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ARTICLES 2017



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Treading the GST Path XXII

GST Vs Service Tax – What is payable during transition?

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Various questions are lingering in the minds of all concerned on the following issues.

Question 1 : A company has received GTA services in June 2017. They are making payment to the GTA in July 2017. What is the tax payable - Service Tax or GST?

Question 2 : Based on the answer to question 1, how to take input tax credit (ITC) of such tax paid?

Question 3 : Royalty payable to foreign parent company for the quarter April to June 2017 is booked on 30th June 2017 but no payment made. What tax is payable and how to take input tax credit of it?

Question 4 : When an activity which was under reverse charge in Service Tax, becomes Forward charge under GST law, how the liabilities have to be determined?

Let us try to find answers to the above questions.

Before proceeding further, we have to note certain basic issues.

The law is well settled in the context of Central Excise that in case of fresh levies, the same shall not apply on the goods manufactured prior to introduction of the levy, though the goods were removed after the levy, but in case of withdrawal of exemptions, excise duty is payable even for the goods manufactured during exemption period, but cleared after withdrawal of exemption. {Wallace Flour Mills Company Ltd. VS CCE – 1989 (44) ELT 598 SC & CCE Vs Vazir Sultan Tobacco Co. Ltd. – 1996 (83) ELT 3 SC}. That was in the context that the levy of excise duty is on manufacture but the same is payable only upon removal of goods.

The next question is whether GST is a new levy or it is only a result of subsuming of all existing duties / taxes and hence cannot be considered as a new tax? For the time being, let us leave the question open.

Let us note some of the provisions under the Finance Act, 1994.

Statutory provisions under the Finance Act, 1994.

SECTION 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 fourteen 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.

SECTION 67A. Date of determination of rate of tax, value of taxable service and rate of exchange. — (1) 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.

Explanation. — For the purposes of this section, "rate of exchange" means the rate of exchange determined in accordance with such rules as may be prescribed].

(2) The time or the point in time with respect to the rate of service tax shall be such as may be prescribed.

Rule 2 (e) of the Point of Taxation Rules, 2012.

"point of taxation" means the point in time when a service shall be deemed to have been provided;

It may be observed from the above that the levy of service tax is on "value of taxable services provided or agreed to be provided". But the time when the service shall be deemed to have been provided, i.e. the Point of Taxation (POT) would be determined with reference to the Point of Taxation Rules, 2012, framed in exercised of the powers under Section 67 A (2) and Section 94 (2) (a) and (hhh) of the Finance Act, 1994.

So irrespective of the actual time of provision of service, the time of provision of service has to be determined only with reference to POT Rules, under the Service tax law. This would mean that the levy of service tax is on services provided, but when such services are deemed to be provided has to be understood with reference to the POT, as determined vide the Point of Taxation Rules, 2012. In other words, POT cannot be equated to mere "removal" under Central Excise law laying down the time at which service tax is payable but is a substantial provision to determine when the service is provided or agreed to be provided.

We should also note that the Finance Act, 1994 has been rescinded vide Section 174 of the CGST Act, 2017 with appropriate saving clauses and the scope and effect of such saving clauses have to be considered.

With the above background, let us deal with some specific situations.

Situation 1: In cases, where GTA service is liable to service tax under reverse charge (the recipient covered under the specified categories) the POT, as per Service Tax law is Date of payment. So, when no payment is made for the bill raised by a GTA in June 2017, the POT has not at all arisen under Service Tax law.

One possible view is that since Finance Act, 1994 has been rescinded with saving clause, despite the recession of Finance Act, 1994, for the above case, on the date of making payment, the service recipient would be liable to pay only Service Tax. If we take such a view, the service recipient cannot take credit for such service tax paid by him as Section 142 (5) covers only situations where service is received post 01.07.2012, for which Service Tax has been paid earlier. In the instant case, service has been provided / received prior to 01.07.2017 but service tax is payable after 01.07.2017. Though we cannot decide the issue based on credit entitlement, we have to take a balanced view.

Under GST law, GST is leviable under Section 9 of the Act on all supplies. As per Section 12 of the Act, the liability to pay GST shall arise at the time of supply, as determined under Section 12 of the CGST Act. So section 9 and 12 have to be read harmoniously. Irrespective of the time of actual supply of service, time of supply has to be decided only with reference to Section 12. As per section 12 (3), time of supply in case of reverse charge cases is date of payment. So, for a GTA service received prior to 01.07.2017, when

payment is made after 01.07.2017, as per Section 12 (3), the time of supply is such date of payment and accordingly, the recipient has to pay GST only. Once it is a GST payment taking ITC of the same also would not pose any problem. To conclude, in respect of reverse charge liabilities (both under Service Tax and GST), though services were received prior to 01.07.2017, if payment is made on or after 01.07.2017, only GST is payable and not Service Tax.

Situation 2 : Let us take a case where the service provider is liable to pay service tax (non reverse charge cases). The POT as per Service tax law would be the date of invoice or date of payment whichever is earlier. So, for a service provided in June 2017, if invoice has also been raised by him in June 2017, he would be liable to pay Service Tax. On the basis of such invoice, credit can be taken by the recipient in June 2017 itself, while filing return for June 2017 and such credit could be carried forward as per Section 140 (1) of the CGST Act.

In the same case, if the service provider raises an invoice in the month of July 2017, for the services provided in June 2017 (within the time prescribed for raising invoice), if we apply the saving clause for Finance Act, 1994, he would be liable to pay Service Tax. But if we apply the time of supply provisions under the CGST Act, he shall be liable to pay GST, as time of supply is the date of invoice as per Section 13 of the CGST Act. Since time of supply under GST act is defined with reference to date of invoice, irrespective of the actual time of supply of service, it is safe to conclude that only GST is payable in such case, where invoice is raised post 01.07.2017, even for the services provided prior to 01.07.2017, if such invoice has been raised within 30 days. Availing ITC of such GST on the basis of such invoice also would not pose any problem.

Situation 3 : Let us take the case of transactions with associated enterprises, where royalty payable for foreign parent company is accounted on 30.06.2017. For this the POT under Service Tax law would be the date of such account and Service Tax would be payable. If such service tax is paid on or after 01.07.2017, availing ITC of the same would not be possible as none of the transitional provisions cover availment of service tax credit under GST law, for the services received prior to 01.07.2017. As the POT falls under Service Tax law, for such cases GST cannot be paid also. As accounting of this on the basis of accrual at the end of the quarter is an accounting requirement, the same cannot be accounted post 01.07.2017 also.

This seems to be a lacunae which has to be addressed by the Government. Suitable transitional provisions need to be incorporated, to allow credit for old taxes post 01.07.2017 even when the services are received prior to 01.07.2017.

Situation 4 : Let us take another case of manpower supply. The manpower supply service provider is registered with Service Tax and also migrated into GST. When he provides service to companies, it attracts reverse charge and in other cases, it is forward charge under Service Tax law. Under GST law, since he is registered, no reverse charge would apply.

Let us assume that the said registered manpower supply agency has provided service to a company in June 2017 and also raised an invoice in June 2017 itself. But payment for the same would be made by the company in July 2017. In this case, the POT as per Service tax law would be the date of payment, i.e. July 2017. But in July 2017, the activity would not attract reverse charge, as the service provider is registered under GST. At the POT, if reverse charge is not applicable, that cannot erase the tax liability. The service was provided in the month of June 2017, but as per the provisions of the Service Tax law, the POT has not arisen till 30.06.2017, as the said service was covered under reverse charge. When the payment is made in July 2017, the POT arises, but there is no reverse charge

liability. So, in such situation, the service provider would be liable to pay GST. To amplify, for all the bills raised by such manpower supply agency in June, 2017 or earlier, for which payment has not been received by them till 30.06.2017, recipient of service would pay GST, if reverse charge is applicable under GST (if the manpower supply agency is not registered under GST) or the manpower supply agency itself would pay GST if they are registered and reverse charge is not applicable.

Reference is also invited to the following provision under the CGST Act.

Section 142 (11) (b).

(b) notwithstanding anything contained in section 13, no tax shall be payable on services under this Act to the extent the tax was leviable on the said services under Chapter V of the Finance Act, 1994;

This protection would apply only when there is a levy under the Finance Act, 1994. If POT has not at all arisen upto 30.06.2017, there would be no levy under the Finance Act, 1994 and this section would not help.

To conclude, the criteria to be applied for different situations would be, if the POT has arisen under Service Tax, Service Tax has to be paid and if the POT has not arisen upto 30.06.2017 under Service Tax Law and if Time of supply arises post 01.07.2017, GST is payable.

Readers may kindly appreciate that the situation of several old taxes getting subsumed in the name of a new tax is arising for the first time in our country and whatever view is expressed above cannot be claimed either as completely correct or be rubbish as utterly erroneous. Ultimately it is for the Courts to correctly interpret the provisions and lay down the law.

To sum up,

S.No.	Situation	Liability	ITC entitlement for the recipient
1	GTA services received prior to 01.07.2017 for which payment is made by the service recipient (liable under RCM), after 01.07.2017	Service Recipient to pay GST.	Eligible
2	Manpower supply services received by a company prior to 01.07.2017 and no payment made upto 30.06.2017. From 01.07.2017 reverse charge not applicable as manpower supply agency is registered under GST.	Service provider – to pay GST.	Eligible.
3	Non RCM services provided prior to 01.07.2017 and invoice also raised prior to 01.07.2017	Service provider to pay Service Tax.	Eligible. Could be availed under last ST 3 return.
4	Non RCM services provided prior to 01.7.2017 and invoice has been issued on or after 01.07.2017 (within 30 days from provision of service)	Service provider to pay GST.	Eligible. Could be availed under GST return.
5	Amount payable to “associated enterprises” accounted prior to 01.07.2017	Service recipient to pay Service Tax.	If such Service tax is paid on or after 01.07.2017, credit availment would not be possible, in the absence of any enabling transitional provision.
6	Amount payable to “associated enterprises” accounted on or after 01.07.2017	Service recipient to pay GST.	Eligible.
7	Advance received by service provider prior to 01.07.2017, for the service to be provided after 01.07.2017.	Service provider to pay Service Tax. No need to pay GST again when service is provided, as per Section 142 (11) (b)	Credit could be availed by the recipient in last ST 3.

(Published in www.taxindiaonline.com on 08.07.2017)

