

## Section 67A Vs. Point of Taxation – Contradictions not cleared

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Whenever there is a change in rate of tax or introduction of new levy like swachh bharat cess (SBC) or krishi kalyan cess (KKC), confusion starts in the minds of assessee on applicability of new rate of tax or cess. This is mainly due to contradictions which exist between Section 67A of Finance Act 1994 and point of taxation provisions. In the recent budget, Government has made attempt to resolve this issue. In this article, we have tried to analyse if the contradictions and the position after amendment in Section 67A.

In June 2012, concept of negative list of services was introduced for taxing the services. During the introduction, a new Section 67A was introduced in Finance Act 1994 effective from 28<sup>th</sup> May 2012 which read as below:

*“67A. 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.***

Section 67A makes it clear that the rate of tax would be rate as applicable at the time when taxable services provided or agreed to be provided. Until introduction of this Section, Rule 5B of Service tax Rules 1994 was effective which also provided that rate of tax would be the rate prevailing at the time when the services are deemed to have been provided as per Point of Taxation Rules 2011 (POT Rules).

However, after removal of Rule 5B, Section 67A when read with POT Rules does not provide clarity. Rule 4 and Rule 5 of POT Rules do not sync with Section 67A as these rules always do not consider time of providing taxable services as taxation point. For example, clauses in Rule 5 do not consider date of providing taxable service for levy of KKC but considers only invoice date and payment date. In fact, strict interpretation would lead to conclusion that KKC is payable even on bills outstanding as on 1<sup>st</sup> June 2016 due to which presently, whole service industry is worried about.

The basic rule in understanding law is that provisions of Act would prevail over provisions in Rules. If we go by this rule, then Section 67A would prevail and provisions of POT Rules would be redundant. Considering the decision of

honourable Supreme Court in the case of *CCE vs. Vazir Sultan Tobacco Co. Ltd.* [1996 (83) ELT 3 (SC)], there cannot be any tax liability if the taxable event happened before introduction of levy.

With an intention to synchronise POT Rules provisions with Section 67A, the following new clause (2) has been introduced with effect from 14<sup>th</sup> May 2016 in Section 67A:

*"The time or the point in time with respect to the rate of service tax shall be such as may be prescribed"*

POT Rules was also amended vide notification no.10/2016-ST dated 01-03-2016 to provide that POT Rules are framed as per Section 67A(2). This amendment is effective from 14<sup>th</sup> May 2016 which is date of enactment of Finance bill 2016. TRU circular issued with respect to service tax amendment also makes it clear that the amendment is made to overcome contradictions between Section 67A and POT Rules.

However, following issues are still unclear for assessee and professionals:

- a) Whether the amendment in Section 67A (2) has retrospective impact or it is only prospective?
- b) Whether introduction of new clause has really solved the problem?

Strict interpretations imply that the amendment is prospective and not retrospective. If it is held so, then POT Rules could be held as invalid prior to introduction of Section 67A (2). High court has struck down levy of service tax on services procured from outside India prior to 18<sup>th</sup> April 2006 as Section 66A was not effective prior to this date. Secondly, even after introduction of new clause in Section 67A, the contradictions still continue. This is for the reason that Section 67A (1) and Section 67A(2) are themselves contrary to each other. Sub-clause (1) provides that rate of tax would be as applicable when services are provided or agreed to be provided. On the other hand, Sub-clause (2) provides that the point of taxation should be as prescribed in POT Rules.

**Conclusion:** It could be concluded that the Government has failed to resolve the issue even by insertion of new Section 67A (2) effective from 14<sup>th</sup> May 2016. Corrective action is necessary to overcome the defect and clear the confusion which

exists in minds of assessee and professionals. A representation from industrial association could prompt the Government to take action in this regard.

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