

CHARTERED WORLD

Presentation

Applicable for May 2013 Examinations

Point of Taxation Rules, 2011

With Recent Amendment

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Point of Taxation Rules, 2011 with recent Amendments

BACKGROUND OF RULES

I will start my article with the wordings of Finance Minister while presenting the Budget proposal for the financial year 2011-12, the Finance minister said that in order to "achieve a closer fit between the present service tax regime and its GST successor "it is important to bring the point of taxation rules, 2011 which would shift the basis for collection of tax from cash to accrual system.

The objective to bring POT Rules is to recover the revenue from service sector which is at present 59% of the GDP which was just 50.9% in the year 2000-01, a sharp increase in this sector also attracted the attention of our Finance Minister to bring these rules.

Prior to 01-04-2011 as per rule 6(1) of Service Tax Rules the service tax was required to be paid to the credit of Central Government by the 6th/5th day of the next month in which payment has been received towards value of taxable services.

By following this practice the revenue to the Government account got deferred some time indefinitely due to non receipt of fund or on account of bad debts.

The Rules has been introduced by Notification No. 18/2011-ST dated 01-03-2011 to prescribe the time when the service tax is legally due to the exchequer. In this article I have made an attempt to cover all the amendment till 20-12- 2012 in Point of Taxation Rules, 2011.

Let me make clear to all of you that though Point of Taxation Rules, 2011 has been made applicable from 01-04-2011 but an option was given in Rule 9 to pay tax on accrual basis w.e.f. 01-07-2011.

Basic Structure of POT Rules, 2011

Rule 3: Main Rule (This Rule is attracted when no specific rule is prescribed for any situation)

Rule 4: Determination of point of taxation in case of change of rate of tax (This Rule is very significant in case there is change in effective rate of tax)

Rule 5: Payment of tax in cases of new services (If a new service has been introduced for the first time then what will be the rate of tax applicable to the newly introduced service and its taxability)

Rule 6: Determination of point of taxation in case of continuous supply of service (Omitted by the Point of Taxation (Amendment) Rules, 2012, w.e.f. 1-4-2012 and this rule has been merged with Rule 3 of the POT Rules, 2011)

Rule7: Point of taxation in case of Reverse charge mechanism (This Rule also determines the point of taxation in case of associated enterprises also)

Rule8: Point of taxation in case of Copyright Services, etc.

Rule8A: Where the point of taxation cannot be determined as per these rules (Central Excise Officer determines the Point of Taxation)

Rule 9: Transitional Provisions (If the Service has been completed or the invoice has been issued up to 30-06-2011 then these rules shall not be applicable to the Service Provider)

Analysis of Rule 3:

This Rule 3 is main rule in the POT Rules and if none of the specific rule is applicable to the service provided then this rule comes into existence and Point of Taxation is determined in terms of this rule.

Point of taxation shall be the earlier of the two events:

1. The time when the invoice for the service provided or to be provided is issued OR
2. Where the person providing the service, receives a payment

Provide the Invoice has been issued in terms of Rule 4A of Service Tax Rules, 1994 and if the invoice has not been issued in terms of Rule 4A of above rules then point of taxation shall be the date of completion of Provision of Service.

Time limit of Rule 4A for issuance of invoice:

In case of Banking and other financial Services: Within 45 days from the date completion of provision of Service.

Services other than Banking and Financial Services: Within 30 days from the date of completion of Provision of Service.

The important point to note is that the Rule 6 has been omitted and the same has been merged with Rule 3, now the Point of Taxation of continuous supply of Service shall be determined with in terms of rule 3 only.

Meaning of Continuous supply of Service: The definition of continuous supply of service is given in two parts -

- (i) continuous supply of service means any service which is provided or **agreed** to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time,
- (ii) Notified services by the Central Government with or without any condition irrespective of its duration

Notification No. 38/2012-ST dated 01-07-2012

Earlier 5 class of service was prescribed by the Notification No. 28/2011-ST dated 01-04-2011 and now substituted by the Notification No. 38/2012-ST dated 01-07-2012 w.e.f 01-07-2012 and two classes of Services has been prescribed as Continuous supply of Services ie of "telecommunication service and service portion in execution of a works contract".

TEST FOR DETERMINING COMPLETION OF SERVICE

In many situations it is not possible to issue invoices within 30 days of the completion of the service since the exact, date of completion of service is difficult to identify. Instances have been given where the task of providing the service may be physically accomplished, but certain other formalities are required to be completed from the client's end before an invoice can be issued.

This issue has been considered by the CBEC and they have tried to clarify the same vide Circular No. 144/13/2011-ST dated 18-07-2011.

Extracts of the Circular No. 144/13/2011-ST dated 18-07-2011:

This would include not only the physical part of providing the service but also the completion of all other auxiliary activities that enable the service provider to be in a position to issue the invoice. Such auxiliary activities could include activities like measurement, quality testing etc. which may be essential pre-requisites for identification of completion of service. The test for the determination whether a service has been completed would be the completion of all the related activities that place the service provider in a situation to be able to issue an invoice. However such activities do not include flimsy or irrelevant grounds for delay in issuance of invoice.

A comprehensive chart indicating the Point of Taxation:

Sr. No.	Date of completion of services	Date of invoice	Date on which payment is received	Point of Taxation	Remarks
1.	April 10, 2011	April 20, 2011	April 30, 2011	April 20, 2011	Invoice issued in 30 days and before receipt of payment
2.	April 10, 2011	May 26, 2011	April 30, 2011	April 10, 2011	Invoice not issued within 30 days and payment received after completion of service
3.	April 10, 2011	April 20, 2011	April 15, 2011	April 15, 2011	Invoice issued in 30 days but payment received before invoice
4.	April 10, 2011	May 26, 2011	April 5, 2011 (part) April 25, 2011 (remaining)	April 5, 2011 and April 10, 2011 for respective amts.	Invoice not issued in 30 days. Part payment before completion, remaining later

Hope this table removed all your queries related to Rule 3 but again I will attract the attention of my readers towards one more burning issue in Rule 3 of Point of Taxation Rules, 2011.

Just a moment back I have shared a Circular of CBEC which was clarifying the doubts regarding completion of Provision of Service and now the second issue is what is the date of Payment to be considered in Rule 3 while prescribing the Point of Taxation and the answer is very simple ie when the cheque or Cash has been received by the person providing the Service. Specific Provisions are also given vide Rule 2A which is as under.

Extract of Rule 2A of POT Rules, 2011:

For the purposes of these rules, "date of payment" shall be the earlier of the dates on which the payment is entered in the books of accounts or is credited to the bank account of the person liable to pay tax:

The things would have been very simple if there was no further Proviso in the above Rule 2A, and the proviso has covered an aspect of the case which can be understood with the help of this illustration:

Illustration:

ABC Pvt. Ltd. has received a cheque for the service provided to XYZ Pvt. Ltd. and on 20-03-2012 and the above cheque was not deposited by ABC Pvt. Ltd. immediately into the Bank Account and the same was deposited in the month of April and the same has been received in the Bank on 20-04-2012, from 01-04-2012 the rate of tax was changed from 10.30% to 12.36%.

Now what is the date of Payment?

Of course **20-03-2012**, in terms of Rule 2A of POT Rules, 2011.

But I do not agree with you since I have the Proviso to Rule 2A and as per the Proviso the date of credit in the Bank Account shall be the date of payment if the following all conditions satisfied:

- (i) If there is change in effective rate of Tax between the date of entry in the books of account and the date of receipt in the Bank account and
- (ii) The credit in the Bank account is after 4 working days from the date of such change and
- (iii) The payment made by an instrument which is credited in the Bank Account

Hope you understood the Proviso to Rule 2A and now I will highlight the impact of the Proviso on the Pocket of Tax Payer.

If in the above case the cheque was deposited in the Bank in such a manner that it get credited in the Bank Account within 4 working days from 01-04-2012 then the date of payment would have been 20-03-2012 rather 20-04-2012 and the rate of tax applicable would have been 10.30% rather 12.36%.

So it is advisable for future to avoid the applicability of proviso to Rule 2A and try to deposit the cheque within time if there is change in effective rate of Tax.

(Circular No. 334/1/2012-TRU dated 16-03-2012)

Rule 4 of POT Rules Change in effective rate of tax:

Now coming to again one of the burning issue in the POT rules that which rate are applicable to my service if there is change in effective rate of tax.

To understand this concept we have to understand the meaning of three terms which all of us know i.e.

- (i) Date of issue of Invoice
- (ii) Date of Receipt of Payment
- (iii) Completion of Provision of Service

The all the three terms have been explained by me earlier in this article and now need recall of all those explanations to understand Point of Taxation in case of Change in effective rate of tax.

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

Case	Point of Taxation
Where the invoice for the Service has been issued and the payment received after the	Point of Taxation shall be date of payment or issuing of invoice, whichever is earlier

change in effective rate of tax	
Where the invoice for the Service has been issued prior to the change in effective rate of tax and the payment received after the change in effective rate of tax	The point of taxation shall be the date of issuing of invoice
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

Case	Point of Taxation
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	Point of Taxation shall be date of payment
Where the invoice has been issued and the payment for the invoice received before the change in effective rate of tax	Point of taxation shall be the date of receipt of payment or date of issuance of invoice, whichever is earlier
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

Hope this charts clear the doubts in your mind relating to change in effective rate of tax and Point of Taxation.

Now one more issue which is still not discussed so far ie what is meaning of change in effective rate of tax?

If I have to reply in one line sentence then Change in effective rate of tax means Upward or downward change in Basic rate of Tax ie rate of tax was enhanced from 10.30% to 12.36% from 01-04-2012 it was an example of Change in effective rate of tax, but definition has described some other situations which are also called in change in effective rate of tax and attracts Rule 4 of POT Rules.

The situations are given below for your reference:

- (i) Change in the rate of abatement as per Notification No. 26/2012-ST Dated 20-06-2012
- (ii) Change in the rate of composition Scheme in Service tax
- (iii) Any other notification issued, altered or amended and which has the effect of change in taxability of any service

This view has been also confirmed by the CBEC vide their Letter F.No.341/34/2010 TRU,dated 31-03-2011.

Point of Taxation in case of New Services (Rule 5 of Point of Taxation Rules, 2011)

Where a service is taxed for the first time or there is addition in the existing taxable services this will be governed by the Rule 5.

Only two types of situations are covered in Rule 5:

Where the Invoice has been issued and the payment received against such invoice before such service became taxable	No tax shall be Payable
Where 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.	No tax shall be Payable

Major of Caution in Rule 5:

This rule covers only two types of situation mentioned above all other situation shall be covered by the general Rule 3; this has been explained with the help of under mentioned illustration.

Where the date of invoice and the date of completion of Service is before the Service became taxable but the payment has been received after the date when the service became the taxable.

This situation has not been covered by the Rule 5 and the same shall be governed by the Rule 3 and Point of Taxation shall be determined by the said Rule.

The Point of taxation in the above case is the date of issue of invoice or date of receipt of payment whichever is earlier i.e. the date of issue of invoice and service is not taxable in this situation also since on the date of payment the service is not a taxable Service.

Point of Taxation in case of Reverse Charge Mechanism (Rule 7)

The Point of Taxation in case of reverse charge Mechanism is the date when the payment is made to the person providing the service but subject to one condition that payment should be made within 6 months from the date of issue invoice.

If the payment is not made within 6 months then the point of taxation shall be governed by Rule 3 of the above rules.

Liability to pay tax shall be fastened and interest shall be charges @ 18% p.a on the payment made by the delay.

Point of Taxation in case of Associated Enterprises (Rule 7)

Where the person providing the service is located outside India, the point of taxation shall be earlier of the following:

The date of debit in the books of account of the person receiving the service or

Date of making the payment.

The expression Associated enterprises shall mean the associated enterprises explained in section 92A of the Income Tax Act, 1961.

Point of Taxation in case of Specified Professionals from 01-04-2012

Before explaining the Point of Taxation in case of specified professionals we have to go in the background of the point of taxation rule, 2011.

From 01-04-2011 to 31-03-2012

From 01-04-2011 a special provision Rule 7(c) was applicable to Individuals, proprietary firm or Partnership Firm providing any of the following taxable Service:

Architect service, CA, CS, CWA, Consulting engineer, Interior decorator, scientific or technical consultancy and legal consultancy service.

The point of taxation was the date of receipt of payment without any restriction on the turnover of the specified professional, but the above provision was applicable if they are providing the above services in their respective capacities.

Sr. No.	Service provided in the capacity	Class of service provided	Point of Taxation
1.	Chartered Accountant	Chartered Accountant Service	As Rule 7(c) the point of taxation is the date of receipt of payment
2.	Chartered Accountant	Management Accountant Service	As per Rule 3 the point of taxation is the date of invoice or the date of receipt of payment whichever is earlier

Whether LLP are covered in the definition of Firm?

Yes with effect from 01-04-2012, a new sub clause (cd) has been inserted in the Rule 2 of Service tax rules, 1994 and now the LLP are also called the Firm and are eligible for all the benefits available to the Partnership Firm.

From 01-04-2012

The Rule 7(c) has been omitted from service tax law and a new Proviso has been inserted in the Rule 6 (1) of service tax Rules, 1994.

Now the from 01-04-2012 the benefit of cash basis payment of service tax has been extended to all the Individuals, Proprietary Firm and Partnership Firm including LLP whose aggregate value of taxable service in the preceding Financial year is up to 50 lacs rupees, these persons has the option to pay tax on cash basis up to 50 Lakhs in the current Financial year

Burning Issue in above matter:

The rate of Service tax has been increased from 10.36% to 12.36% from 01-04-2012, what rate shall be applicable to the service provided and bills raised before 01-04-2012 by the following class of persons and the payment has been received after 31-03-2012.

Of course the rate shall be 12.36% and the same has been confirmed by CBEC vide their circular 154/5/2012-ST dated 28-03-2012 and again the same was reiterated vide Circular No. 158/9/2012-ST dated 08-05-2012.

Stay by the Delhi High Court in the above matter vide Stay application dated W.P. (C) 4456/2012 & CM No. 9237/2012

The Delhi high court has given a stay on the above differential recovery of 2% vide their Stay order dated 27-07-2012.

Determination of point of taxation in case of copyrights, etc. (Rule 8)

In respect of royalties and payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed, and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration, the service shall be treated as having been provided each time when a payment in respect of such use or the benefit is received by the provider in respect thereof, or an invoice is issued by the provider, whichever is earlier.

Section 67A of Finance Act inserted with effect from 28-05-2012

From 28-05-2012 Section 67A has been inserted to determine the rate of tax and rate of exchange applicable to a class of Service. From 28-05-2012 the Point of Taxation Rules, 2011 are only relevant to determine the due date of payment of service tax.

The rate of tax shall be determined by newly inserted Section 67A which is given below for your kind reference:

The rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided.

Treatment of Advance not exceeding Rs.1000 from 01-04-2012

As a measure of added facilitation, an option has been provided to determine the point of taxation in respect of small advances up to Rs. 1000, in excess of the amount indicated in the invoice, on the basis of invoice or completion of service rather than payment. Such provision is expected to address the accounting problems faced by service providers in telecommunications, credit card businesses who regularly receive minor excess payments from their customers.

This provision is made mainly for telephone companies and credit card companies. In many cases (particularly in e-payments) the customer pays amount slightly more than the bill amount (which is adjusted in next bill). Legally, in such case, it is 'advance' and Invoice is to be issued and service tax is to be paid this is impractical and hence this relaxation has been given to such companies.

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