

THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 01.02.2013

+ **W.P.(C) 4456/2012 & C.M.No.9237/2012(for stay)**

**DELHI CHARTERED ACCOUNTANTS
SOCIETY (REGD.)**

.....Petitioner

versus

UNION OF INDIA AND ORS.

.....Respondent

Advocates who appeared in this case:

For the Appellant : Mr Ruchir Bhatia, Adv.
For the Respondent : Mr Sumeet Pushkarna, CGSC with Mr Varun Dubey, Adv.
for R-1/UOI.
Mr Anshuman Chowdhury, Sr. Standing Counsel for
Comm/S.Tax

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

R.V.EASWAR, J

The petitioner is an association of Chartered Accountants, registered as a society in Delhi. The matter arises under the service tax provisions which were brought into force by the Finance Act, 1994. The prayer in this petition is for (a) quashing of the circular No.158/9/2012-ST dated 08.05.2012 and circular No.154/5/2012-ST dated 28.03.2012 as null and void and *ultra vires* the Constitution of India and/ or the provisions of the Finance Act, 1994; (b) issuance of a writ or order or

direction in the nature of a writ declaring that under the provisions of the Finance Act, 1994, the taxable event is the rendition of the service and accordingly the rate of tax payable is the rate in force on the date of providing the service.

2. The petition came to be filed in this manner. The Finance Act, 1994 introduced the levy of service tax for the first time in India. Section 66 provided for the charge of service tax. Section 66A provided for the charge of service tax on services received from outside India. Section 67 provided for the valuation of taxable services for the purpose of charging service tax. This section underwent certain changes under the Finance Act, 2006 w. e. f. 18.04.2006 but we are not concerned with them. Section 68 provided for the payment of service tax. There are other procedural provisions to give effect to the levy and collection of service tax with which we are not concerned. Section 93 conferred power upon the Central Government to grant exemption from the levy of service tax. Section 94 conferred power upon the Central Government to make rules for carrying out the provisions of Chapter V of the Finance Act, 1994.

3. A question arose as to what is the taxable event for the purpose of

levy of service tax. In Association of Leasing and Financial Service Companies Vs. UOI & Ors. : (2011) 2 SCC 352 the Supreme Court held that the taxable event was the rendition of the service. However, w. e. f. 01.04.2011 the Point of Taxation Rules, 2011 were notified. Rule 2(e) of the said Rules defines “point of taxation” as the point in time when a service shall be deemed to have been provided.

4. Rule 4 provided as follows: -

“4. Determination of point of taxation in case of change in effective 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 in effective rate of tax,-
 - (i) where the invoice for the same has been issued and the payment received after the change in effective rate of tax, the point of taxation shall be date of payment or issuing of invoice, whichever is earlier; 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
 - (iii) where the payment is also received before the change in effective rate of tax, but the invoice for the same has been issued after the change in effective rate of tax, the point of taxation shall be the date of payment;

- (b) in case a taxable service has been provided after the change in effective rate of tax,-
- (i) where the payment for the invoice is also made after the change in effective rate of tax but the invoice has been issued prior to the change in effective rate of tax, the point of taxation shall be the date of payment; or
 - (ii) where the invoice has been issued and the payment for the invoice received before the change in effective rate of tax, the point of taxation shall be the date of receipt of payment or date of issuance of invoice, whichever is earlier; or
 - (iii) where the invoice has also been raised after the change in effective rate of tax but the payment has been received before the change in effective rate of tax, the point of taxation shall be date of issuing of invoice.”

5. Rule 7 provided for determination of the point of taxation in case of specified services or persons. This rule was substituted by a new rule w.e.f. 01.04.2012. The old rule which existed prior to that date was as below:

“7. Determination of point of taxation in case of specified services or persons. - Notwithstanding anything contained in these rules, the point of taxation in respect of,-

- (a) the services covered by sub-rule (1) of rule 3 of Export of Services Rules, 2005;
- (b) the persons required to pay tax as recipients under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Finance Act, 1994;

(c) individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za), (zzzzm) of clause (105) of section 65 of the Finance Act, 1994, shall be the date on which payment is received or made, as the case may be:

Provided that in case of services referred to in clause (a), where payment is not received within the period specified by the Reserve Bank of India, the point of taxation shall be determined, as if this rule does not exist.

Provided further that in case of services referred to in clause (b) where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist.

Provided also that in case of “associated enterprises”, where the person providing the service is located outside India, the point of taxation shall be the date of credit in the books of account of the person receiving the service or date of making the payment whichever is earlier.”

6. The petitioner is an association of chartered accountants; services rendered by chartered accountants are taxable services u/s 65(105)(s) of the Act. Accordingly, sub-rule (c) of Rule 7 would apply, with the result that the date on which the payment for the services of the chartered accountants is made or received will be deemed to be the date on which the services were provided or rendered.

7. It is not in dispute that consequent to the insertion of Sec 66B into the Act, the rate of service tax was enhanced from 10% to 12%. The

question before us is what would be the rate of tax where (a) the service is provided by the chartered accountants prior to 01.04.2012; (b) the invoice is issued by the chartered accountants prior to 01.04.2012 but (c) the payment is received after 01.04.2012.

8. In the present case there is no dispute that all the services were rendered before 01.04.2012 and even the invoices were raised before that date and it was only that the payment was received after the said date. In such a case, according to the petitioner, Rule 4(a)(ii) of the Point of Taxation Rules, 2011, applies and the point of taxation shall be the date of issuance of the invoice. 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 which are annexed to the writ petition. They are as follows: -

“Circular No.154/5/ 2012 – ST

FNo 334/1/2012- TRU
Government of India
Ministry of Finance
Department of Revenue
Central Board of Excise and Customs
Tax Research Unit
Room No 146, North Block, New Delhi
Dated: 28th March 2012

To

Chief Commissioner of Customs and Central Excise (All)
Chief Commissioner of Central Excise & Service Tax (All)
Director General of Service Tax
Director General of Central Excise Intelligence
Director General of Audit
Commissioner of Customs and Central Excise (All)
Commissioner of Central Excise and Service Tax (All)
Commissioner of Service Tax (All)

Madam/Sir,

Subject: - Clarification on Point of Taxation Rules - regarding.

1. Notification No.4/2012 - Service Tax dated the 17th March 2012 has amended the Point of Taxation Rules 2011 w.e.f. 1st April 2012, inter- alia, amending Rule 7 which applied to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause (105) of section 65 of the Finance Act, 1994. Rule 7 determined the point of taxation in such cases as the date of receipt of payment. The provisions have been amended both in the Point of Taxation Rules 2011 and the Service Tax Rules 1994 such that from 1st April 2012 the payment of tax shall be allowed to be deferred till the receipt of payment upto a value of Rs 50 lakhs of taxable services. The facility has been granted to all individuals and partnership firms, irrespective of the description of service, whose turnover of taxable services is fifty lakh rupees or less in the previous financial year.

2. Representations have been received, in respect of the specified eight services, requesting clarification on determination of point of taxation in respect of invoices

issued on or before 31st March 2012 where the payment has not been received before 1st April 2012.

3. The issue has been examined. For invoices issued on or before 31st March 2012, the point of taxation shall continue to be governed by the Rule 7 as it stands till the said date. Thus in respect of invoices issued on or before 31st March 2012 the point of taxation shall be the date of payment.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

(Shobhit Jain)

OSD, TRU

Fax: 011-23092037

“Circular No. 158/9/ 2012 – ST

F.No 354/69/2012- TRU

Government of India

Ministry of Finance

Department of Revenue

Central Board of Excise and Customs

Tax Research Unit

Room No 146, North Block, New Delhi

Dated : 8th May 2012

To

Chief Commissioner of Customs and Central Excise
(All)

Chief Commissioner of Central Excise & Service Tax
(All)

Director General of Service Tax

Director General of Central Excise Intelligence
Director General of Audit
Commissioner of Customs and Central Excise (All)
Commissioner of Central Excise and Service Tax (All)
Commissioner of Service Tax (All)

Madam/Sir,

Subject: - Clarification on Rate of Tax - regarding.

1. The rate of service tax has been restored to 12% w.e.f. 1st April 2012. Representations have been received requesting clarification on the rate of tax applicable wherein invoices were raised before 1st April 2012 and the payments shall be after 1st April 2012. Clarification has been requested in case of the 8 specified services provided by individuals or proprietary firms or partnership firms, to which Rule 7 of Point of Taxation Rules 2011 was applicable and services on which tax is paid under reverse charge.
2. The rate of service tax prevalent on the date when the point of taxation occurs is rate of service tax applicable on any taxable service. In case of the 8 specified services and services wherein tax is required to be paid on reverse charge by the service receiver the point of taxation is the date of payment. Circular No 154/5/2012 – ST dated 28th March 2012 has also clarified the same. Thus in case of such 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%.
3. The invoices issued before 1st April 2012 may reflect the previous rate of tax (10% and cess). In case of need, supplementary invoices may be issued to reflect the new rate of tax (12% and cess) and recover the

differential amount. In case of reverse charge the service receiver pays the tax and takes the credit on the basis of the tax payment challan. Cenvat credit can be availed on such supplementary invoices and tax payment challans, subject to other restrictions and conditions as provided in the Cenvat Credit Rules 2004.

4. Trade Notice/Public Notice may be issued to the field formations accordingly.

5. Please acknowledge the receipt of this circular. Hindi version to follow.

(Dr. Shobhit Jain)
OSD, TRU
Fax: 011-23093037

9. The grievance of the petitioner is that the circulars cannot override the provisions of the Finance Act, 1994 or the rules made thereunder and in so far as they seek to levy the enhanced rate of service tax of 12% in respect of the 8 specified services, though the services were rendered and the invoices were issued but payments were received after 01.04.2012, are *ultra vires* the Act/ Rules.

10. Before dealing with the grievance of the petitioner, it would be necessary to note that Rule 7 of the Point of Taxation Rules, 2011 was substituted by a new Rule w.e.f. 01.04.2012. The new Rule notified on 17.3.2012 by notification No.4/12-ST is as under :-

“7. Determination of point of taxation in case of specified services or persons.— Notwithstanding anything contained

in these rules, the point of taxation in respect of the persons required to pay tax as recipients of service under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Act, shall be the date on which payment is made:

Provided that, where the payment is not made within a period of six months of the date of invoice, the point of taxation shall be determined as if this rule does not exist:

Provided further that in case of “associated enterprises”, where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.”

11. A comparison of Rule 7 as it existed both before and from 01.4.2012 shows two significant changes. The first change is that while the old Rule referred to recipients of service only in respect of services notified under Section 68(2) and did not make any reference to the recipients of the service in either Clause (a) or Clause (c), the new Rule covers only the recipients of service in respect of services notified under Section 68(2). The second significant change is that the reference to services covered by sub-rule (1) of Rule 3 of Export of Services Rules, 2005 in Clause (a) of the old Rule and the reference to individuals or proprietary firms or partnership firms providing taxable services referred to in sub-clauses (g), (p), (q), (s), (t), (u), (za) and (zzzzm) of clause 105

of Section 65 of the Finance Act, 1994 in Clause (c) of the old Rule does not find any mention in the new Rule. The result is that the new Rule 7 inserted w.e.f. 01.04.2012 was not applicable to services rendered by chartered accountants under Section 65(105)(s) of the Act. Thus the position is that the new Rule 7 with effect from 01.04.2012 does not provide for the determination of point of taxation in respect of services rendered by chartered accountants. Both the circulars which are impugned in the present writ petition proceed on the erroneous basis that Rule 7 inserted w.e.f. 01.04.2012 covers the services rendered by chartered accountants. Circular No.154 when it states that invoices issued on or before 31.3.2012 shall continue to be governed by Rule 7 as it stood before 01.04.2012 is erroneous because on and from 01.04.2012, the old Rule 7 was no longer in existence, having been replaced by new Rule 7. Circular No.158, insofar as it states that in the case of the eight specified services (which includes the services of chartered accountants), if the payment is received or made, as the case may be, on or after 01.04.2012, the service tax needs to be paid at 12% is again without any statutory basis. The new Rule 7 does not cover the services which were earlier referred to in Clause (c) of Rule 7 (including services of chartered

accountants) as it existed up to 31.3.2012. The circular seems to have overlooked this crucial aspect.

12. We still have to reckon with Section 66B of the Finance Act, 1994 inserted by the Finance Act, 2012 w.e.f. 1.7.2012 vide notification No.19/2012-ST, dated 5.6.2012. This Section is as follows :-

“66B.Charge of service tax on and after Finance Act, 2012 – There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent, on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.”

13. Rule 4 of the Point of Taxation Rules, 2011 which has continued even after 01.04.2012 is clearly the answer. We have already extracted the Rule hereinabove. It provides for a specific situation namely determination of the point of taxation in case of change in effective rate of tax. The words earlier used in the Rule were “change of rate”. In the place of these words, the words “change in effective rate of tax” were inserted w.e.f. 01.04.2011. This was done by the Point of Taxation (Amendment) Rules, 2011 vide notification No.25/11-ST dated 31.3.2011. The petitioner has pointed out to sub-clause (ii) of Clause (a) of Rule 4. This Rule applies notwithstanding anything contained in Rule

3 which provides for the determination of point of taxation. As per Rule 4, whenever there is a change in the effective rate of tax in respect of a service, the point of taxation shall be determined in the manner set out in the Rule. Clause (a) provides for a case of taxable service which was provided before the change in effective rate of tax has taken place. Clause (b), in contrast provides for a case of a taxable service which has been rendered after the change in the effective rate of tax has taken place. W.e.f. 01.07.2012, there has been a change in the effective rate of tax from the earlier 10% to 12%. In the petitioner's case, the dispute is only with reference to the services provided by the chartered accountants before 01.04.2012. Clause (a) of Rule 4 would therefore govern its case. This clause provides for three further situations. Clause (i) covers a case where an invoice for the service was issued and the payment was also received after the change in the effective rate of tax. In such a case, the date of payment or the issuance of the invoice, whichever is earlier, will be deemed to be the date on which the service was rendered and that will be the point of taxation. The present case is not governed by this sub-clause. Sub-clause (iii) takes care of a case where the payment is also received before the change in the effective rate of tax, but the invoice for

the same was issued after the change. In such case the point of taxation shall be the date of payment which will be deemed to be the date on which the service was provided. The petitioner's case is not governed by this sub-clause either.

14. The case of the petitioner is governed by sub-clause (ii). Under this clause where the taxable service has been provided before 01.04.2012 and the invoice was also issued before 01.04.2012, but the payment is received after 01.04.2012, then the date of issuance of invoice shall be deemed to be the date on which the service was rendered and, consequently, the point of taxation.

15. The result of the discussion will be 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%. 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 continued to govern the case notwithstanding the introduction of the new Rule 7 which does not provide for the contingency that has arisen in the present case.

16. In view of the foregoing discussion the circulars are quashed as

being contrary to the Finance Act, 1994 and the Point of Taxation Rules, 2011. The Point of Taxation Rules, 2011 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.

17. 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:-

“7. 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.”

18. The writ petitions are accordingly allowed but in the circumstances, with no order as to costs. Since we have quashed the Circulars, prayer (b) in the writ petition becomes infructuous.

R.V.EASWAR, J

BADAR DURREZ AHMED, J

FEBRUARY 01, 2013

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