Rule 5(a) of POT Rules vis-à-vis new services taxable from 1-10-2014 : 30-09-2014

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In terms of changes made to Section 66D of the Finance Act, 1994 read with Notification No.18/2014-S.T dated August 25, 2014, certain new services which were exempt, will come into the service tax net from 1-10-2014. Thus, space of space for advertisement other than in print media and services provided by radio taxis would be taxable from 1-10-2014. The pertinent question that arises is the point of taxation for these services rendered during the period prior to 1-10-2014.

It is relevant to refer to Rule 5 of the Point of Taxation Rules, 2011, one of the most mischievous rules that one comes across in the service tax law. This rule reads as under:

> 5. Payment of tax in case of new services.-
>
> Where a service is taxed for the first time, then,-
>
> (a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;
>
> (b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within fourteen days of the date when the service is taxed for the first time.

This amended Rule 5 which has come into effect from 1-4-2012 vide Notification No.4/2012-ST dated 17-3-2012 is bound to create big time confusion vis-à-vis the point of taxation in respect of the new services coming into the tax net with effect from 1-10-2014.

Consider these….

1. In terms of Sub-Rule (a) of Rule 5 reproduced above, service tax, in respect of a new service would have to be levied unless both the invoice and the payment against such invoice have been received by the service provider before the date such new service has come into effect.

This rule goes against the very foundation of the service tax law, which is now based on accrual basis as contrasted to the old law that existed before 01-04-2012 under which, the service provider was liable to pay service tax on the cash basis, i.e. on the basis of receipts. It is amazing that during the time that the Board came out with this notification 4/2012-STdated 17th March, 2012, the service tax law fastening tax liability on

accrual basis had already come into effect. This makes one wonder as to the kind of confusion that prevails at the level of the Board.

Be that as it may……taking the example of the new services coming into effect from 1-10-2014 (eg. Sale of space for advertisement in non-print media), as per this Rule, the service provider would be liable to pay service tax in respect of invoices raised before 1-10-2014 and remaining uncollected as on 1-10-2014. It seems clear that Rule 5(a) of the POT Rules is *ultra vires* Section 66B of the Finance Act, 1994, inasmuch as, service tax liability under Section 66B can be levied only on 'services provided or to be provided or agreed to be provided'. This Rule would travel beyond the charging section by fastening the tax liability on the service provider even though he has not rendered any services after the date of introduction of tax on the new services.

Moreover, the concept involving levy of tax and the concept involving collection of tax are two entirely different concepts. The pre-requisite for collection of tax is the levy of tax. TIOL readers would be familiar with the landmark decision of the Apex Court in *Collector of Central Excise, Hyderabad Vs. Vazir Sultan Tobacco Co. Ltd.* - ***2002-TIOL-215-SC-CX-LB*** rendered in 1996, wherein it was held as under, in para 5:

> "Once the levy is not there at the time when the goods are manufactured or produced in India, it cannot be levied at the stage of removal of the said goods. The idea of collection at the stage of removal is devised for the sake of convenience. It is not as if the levy is at the stage of removal; it is only the collection that is done at the stage of removal. Section 3(1) of the Central Excise Act says: "(1) There shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India…."

The Apex Court further held as under, in Para 11, of this decision:

> "The removal of goods is not the taxable event. Taxable event is the manufacture or production of goods"

If one applies the ratio of this decision to the service tax law, it is clear that, when there was no levy on the date of rendering of the service, service tax liability cannot be fastened on the service provider on the basis of the date of receipt of payment.

Moreover, the Apex Court, in its decision rendered on October 26, 2010, in *Association of Leasing and Financial Service Companies v. Union of India* - ***2010-TIOL-87-SC-ST-LB*** has categorically held in Paras 18, 19 and 37 that, the taxable event, in respect of levy of service tax, is the "rendition of services". So, even on the basis of this binding decision, Rule 5 (a) would fall flat.

Before concluding…..

There is no issue in so far as Rule 5(b) of the POT Rules is concerned. Nobody bothered about this Rule…. Now that, this is the first time new services are being subjected to the levy since this Rule came into the statute book, this Rule could see a judicial challenge in the days to come, for sure. Unfortunately, since this is the only direct rule that is applicable for new services, none of the other rules can be of help to the service providers.

CBEC would be well advised to issue a clarification on Rule 5(a), as otherwise, there is bound to be harassment to service providers, vis-à-vis the new taxable services coming into the tax net from 1-10-2014.