

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Dear Professional Colleague,

Service Tax - 10% or 12% - Delhi HC quashes two Circulars imposing higher rate of Service tax

We are sharing with you an important judgement of Hon'ble Delhi High Court in the case of **DELHI CHARTERED ACCOUNTANTS SOCIETY (REGD.) versus UNION OF INDIA AND ORS. (2013-TIOL-81-HC-DEL-ST)** on following issue:

Issue:

What would be the rate of Service tax where the service is provided by the Chartered Accountants prior to 01.04.2012 and the invoice is also issued prior to 01.04.2012 but the payment is received after 01.04.2012.

Facts:

The petitioner is an association of chartered accountants. Services rendered by chartered accountants are taxable services under erstwhile Section 65(105)(s) of the Finance Act, 1994.

As you know that the rate of service tax was enhanced from 10% to 12% w.e.f 1-4-2012. As per Rule 7(c) of the Point of Taxation Rules, 2011 {the POT Rules}, in case of 8 specified services (one of which was Chartered Accountants Service) provided by the individuals or proprietary firms or partnership firms, the Point of Taxation shall be ***the date on which payment is received or made, as the case may be.***

Further, Rule 7(c) of the POT Rules has been amended vide Notification No 4/2012-ST dated. 17.03.2012, effective from 01.04.2012 i.e. under the new Rule 7 of the POT Rules, the point of taxation is date of receipt of payment only for the service tax payable under reverse charge, i.e. under Section 68(2) of the Finance Act, 1994.

Furthermore, date of receipt of payment as POT for 8 specified services by the individuals or proprietary firms or partnership firms has been extended to all Service Providers, by simultaneously inserting a proviso in Rule 6(1) of the Service Tax Rule, 1994 vide Notification No. 3/2012-ST dated. 17-3-2012 w.e.f. 1-4-2012 as under:

“Provided also that in case of individuals and partnership firms whose aggregate value of taxable services provided from one or more premises is fifty lakh rupees or less in the previous financial year, the service provider shall have the option to pay tax on taxable services provided or to be provided by him up to a total of rupees fifty lakhs in the current financial year, by the dates specified in this sub-rule with respect to the month or quarter, as the case may be, in which payment is received.”

Mobile: +91 98106 04563; E-mail: bimaljain@hotmail.com

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

In this backdrop, the service tax authorities however rely on two circulars issued by the Tax Research Unit of the CBEC –Circular No.154 dated 28.03.2012 and Circular No.158 dated 08.05.2012 and which say that *“in case of 8 specified services provided by individuals or proprietary firms or partnership firms and in case of services wherein tax is required to be paid on reverse charge by the service receiver, if the payment is received or made, as the case maybe, on or after 1st April 2012, the service tax needs to be paid @12%.”*

In lieu of the above clarification in respect of Chartered Accountant Service, though the service was rendered on or before 31st March 2012 and invoice was also issued on or before 31.03.2012, if the payment is received on or after 01-04-2012, the rate of service tax applicable will be 12%, but not 10%.

According to the petitioner in such case, Rule 4(a)(ii) of the POT Rules (reproduced here in below), applies and the point of taxation shall be the date of issuance of the invoice.

“Rule 4. Determination of point of taxation in case of change of rate of tax.-

Notwithstanding anything contained in rule 3, the point of taxation in cases where there is a change in effective rate of tax in respect of a service, shall be determined in the following manner, namely:-

(a) in case a taxable service has been provided before the change of rate,-

(i).....; or

(ii) where the invoice has also been issued prior to change in effective rate of tax but the payment is received after the change in effective rate of tax, the point of taxation shall be the date of issuing of invoice; or.....”

Held:

It was held that where the services of the Chartered Accountants were actually rendered before 01.04.2012 and the invoices were also issued before that date, but the payment was received after the said date, **the rate of tax will be 10% and not 12%.**

While quashing the Circulars as contrary to the provisions, the High Court has compared the old and new Rule 7 of the POT Rules and held that the circulars in question have not taken note of this aspect, and as noted earlier have proceeded on the erroneous assumption that the old Rule 7 of the POT Rules continued to govern the case notwithstanding the introduction of the new Rule 7 of the POT Rules which does not provide for the contingency that has arisen in the present case.

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Hence, ***the Circulars are quashed as being contrary to the Finance Act, 1994 and the POT Rules***, which have been notified in exercise of the powers conferred upon the Central Government under Clause (a) and Clause (hhh) of sub-section (2) of Section 94 of the Finance Act, 1994 and they are also required to be placed before both the Houses of Parliament under sub-section (4) of Section 94. They thus have the force of law. The circulars have to be in conformity with the Act and the Rules and if they are not, they cannot be allowed to govern the controversy.

It is well-settled that a Circular which is contrary to the Act and the Rules cannot be enforced. In ***Commissioner of Central Excise, Bolpur vs Ratan Melting & Wire Industries 2008(13) SCC (1)*** a Constitution Bench of Supreme Court held as under:-

“Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.”

Another setback for CBEC:

Recently the Hon'ble Delhi High Court in the case of ***Intercontinental Consultants and Technocrats Pvt. Ltd. Vs. Union of India & ANR (2012-TIOL-966-HC-DEL-ST)*** has held that the Rule 5(1) of Service Tax Valuation Rules, which provides for inclusion of the expenditure or costs incurred by the service provider in the course of providing the taxable service in the value for the purpose of charging service tax is ***ultra vires Section 66 and 67*** and travels much beyond the scope of those sections.

Hope the information will assist you in your Professional endeavours.

Bimal Jain

FCA, ACS, LLB, B.Com (Hons)

Mobile: +91 9810604563

E-mail: bimaljain@hotmail.com

Mobile: +91 98106 04563; E-mail: bimaljain@hotmail.com