

## Place of Provision of Services Rules, 2012 lacks clarity – Feb 25, 2013



FEBRUARY 25, 2013

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**THE** Place of Provision of Services Rules, 2012, which have come into effect from July 1, 2012 contain many confusing provisions. Some of them are discussed below with a fervent hope that the forthcoming Budget would introduce clarity.

### **Rule 4**

*Place of provision of performance based services.-*

*04. The place of provision of following services shall be the location where the services are actually performed, namely:-*

*(a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:*

*Provided that when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service:*

*Provided further that this sub-rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning or reengineering for re-export, subject to conditions as may be specified in this regard.*

*(b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.*

In terms of Rule 4, it would seem that a lot of activities including technical testing, inspection, analysis of goods, certification services, etc. which are dependent on the activities to be physically performed on the goods provided by the service recipient, would be taxable in India. This, of course, would be a big blow for industries such as Pharma, given the fact that, many Indian Companies are engaged in these activities. Since Rule 4 appears after Rule 3, Rule 4 would prevail over Rule 3 and these activities which were exempt till 30 th June, 2012 would seem to have come into the tax net.

**Rule 7:** In terms of this Rule, in a case where a service is provided in more than one location, including from India (which is included under the definition of 'taxable territory'), the place of provision of services would be India, attracting service tax. The Education Guide has provided some examples on how this Rule would operate. Let's take the example of an International Consulting Company engaged in providing testing services from its facility, located outside India, to its clients outside India. Assume further that, this Company has retained a Consultant who renders some testing services to this Company which is insignificant as compared to the quantum of the testing services rendered by this International Consulting Company. Under Rule 7, even if a negligible portion of the services covered by Rule 4, 5 and 6 are provided in India, it would be deemed that the services have been provided in India. This Rule is bound to create a lot of issues for service providers in respect of services covered by Rules 4, 5 and 6 who are essentially located outside India and procuring a small/negligible proportion of the services from India.

**Rule 9** . As per this Rule, the place of provision of service, in respect of 'IntermediaryServices' shall be the location of the service provider. As per Rule 2(f), "intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) between two or more persons, but does not include a person who provides the main service on his account.

Interestingly, the term 'main service' has not been defined in these Rules.

In terms of the 'clarification' contained in the Education Guide, it would seem that service providers in India who provide the 'main service' on their own account, would not be covered under the definition of 'Intermediaries'. Thus, Indian companies *per se* which are into BPO, KPO and LPO services and call centers would be outside the mischief of this Rule 9. However, in the absence of a definition of 'main service', Indian KPOs, BPOs, etc. could face some issues, in terms of whether the services rendered by them could be treated as the 'main service'.

The mischief arising out of Rule 9 could be far and wide, as Indian Companies who promote services of foreign players including global software players, on a commission basis, would come under the service tax net, with effect from 1-7-2012, as these players would be considered as rendering 'intermediary services'. In effect, any Indian company which gets a commission from its foreign client/principal could get covered under the service tax levy, in terms of Rule 9. Many Indian Companies which promote foreign brands could get covered under this Rule. Also, Indian agents who facilitate maintenance of goods and machinery by foreign suppliers would also get covered under Rule 9.

Though, the Education Guide states that, an agent dealing in 'goods' is not covered under the definition of 'intermediary services', there is no clarity in respect of transactions which are composite transactions. For instance, it is not uncommon for Indian agents to facilitate import of goods and machinery by Indian Companies, by performing on-site services which are critical for acceptance of such goods by the Indian importers.

Despite the Education Guide clarifying as to what would constitute an "intermediary service", it would be prudent if the Board can come out with a more detailed Circular on this contentious subject.

#### **Before concluding...**

Sadly, these Rules are very loosely worded. Any view that can be taken would have to depend on a detailed scrutiny of the facts and circumstances governing each case. Service Providers would have to gather and maintain detailed documentary and other evidence to prove their point of view. However, for the Revenue, there is no denying the fact that these Rules would surely bring in a lot of additional revenue as scores of transactions which were exempt under the erstwhile Export of Services Rules would seem to be squarely covered under these Rules.

One would expect the Government to clarify these and other issues arising out of the Place of Provision of Services Rules, 2012, in the coming Union Budget.