

TO,

Sir,

**Re : SECURITY GUARDS BOARD MUMBAI, SERVICE TAX UNDER  
REVERSE CHARGE MECHANISM**

The board is in receipt of your letter informing of the reverse charge mechanism of service tax whereby the service receiver is required to pay 75% element of service tax while service provider is required to pay @ 25% as a service provider w.e.f.01.07.2012. In that connection we state that we deny that we are covered as service provider to pay service tax @ 25% of the total service tax under newly devised and notified partial reverse mechanism.

**Even if the unit/company wants to implement the provisions of service tax under the newly devised and notified RCM, the service tax so paid by you is your obligation and the security guard board is in no way responsible or liable for it. Since service tax is to be ultimately borne by the service receiver, the board strongly objects to deduction of service tax from the wages and levy due to the guards to be deposited with the board. In any event the service tax if at all is applicable, it is your liability over and above wages and levy to be deposited and it can not be deducted from the amount to be deposited with the board as service tax is a indirect tax.**

The board is of the view that even after amendment and negative list, they are not covered by service tax not because they are charitable institutes but because:-

1. The board is a **statutory Board**, constituted for carrying out the object of administering the scheme in any area.

2. It is therefore submitted that the taking into account of the preamble and object of the said "**Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981**, it is abundantly clear that, the Board, is a statutory authority, and it's purpose is to implement the provisions of the said Act, and, the welfare scheme issued under the said "**Maharashtra Private Security Guards (Regulation of Employment and Welfare) Act, 1981**, and therefore, such an activity is purely in public interest and it is undertaken as mandatory and statutory function, and, are not in **nature of service** to any particular individual for any consideration. It is submitted that the board is a statutory authority with a power to implement the provisions of the said Act.
  
3. **The board is of the view that even after amendment, they are not covered by service tax not because they are charitable institutes but because:-**
  - 3.1 They are not engaged in providing Security guards or manpower supply.
  
  - 3.2 There is no consideration and hence no contract, receipts in the hands of the boards are by virtue of legislative powers and can not be considered as " Consideration" to provide services.
  
  - 3.3 There is no business activity of rendering services.
  
4. These boards are only regulatory bodies fixing the wage rates, disbursing authority of wages and other labour law benefits and their functions are governmental and hence cannot be considered to be of labour contractor.
  
5. CBEC circular is binding on the department which clarifies that services to the public at large even for fee cannot liable to service tax. *The Board (CBCE) has clarified the " the activities performed by the sovereign / public authorities under the provisions of law are in the nature of statutory obligations which are to be fulfilled in accordance with law. The fee*

*collected by them for performing such activities is in the nature of compulsory levy as per the provisions of relevance statute and it is deposited into the government treasury. Such activities are purely in public interest and it is undertaken as mandatory and statutory function. These are not in the nature of service to any particular individual for any consideration. Therefore, such an activity performed by a sovereign/ public authority under the provisions of law does not constitute provision of taxable service to a person and therefore no service tax is leviable on such activities.”*

6. Hon'ble Mumbai H.C. in the case of H.M. Mhasavdekar vs. Bombay Iron and Steel Labour Board has examined the nature of activities of the board, its functions and from these observations, the importance follows.

**The judgment states: “ If the board was not constituted all the work required to be done by the state Government through its own department. Merely because the state Govt. has constituted the statutory authority with the delegated powers it cannot be said that the board is not discharging the regal functions of the state. The board is entrusted with such functions, which cannot be delegated to the private party at all. The regulation of employer- employee relationship is the function of the state as administration of law and the functions of the board are primarily or substantially to administer the law.**

**Thus the board does not carry on any business, trade nor any activity in the nature of trade, commerce or business is carried out. Hon'ble Supreme Court in the case of Vizagapattanam Dock Labour Board's case has held that the board is not an industry. It has also held that the employer employee relationship does not exist between the board and the workers.**

7. Govt. of India, Ministry of finance, Dept. of Revenue, (Tax research Unit) has issued D. O. F. No 334/1/2012-TRU dated 16th March, 2012 clarifying about the provisions of service tax post amendments in the budget 2012.
8. It clarifies that : - “ In the existing system, only the services specified in clause (105) of section 65 of the Finance Act, 1994 are taxed under the charging section 66. In the new

system, all services, other than services specified in the negative list, provided or agreed to be provided in the taxable territory by a person to another would be taxed under section 66B. This Note explains the various ingredients and aspects of the definition of service.

“Service’ has been defined in clause (44) of the new section 65B and means –

- i) any activity
- ii) for consideration
- iii) carried out by a person for another
- iv) and includes a declared service.

8.1 The guidance note then explains what is consideration.

#### **“2.1.1 What 2.2 Consideration**

##### **2.2.1 The phrase ‘consideration’ has not been defined in the Act. What is, therefore, the meaning of ‘consideration’?**

Yes. ‘Consideration’ has not been defined in the Act. The definition of consideration’ as given in the Indian Contract Act, 1872 can safely be adopted to understand the concept of consideration.

When so applied to the Act, ‘consideration’ for a service provided or agreed to be provided by service provider would mean anything which the service receiver or any other person has done or abstained from doing, or does or abstain from doing, or promises to do or to abstain from doing for receiving the service.

In simple term, ‘consideration’ means everything received in return for a provision of service which includes monetary payment and any consideration of non- monetary nature as well as deferred consideration.

##### **2.2.2 What are the implications of the condition that activity should be carried out for a ‘consideration’?**

- i) To be taxable an activity should be carried out by a person for another for a ‘consideration’.
- ii) Activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service. For example grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research.
- iii) An act by a charity for consideration would be a service and taxable unless otherwise exempted. ( **for exemptions to charities please see Guidance Note 6**)

- iv) Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.
- v) Donations to a charitable organization are not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a business advantage to the donor.

15. Now if we analyse the definition of consideration, it follows that the considerations must have value that is recognized by law to make them legally sufficient. These considerations must be either a benefit or a detriment to a party involved in the contract. A legal benefit is when a party receives something of value that they previously didn't have the right to. A legal detriment is when someone performs an act that they were not previously obligated to do or not perform an act that they previously were obligated to do.

**Preexisting Obligations:**

Preexisting public obligations – pre existing public obligations are obligations that are imposed by a law. These obligations are neither a legal detriment or a legal benefit. Thus the most important feature of a contract is that one party makes an **offer** for an arrangement that another **accepts** by free will.

- 16. Therefore it is clear that money received by the board from registered employers is not a “Consideration”, there is no contract either written or oral.
- 17. The following principles enunciated by the Bombay High Court also support the view that the function and Powers of the Board is a statutory and mandatory functions.

17.1 Security guards do not become the direct employee of the registered employer on being allotted by the board to the said employer.

17.2 The board is empowered to withdraw and re-allot a Security guards to another registered employer and this discretionary power is anathema to a direct and regular employment.

**17.3** As the board constituted under the act is not a contractor the contract Labour Act is not applicable to security guard who are governed by the Act. **IAAI Employees Union V/s. IAAI LIC 1603 (Bom DB)**

17.4 Board is not a commercial concern and is not constituted for a profit motive – no services is rendered by the Board – Board is not an employer of the Security

guards and therefore can not be said to be engaged in providing service of security of property or person.

The Board being Governmental / Quasi Governmental authority no suppression can be alleged- extended provisions of limitation is not applicable, therefore penalty not sustainable.

At the highest the administrative charge of 2% could be the subject matter of Service Tax levy.

In view of above we request you to deposit full amount of wages and levy with the board.

Thanking you