Service Tax liability on importers starts only from – Apr 7, 2009

Service Tax liability on importers starts only from April 18, 2006
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SINCE when are importers of taxable services liable to pay service tax? A million dollar question, isn't it? The law related to the payment of service tax by importers of taxable services, has moved like a pendulum, over the last seven years or so from one to another, with contracting decisions coming from the Tribunals and the Courts. When most of us thought that the decision of the Bombay High Court in the Indian National Shipowners Association case had settled the issue vis-à-vis the levy of service tax on importers prior to April 18, 2006, the recent dismissal of the civil appeal filed by the Department against the CESTAT-LB decision in the Hindustan Zinc Ltd case has revived the subject, especially in the context of the Department taking the view the dismissal of its civil appeal by the Supreme Court is confirmation of the legal position that service tax on importers is leviable from January 1, 2005.

A peep into the legislative history of the subject matter, would, perhaps, help put things in perspective.

IMPORT OF SERVICES – A SYNOPSIS OF THE AMENDMENTS IN THE FINANCE ACT, 1994 AND THE RULES SINCE 1998

Date	Event	Remarks
16-10-1998	Section 68 amended by inserting Sub-Section (2) granting power to Central Government to notify taxable services for which service tax is to be paid by any person specified in such notifications.	No effect since the Government did not issue any Notifications under Section 68.
28-2-1999	Notification No. 1/99-ST, dated 28-2-1999 introduces proviso to rule 6(*i*) to make the person authorized by the non-resident liable to pay Service Tax.	Without notifying the service, no chance of levy of service tax on importers
16-8-2002	Amendment to rule 2(1)(*d*)(*iv*) to make recipient in India liable to pay Service Tax (Notification No. 12/02-ST, dated 1-8-2002).	
1-1-2005	Notification No. 36/2004-ST dated 31-12-2004 issued under Section 68(2) notifying taxable services and the person liable to pay service tax in respect of such.	Notification issued to specify the taxable services only for the purpose of Section 68(2).
16-6-2005	Insertion of *Explanation*under section 65(*105*),*i.e.*, definition of taxable services to stipulate liability to pay duty by recipient in India in respect of services rendered by a person from outside India.	Charging of o Service Tax by simply inserting an *Explanation without*amending the charging Section has no legal impact.

18-4-2006	Introduction of the all important Section 66A. Introduction of the New Rules, viz. Taxation of Services (Provided from Outside India and Received in India) Rules, 2006 thro' Notification No. 11/2006-ST, dated 19-4-2006.	Effective levy of service tax on import of services starts with the introduction of the charging Section 66A.

If the Government is guilty of not having legislated the subject matter over the years, in an organized manner, the fact that the CESTAT Benches and the Courts have taken differing stands on the date from which liability to pay service tax gets fastened on the importer of taxable services has only added to the confusion.

Some of the earlier decisions on the subject matter took the view that there was no service tax liability on the importers prior to January 1, 2005. Thus, in Aditya Cement v. CCE **2007-TIOL-236-CESTAT-DEL**, a Single Member Bench of the Tribunal held that the service receiver was not liable to pay service tax for the services received prior to 1-1-2005. This decision was followed by a Division Bench in Ispat Industries Ltd. v. CCE **2007-TIOL-399-CESTAT-MUM**.

At around the same time, certain CESTAT benches started taking the clear view that, with the charging Section 66A having come into effect from April 18, 2006, there was no liability on the importers prior to April 18, 2006. Some of the decisions that took this view are Foster Wheeler Energy Ltd. (**2007-TIOL-785-CESTAT-AHM**), Prabhat K Tyagi v. Commissioner of Central Excise (Appeals-1) 2008-TIOL-678-CESTAT-BANG, Commissioner of Central Excise, Ludhiana v. Bhandari Hosiery Exports Ltd **2008-TIOL-604-CESTAT-DEL** and Anant Spinning Mills Ltd v. Commissioner of Central Excise, Bhopal [**2008-TIOL-2143-CESTAT-DEL**]

However, in a landmark judgment delivered on June 27, 2008, the Larger Bench of the CESTAT, in Hindustan Zinc Ltd v. Commissioner of Central Excise, Jaipur reported in **2008-TIOL-1149-CESTAT-DEL-LB** took the view that service tax liability cannot be fastened on the importer prior to January 1, 2005. Following this decision of the LB, many CESTAT Benches started giving judgments holding that there was no service tax liability prior to January 1, 2005 including in Larsen & Toubro Limited v. Commissioner of Central Excise, Vadodara-II [**2008-TIOL-1994-CESTAT-AHM**).

However, one must bear in mind, the fact that, the question of the service tax liability getting fastened on the services importers prior to April 18, 2006, with the introduction of Section 66A, was not at all a subject matter of adjudication before the LB, as can be clearly seen from its judgment in the Hindustan Zinc case, the relevant part of which is reproduced below:

Quote :

Although not relevant for this case, it may be mentioned that with effect from 18-4-2006, section 66A was inserted in the Act by Finance Act, 2006 incorporating provision regarding charge of service tax on services received from outside India. With the incorporation of section 66A, the dispute in the matter of levy of service tax on services received from abroad afterwards has generally come to an end.

Unquote :

Given this, in my strong view, there is no merit in holding that the LB decision in the Hindustan Zinc ever considered specifically, the question of levy of service tax on importers vis-à-vis the introduction of Section 66A with effect from April 18, 2006, which however, got resolved in the Bombay High Court's judgment in the Indian National Shipowners Association case. In this landmark judgment pronounced on December 11, 2008 and reported in ***2008-TIOL-633-HC-MUM-ST***, it was held that has held that the liability on the importer to pay service tax on taxable services imported, would arise only from April 18, 2006. The Bombay High Court had depended on the Apex Court's judgments in ***Laghu Udyog Bharati v/s. Union of India***- **2002-TIOL-162-SC-ST**and ***Gujarat Ambuja Cements Ltd. v/s. Union of India*** - **2005-TIOL-53-SC-ST** .

It would do us good to go thro' the following paragraph which has been reproduced from the Bombay High Court decision

Quote :

Before enactment of Section 66A there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India – . Before enactment of Section 66A it is apparent that there was no authority vested by law in the Respondents to levy service tax on a person who is resident in India, but who receives services outside India. In that case till Section 66-A was enacted a person liable was the one who rendered the services. In other words, it is only after enactment of Section 66-A that taxable services received from abroad by a person belonging to India are taxed in the hands of the Indian residents. In such cases, the Indian recipient of the taxable services is deemed to be a service provider. Before enactment of Section 66-A, there was no such provision in the Act and therefore, the Respondents had no authority to levy service tax on the members of the Petitioners-association.

Unquote:

Now, coming back to the Hindustan Zinc case…

After losing the case before the LB of the New Delhi CESTAT, the Department filed a civil appeal No. 463/2009 (D.No.32643/2008) which was dismissed by the Supreme Court in its short order dated January 23, 2009. Some Departmental officers would seem to have taken the view that the Apex Court's dismissal of its civil appeal would reinforce the law that, service tax on importers is leviable from January 1, 2005.

The Apex Court's dismissal order, it is respectfully submitted, is only qua the judgment of the CESTAT-LB in the Hindustan Zinc Ltd case, vis-à-vis levy of service tax prior to January 1, 2005 and by no stretch of imagination can one assume that the Apex Court's dismissal order dated January 23, 2009 constitutes the law that service tax on importers can be levied from January 1, 2005, as is being claimed by some Departmental Officers.

The law then, as of date, in respect of levy of service tax on importers, is as laid down by the Bombay High Court in the Indian National Shipowners Association case holding that the service tax liability on importers arises only from April 18, 2006 and until and unless this decision is set aside on appeal by the Department, services importers cannot be asked to pay service tax prior to April 18, 2006.

Before parting…

The Department has been collecting service tax from importers of taxable services right from 2002 onwards and given the decision of the Bombay High Court in the Indian National Shipowners case, all such collection of service tax from importers of taxable services, prior to April 18, 2006 is without the authority of law and is liable to be refunded by the Department.

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