also given an option to pay the same by 31 December 2014 with interest. Immunity under the provisions of Section 108 of the Finance Act, 2013, would be extended only to such declarants who make payment of tax dues declared, in accordance with the provisions of Section 107 of the Finance Act, 2013.

We noticed in 53 cases in 10 Commissionerates, involving whole/part of tax/interest dues of ₹ 1.49 crore were not paid by 31 December 2014. Hence, all the above declarants were not eligible for VCES.

When we pointed this out (between October 2015 and January 2016) the Ministry accepted the observation (May 2016) in three cases. In 17 cases it was stated that the declarants paid tax dues with interest subsequently and that penalty was not recoverable on tax dues declared under the Scheme or the reply was silent about levy of penalty. This stand of Ministry could not be accepted as Section 108 provided for immunity from penalty and other proceedings to declarant only on payment of tax dues by 30 June 2014/payment of balance tax dues with interest by 31 December 2014.

In 15 cases, Ministry stated that action under Section 87 was initiated and was under progress and reply awaited in 18 cases.

An illustrative case is given below:-

3.8.1 An assessee in Lucknow Commissionerate, declared (December 2013) tax dues of ₹ 60.89 lakh for the period April 2012 to December 2012 and deposited first installment of ₹ 30.45 lakh within the due date. The assessee deposited the balance amount ₹ 30.44 lakh only upto 7 July 2015, i.e., after the prescribed due date. Hence, the declaration of the assessee was required

to be disallowed under VCES Scheme and the entire amount along with interest should have been recovered.

When we pointed this out (October 2015), the Ministry accepted the observation (May 2016).

3.8.2 We observed in 441 cases in 18 Commissionerates who declared tax dues of ₹ 60.68 crore did not pay the second installment of dues either in part or in full, thereby making themselves defaulters under the Scheme. The department did not initiate action for recovery of the dues, along with interest and penalty, under Section 87 of Finance Act, 1994 *ibid*.

When we pointed this out (between October 2015 and January 2016), the Ministry while admitting the observation in 438 cases stated (May 2016) that remedial action was undertaken against the defaulters. Reply was awaited in three cases.

A reading of Section 110 along with Section 108 suggests that immunity from payment of interest and penalty may not be extended to the declarants in case of violation of the provisions of Section 108. However, Section 110 did not prescribe any mechanism to recover the amount of interest and penalty leviable from the date it became due. Section 87 of Finance Act, 1994, as amended from time to time stipulates mechanism for recovery of arrears. In case of defaulters under VCES, the tax dues declared but not paid can only be construed as arrears but not interest and penalty as it is not demanded and confirmed as per the relevant provisions of the Act.

Section 87 of the Finance Act, 1994, gives very wide powers to the Central Excise Officers to recover any amount payable under the service tax provisions. Further, as the defaulters are no more eligible for the immunity under the Scheme, other provisions like Section 73, 73A, 73C also can be used for recovery of the defaulted amounts along with interest and penalty. That is, the failure on the part of assessee in complying with the provisions of the Scheme would automatically invoke the extant provisions of Finance Act, 1994, which are permanent in nature.

Audit noticed that despite having extensive powers to make good the service tax dues, the department did not initiate any action under the general penal provisions in respect of in all above cases mentioned at Para Nos. 3.7 and 3.8, where the declarants did not comply with the conditions prescribed under the Scheme for availing the benefit of immunity from interest and penalty.

3.9 Treatment of Payments made prior to 10 May 2013 considered under VCES

Board clarified (August 2013) that VCES benefits cannot be availed where a person has made part payment of his tax dues before the Scheme was notified (i.e. 10 May 2013) and makes the declaration under VCES for the remaining part of the tax dues. In such cases, if any tax dues have been paid prior to enactment of the Scheme, any liability of interest or penalty thereon shall be adjudicated as per the provisions of the Chapter V of the Finance Act, 1994.

Gujarat High Court in the case of M/s. Sadguru Construction Company Vs. Union of India held that “circular cannot override the enactment and so tax due as on 1 March 2013 and paid after 1 March 2013 shall be eligible for declaration under VCES Act, 2013 even though the Scheme has been enacted on 10 May 2013”.

After pronouncement of this judgement also the Board has not taken action to review the circular issued by them.

We observed in 46 cases in 13 Commissionerates, the declarants paid the amount of ₹ 7.05 crore towards service tax prior to the notification of the Scheme. Hence all these declarants are not eligible for VCES as per Board's circular. However, we noticed that the department issued VCES-3 certificates in 21 cases.

An illustrative case is given below:-

An assessee in Patna Commissionerate, declared (August 2013) tax dues of ₹ 10.08 lakh for the period July 2010 to December 2012. We noticed that entire tax dues declared had been paid by the declarant prior to 10 May 2013, i.e, prior to enactment of the Scheme. The department issued VCES-3 to the assessee.

When we pointed this out (December 2015) the Ministry stated (May 2016) that the declarant deposited the amount in the month of March 2013 i.e., before the pronouncement of the Scheme, however, since there was no adverse report from field formations, the VCES-3 was issued. The Ministry further stated (June 2016) that the judgement was delivered on 24 April 2016 whereas the VCES Scheme envisaged payment of the first instalment by 31 December 2013. So revision of the circular would have created confusion and lead to more disputes.

Ministry reply was not tenable as some field formations, following the High Court judgement, allowed the payment made by the declarants between 1 March 2013 to 10 May 2013, while some applications were rejected

quoting Board Circular. Thus there was no uniformity in treatment of tax dues paid between 1 March 2013 to 10 May 2013.

3.10 Cenvat credit utilised for payment of tax dues

Rule 6(2) of the STVCES Rules, 2013, envisages that Cenvat credit shall not be utilised for payment of tax dues under the Scheme.

We noticed in 28 cases in nine Commissionerates the declarants utilized Cenvat credit of ₹ 2.52 crore before arriving at the tax dues. The department rejected none of these cases and issued Form VCES-3 in 19 cases.

When we pointed this out (between October 2015 and January 2016) the Ministry stated (May 2016) that in 10 cases, action for denial of immunity was being initiated and the outcome would be intimated. In 11 cases, Ministry stated that the declarants paid entire tax dues declared in VCES in cash but reply was silent about adjustment of Cenvat credit for arriving at tax dues declared in VCES, which amounted to using Cenvat credit for part payment of tax dues. In seven cases, the reply of the Ministry was awaited.

Two illustrative cases are given below:-

3.10.1 An assessee in Jalandhar Commissionerate declared (December 2013) tax dues of ₹ 4.48 lakh, towards cable operator services, for the period April 2008 to December 2012. The declared amount of ₹ 4.48 lakh was arrived at, after adjusting an amount of ₹ 60.19 lakh through Cenvat credit. As Cenvat credit was not allowed for utilization for making payment of tax dues under VCES, the department should have disallowed the same, which was not done. This resulted in short declaration of service tax of ₹ 60.19 lakh. The department, by issuing VCES 3 on 4 August 2014, extended undue benefit to the assessee by way of immunity from interest and penalty.

When we pointed this out (December 2015) the Ministry stated (June 2016) that though VCES-3 had been issued, Commissionerate had been asked to provide further clarification.

3.10.2 An assessee in Allahabad Commissionerate, declared (September 2013) tax dues of ₹ 3.43 lakh towards advertisement income for the period July 2012 to December 2012, after adjusting the Cenvat credit of ₹ 8.03 lakh availed on input services, while the actual tax dues were ₹ 11.47 lakh. The Department issued VCES-3 (January 2014). As Cenvat credit was not admissible for utilising the payment of the tax dues declared by the declarant, the department was required to determine the actual tax liability by disallowing the adjustment of Cenvat credit, which was not done resulting in short declaration of service tax dues of ₹ 8.03 lakh.

When we pointed this out (December 2015) the Ministry stated (May 2016) that the declarant had deposited tax dues of ₹ 3.43 lakh in cash.

The reply of the Ministry was silent on short-declaration of tax dues to the tune of ₹ 8.03 lakh by adjusting the Cenvat credit from total tax dues.