

Ready Reckoner on KK CESS and the New services

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These Ready Reckoner has to be read along with the detailed analysis appended at the end.

| S.No. | Query | Answer | Remarks |
|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1 | Various service providers have provided services to us before 01.06.2016 and issued invoices also prior to 01.06.2016. We have not yet paid them. They are asking us to pay the same before 31.05.2016 and otherwise KK Cess is payable. Are we liable to pay KK CESS in such cases? No. No new tax can be demanded when the service was provided prior to the levy of new tax. | No | No new tax can be demanded when the service was provided prior to the levy of new tax. |
| 2 | We are providing taxable services and provided such services before 01.06.2016 and also issued invoices prior to this date and we have not yet received payments for the same. Are we liable to pay KK Cess in such cases, if we receive payment on or after 01.06.2016? | | |
| 3 | We have paid advance amount before 01.06.2016 for provision of taxable services to a service provider, along with Service Tax and SB Cess. The service will be provided after 01.06.2016. Are we liable to pay KK Cess also? | No | Rule 5 of POTR, 2011. |
| 4 | We are a service provider and we have received advance amount before 01.06.2016 for provision of taxable services, which would be provided after 01.06.2016. We have already paid service tax and SB Cess in this case. Are we liable to pay KK Cess also, as the service would be provided after 01.06.2016? | No | Rule 5 of POTR, 2011. |
| 5 | We have provided taxable services to a customer in March 2016 but we have not issued any invoice so far. If we raise the invoice after 01.06.2016, are we liable to pay KK Cess also? | No | No new tax can be demanded when the service was provided prior to the levy of new tax. |
| 6 | We have been receiving some continuous supply of services like insurance, etc. What is the KK Cess liability in such cases. | | If the invoice has been raised for such services and payment is also made prior to 01.06.2016, there will be no liability to pay KK Cess in such cases, even for the portion of service to be provided after 01.06.2016 (Rule 5 of POTR, 2011). |
| 7 | One service provider has provided service to us on 15.04.2016 and he has not raised any invoice until 31.05.2016. If he raises invoice in June 2016, is he liable to charge KK CESS? | No | No new tax can be demanded when the service was provided prior to the levy of new tax. |
| 8 | We are a manufacturer of excisable goods and paying excise duty. We receive various input services on which KK Cess would be paid and under reverse charge also we would be paying KK Cess. Can we take Cenvat Credit of KK Cess and utilise it for payment of Excise duty. | No | Only a service provider can take credit of KK Cess. Rule 3 (1a) of CCR, 2004. |
| 9 | We are a manufacturer of excisable goods and paying excise duty. We also provide taxable services. We receive various input services on which KK Cess would be paid and under reverse charge also we would be paying KK Cess. What is the Cenvat Credit entitlement of KK Cess in such cases. | | The KK Cess paid on input services which are used for providing output services can be taken and used for payment of KK Cess on output services provided. The KK Cess paid on input services which are used in your manufacturing activity cannot be availed as cenvat credit. Rule 3 (1) (a) and Rule 4 (7)(d) of CCR, 2004. |
| 10 | We are liable to pay service tax on various services, under reverse charge. The KK Cess payable in such cases can be paid from our cenvat credit? | No | 10th Proviso under Rule 3 (4) of CCR, 2004. |
| 11 | We have provided taxable service before 01.06.2016 and received part payment in advance, before 01.06.2016 and paid Service tax and SB Cess thereon. We have also raised an invoice for the advance received. For the remaining amount we would raise invoice after 01.06.2016. Are we liable to charge KK Cess on this? | No | No new tax can be demanded when the service was provided prior to the levy of new tax. |

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|-------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------|-------------------------------------------------------------------------------------------------------------------------------|
| 1 | We have engaged an Indian Shipping agency for our imports and the import was made in April 2016 and they have also issued invoice in May 2016. We are yet to make the payment. Whether we have to pay service tax also to them? | No | No service tax can be levied for the services provided when it was not taxable. |
| 2 | We have paid the entire ocean freight in advance and engaged an Indian Shipping company for our imports. The imports are going to be made in June 2016. Whether we are liable to pay service tax? | No | Rule 5 of the POTR, 2011 |
| 3 | We have engaged a foreign Shipping agency for our imports and the import was made in April 2016 and they have also issued invoice in May 2016. We are yet to make the payment. Whether we have to pay service tax under reverse charge when we make payment to them after 01.06.2016? | No | No service tax can be levied for the services provided when it was not taxable. Further third proviso to Rule 7 of POTR, 2011 |
| 4 | We have paid the entire ocean freight in advance and engaged a foreign Shipping company for our imports. The imports are going to be made in June 2016? Whether we are liable to pay service tax under reverse charge? | No | Rule 5 of POTR, 2011. |
| 5 | We have made payments to Government prior to 01.04.2016 for various services to be provided by Government. The service will be provided after 01.04.2016. Are we liable to pay service tax? | No | Rule 5 of POTR, 2011 Further fourth proviso to Rule 7 of POTR, 2011 |
| 6 | We have received certain services from the Government before 01.04.2016 and payment for the same was made after 01.04.2016. Are we liable to pay service tax | No | No service tax can be levied for the services provided when it was not taxable. |
| 7 | We have to receive certain services from the Government and the Government has claimed the amount for the same before 01.04.2016. We have paid the same in May 2016 and the service was also provided in May 2016. Are we liable to pay service tax? | No | Fourth proviso to Rule 7 of POTR, 2011. |
| 8 | We will be importing goods in June 2016 on CIF basis and the exporter will arrange the transport. Are we liable to pay service tax on the freight component of the CIF price? | No | You are not availing the services of transportation and only the exporter is availing it. |

New Services and New Levy - Certain critical aspects.

With effect from 01.04.2016 all services provided by the Government to Business entities has become liable to service tax. With effect from 01.06.2016 transport of goods by a vessel from a place outside India to the customs station of clearance in India has also become liable to service tax, as this entry has been removed from the negative list. Similarly, transportation of passengers by air-conditioned stage carriage vehicles is also made liable to service tax, consequent to removal of the said activity from the negative list. Further, with effect from 01.06.2016 a new Krish Kalyan CESS (KKC) is also leviable on all taxable services.

The issues as to whether the service tax is applicable on the services provided before the introduction of levy of service tax on such services; and whether KKC is leviable on services provided before 01.06.2016 are very contentious. In this article a detailed analysis of the said issue is attempted.

Upto 30.06.2012 service tax was levied "on the value of taxable services referred to in various clauses of sub section (105) of Section 65, provided or to be provided". The Hon'ble Supreme Court has observed in the case of Association of Leasing and Financial Service Companies Vs UOI - 2010 (20) STR 417 SC, that the taxable event under service tax is the rendition of service and this proposition would hold good even under the present service tax regime also, where, under Section 66 B of the Act, service tax is leviable on the "value of all services provided or agreed to be provided".

In this connection, it is also relevant to refer to the two celebrated decisions under Central Excise. In the case of Wallace Flour Mills Co Vs CCE - 1989 (44) ELT 598 SC, it was held by the Hon'ble Apex Court that the goods manufactured when the goods were exempted from payment of duty of excise, but cleared when there was no exemption, duty of excise is payable. It was observed that the taxable event is manufacture and the goods were excisable when they were manufactured, though such duty was exempted. At the time of removal of goods, when duty is payable, appropriate duty has to be paid, in the absence of any exemption on the date of removal. In the case of CCE Vs Vazir Sultan Tobacco Co Ltd - 1996 (83) ELT 3 SC, the Hon'ble Supreme Court has held that the goods manufactured prior to introduction of the levy of excise duty but cleared after the levy are not liable to duty, as the

taxable event for the levy of excise duty is manufacture and when the goods were manufactured there was no levy at all and the goods were not excisable goods. Thus the distinction between new levy and withdrawal of exemption is well borne out judicially. The ratio laid down by these decisions can be applied to Service tax also, where the taxable event is the rendition of service and service tax is payable upon receipt of value of taxable service (prior to introduction of Point of Taxation Rules, 2011) and at Point of Taxation (after introduction of Point of Taxation Rules, 2011). So, when a service is provided when there is no levy of service tax on such services, no service tax is payable, even if the value of such service is received, after introduction of service tax on such services. Similarly, when a new levy like KK Cess is introduced, the new levy should not apply on such services provided before introduction of the new levy.

The above decision of the Hon'ble Supreme Court in the case of Association of Leasing and Financial Services has been followed in the following decisions, wherein it has been held that the rate of service tax, which was prevalent at the time of providing the service alone shall apply.

Vistar Constructions (P) Limited VS UOI - 2013 (31) STR 129 Del.

CST Vs Consulting Engineering Services (I) Pvt. Ltd - 2013 (30) STR 586 Del.

Off course, these decisions were pertaining to the period prior to introduction of Point of Taxation Rules, 2011 which came into force from 01.04.2011 and the effect of these rules has to be seen.

Section 94 of the Finance Act, 1994 empowers the Central Government to frame rules for carrying out the purposes of Chapter V of the Finance Act, 1994. As per sub section (2) of section 94, such rules can be framed for specific purposes mentioned thereunder. As per Section 64 (3) of the Finance Act, 1994 the said Chapter V shall apply to "taxable services". As per Section 65 B (51) of the Act, "taxable service" means any service on which service tax is leviable under Section 66 B. Hence, section 94 of the Act and the rules framed under the said Rule and all other provisions of the Finance Act, 1994 would apply only for "taxable services". Point of Taxation Rules, 2011 (POTR, 2011) have been framed in exercise of the powers conferred under the following clauses of sub section (2) of Section 94.

94 (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the provisions of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely :-

(a) collection and recovery of service tax under sections 66 and 68; (hhh) the date for determination of rate of service tax and the place of provision of taxable service under section 66C.

The term "point of taxation" is defined in Rule 2 (e) of POTR, 2011 as, "point of taxation" means the point in time when a service shall be deemed to have been provided.

The various rules of the POTR, 2011 (viz., Rules, 3, 4, 7, 8 and 8A deals with determination of Point of Taxation (POT) in different circumstances. Rule 5 of the POTR, 2011 reads as under.

5. Payment of tax in case of new services. - Where a service is taxed for the first time, then, -

(a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;

(b) no tax shall be payable if the 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."

The above rule gives an impression that it shall apply even to the services provided before the said service becomes taxable. To elaborate, let us assume that transportation of goods in a vessel from a foreign port to Indian port has been provided before 01.06.2016, but payment for the same has not been received before 01.06.2016, but received only after 01.06.2016. The above rule is capable of being interpreted that in such cases service tax is payable. But such an interpretation is not legally permissible as explained below. At the outset, the provisions of POTR, 2011 itself is applicable only for "TAXABLE SERVICES" and the same cannot be applied to a service, which was not a taxable service, when provided.

Under the erstwhile service tax regime, when different services have been made as taxable services from different dates, a notification would be issued to the effect that no service tax would be payable if the value of taxable service is received prior to the

date of introduction of the levy. Examples of such notifications are, 25/2004 ST Dt.10.09.2004, 36/2010 ST Dt. 28.06.2010, etc. The effect of Rule 5 is similar to such notifications. It is a settled position of law that, no service tax is payable for the services provided before introduction of the levy, as discussed above. Hence, Rule 5 shall apply only for the services provided after introduction of the levy. As there is always a time gap between the proposal to bring a service into tax net through the Finance Bill and enactment of the Finance Bill into Finance Act, some service providers may, after knowing that their service is going to attract service tax, can raise invoices for future periods and as per Rule 3 of POTR, 2011 since earlier of the date of invoice and date of receipt of value is the POT, they can plead that since the POT of such services is prior to introduction of the levy (date of invoice), no service tax is payable. In order to plug such loophole Rule 5 provides that no service tax is payable only when both raising of invoice and receipt of payment occurs before introduction of the levy. Further,

Section 67 A of the Act reads as below.

SECTION 67A. Date of determination of rate of tax, value of taxable service and rate of exchange. - 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.

If Rule 5 is applied for services provided before the levy, then service tax is payable for the services provided before introduction of the levy of service tax on such services if payment for such services is received after introduction of the levy, since the condition under Rule 5 as to receipt of value before introduction of levy is not satisfied. But, as per Section 67 A of the Act, the rate of service tax is the rate which is in force at the time of provision of service and any rule which leads to application of service tax at a different rate than what is prevalent at the time of provision of service, would fail the mandate of Section 67 A.

Further, it may be noted that Rule 5 does not lay down any POT but only says that in certain circumstances service tax is not payable. If it is interpreted to cover services provided before introduction of the levy also (for which payment has not been received until introduction of the levy), then POT for such service has to be determined. As per Rule 3 of the POTR 2011 the POT would be the date of invoice. For the services already provided, invoices would have been raised invariably which is also mandatory as per Rule 4 A of the Service Tax Rules, 1994. Hence, since the POT falls when there is no service tax levy, no service tax is payable, making Rule 5 redundant. Any interpretation, which renders a provision as redundant shall be avoided. Hence, it is clear that Rule 5 covers only the services provided after the introduction of the levy, i.e. for the services provided after the introduction of the levy, if payment is received and invoice is issued before introduction of the levy (or within 14 days of introduction of levy), no service tax is payable. This is the true and intended scope of Rule 5 of POTR, 2011. (This argument is only by way of an example. This does not mean that if the invoice for a service provided before 01.06.2016 is issued after 01.06.2016 the same is liable to service tax. For example, if ocean transport service upto Indian Port was rendered on 20.05.2016 and invoice for the same was raised on 05.06.2016, within the time prescribed under Rule 4 A of the ST Rules, 1994. Still service tax is not payable, as the service was provided when there was no levy of service tax on such services).

In Budget 2016, a new sub section (2) has been introduced under Section 67 A of the Act, which reads as,

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

Further, POTR, 2011 has also been amended vide Notification 10/2016 ST Dt. 01.03.2016, whereby the said rules were also made to draw power from Section 67A (2) and hence any point of taxation determined under the rules and consequent rate of service tax would not fail the test of Section 67 A, even if such rate was not in force when the service was rendered.

The following two Explanations were also inserted under Rule 5 of the POTR, 2011 with effect from 01.04.2016 vide Notification 10/2016 ST Dt. 01.03.2016.

Explanation 1. - This rule shall apply mutatis mutandis in case of new levy on services.

Explanation 2. - New levy or tax shall be payable on all the cases other than specified above.

The first Explanation makes it clear that this rule will apply for new levy (example - Krish Kalyan Cess) also.

The second Explanation appears to add strength to the argument that this rule will apply even for the services provided before introduction of the levy on a service / new levy also, if the payment for the same is not received before introduction of the levy on new service / new levy. Further, it can also be argued that the dictum laid down under Section 67 A (1) that only the rate of tax

prevalent while providing service alone would apply has been diluted through sub section (2) of Section 67 A, whereby the POT can be prescribed by the rules.

But such an argument is not sustainable.

As already stated, the taxable event is the rendition of service and there is no departure from this position. Once a service is provided when there was no levy of service tax on such services, the same is assessed and considered as a non taxable service. Once the service is thus assessed and the liability is finalised at NIL, the same cannot be reopened at the time of receiving payment.

Sub section (2) of Section 67 A has been introduced to overcome the incongruity between the statutory mandate of Section 67 A and the rule making power under Section 94 (2) (hhh). For example under Rule 4 of POTR, 2011, in case of change of rate, in some situations, the rate of tax, not prevalent at the time of provision of service would apply {for the services provided before the change of rate, if invoice is issued and payment is received after the change of rate the changed rate would apply - Rule 4 (a) (i)}. In order to give a legislative backing to such cases, sub section (2) of Section 67 A has been introduced and not to tax all services provided before the introduction of the levy.

To summarise,

No service tax is payable for the services on which service tax has been introduced from 01.04.2016 / 01.06.2016, if such services were provided and received (in case of reverse charge) before the said dates, irrespective of the date of invoice, date of payment.

No KK Cess is payable for the services provided and received (in case of reverse charge) before 01.06.2016, irrespective of the date of invoice, date of payment.

Even if the services on which service tax is levied from 01.04.2016/ 01.06.2016 are provided on after these dates, no service tax is payable if payment for such services have been made prior to these dates and invoices are also raised latest before 14.04.2016 / 14.06.2016, respectively.