



POINT OF TAXATION RULES, 2011

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At the outset, we would be examining the law as it stood prior to the introduction of the Point of Taxation Rules, 2011. The service tax levy would be attracted at the time of provision of taxable services and crystallize at the time of receipt of the consideration either in full or in part. However where any advance was received for the service to be provided in future, the point of levy and crystallization of levy happened at a single point of time. This is because the taxable service definition as per Section 65(105) read as under-“taxable service” means any service to be provided or to be provided. The services to be provided were included within scope of taxable service by the Finance Act, 2005 w.e.f 16.6.2005. Thus the levy covered even the services to be provided within its scope. The Point of Taxation Rules, 2011 has been introduced in service tax law in preparation of impending GST. Coincidentally in the year 2011-12 it could also garner additional service tax.

As a procedural requirement, there was a requirement of preparing a bill or invoice or challans within 30 days from the date of completion of service. However at the time of receipt of such advance itself, bill or invoice or challan had to be raised. There was a legal question of whether the levy on future contingent event could be called a service at all without even the service commencing, which continues even today.

Adjustment of Non provision of service: In view of the paper writers, in cases where the receipt of advance took place for the services to be provided and the service was not provided at all, technically speaking the incidence of levy was complete and the tax already became due. In order to nullify the impact of such incidence the service tax paid on the advance would be allowed to adjust for the subsequent payments. However if there were no payments in future, technically claiming refund of the same would have been difficult.

Further the service tax was to be paid in accordance with Rule 6 of Service tax Rules, 1994 which stated that Service tax to be paid when the receipt of gross amount charged took place.

Point of Taxation Rules, 2011:

The main intention of the new rules appears to ensure transition from cash system to accrual system like Central Excise and Sales Tax/VAT. POTR deals with the following types of transactions, namely service provided or agreed to be provided & continuous supply of service along with treatment in case of change in rate of tax. It would be relevant to understand some of the new terms defined in the said Rules.

Definitions/Meaning

The “Change in effective rate of tax”, which include a change in the portion of value on which tax is payable in terms of a notification issued in the Official Gazette under the provisions of the Finance Act, 1994 or rules made thereunder. Earlier this was in the form of an explanation to the Rule 4.

The term “**continuous supply of service**” is defined to mean

- 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 **or**
- where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition;

PoT as defined under Rule 2(e) means the point in time when a service shall be deemed to have been provided. The intent is to provide for the point when service shall be deemed to be provided for the purpose of Rule 6 of Service Tax Rules which provides for the liability to pay Service Tax.

Date of Payment (Rule 2A):

The new rule has been inserted for the purpose of setting out what is “date of payment”. Accordingly, earlier of the following dates would be considered as date of payment i.e.

- Date on which the payment is entered in the books of account; or
- Date on which the payment is credited to the bank account of the person liable to pay tax.

Further the date of book entry would not be considered and only date of credit into bank account would be considered if all the three conditions below are fulfilled-

- Between the date of entry and date of credit, there is change in effective rate of tax or when a service is taxed for the first time; and
- The credit in the bank account is after four working days from the said date of rate change or new levy;

- The payment is made by way of an instrument which is credited to bank account.

The above said principle would equally apply for determining the date of receipt as well.

Point of Taxation in general-Rule 3

The above definition of continuous supply of service has been amended to capture the concept in a more wholesome manner, namely the recurrent nature of services and the obligation for payment periodically or from time-to-time.

Since the essence of the rule in case of continuous supply of service is the same as the main Rule, the separate rule for continuous supply of service [Rule 6] is being merged with the main rule. Thus, the PoT in general is summed up as under:

Scenario	Point of Taxation
Invoice issued within 30 days from the completion of service	Date of Invoice
Service completed, but invoice not issued within 30 days	Date of completion of Service
Advance received before completion	Date of receipt to the extent of advance received.
Invoice issued before completion of service	Date of Invoice
In case of continuous supply of service	Completion of respective events as per the contract entered

However, small relaxation is given in case where excess payment up to rupees one thousand (over and above mentioned in the invoice) is received, the POT to the extent of such excess amount, may be worked out as above or in the next billing cycle.

Rule 3 is general rule, identifies three events either of which may be defined as PoT as per the provided Rules. The said three events are:

- Issuance of Invoice
- Rendering of Service if the invoice is not issued within 30 days of completion of provision of service
- Receipt of Payment

The thumb rule is that PoT shall coincide with the event occurring earliest.

Point of taxation where there is a change in rate of Taxes-Rule 4

Rule 4 states that point of taxation as stated in Rule 3 shall not be applicable for determination of date (point of taxation) in cases where there is change of rate of tax in respect of a particular service.

The change of rate means not only the change of rate by amendment in the Act, but also covers change of rate by amendment in exemption notification. Further also it covers a change in abatement rate or value on which the duty needs to be computed.

When there is change of tax rate for a particular service the point of taxation shall be decided in accordance with Rule 4 as under:

Rule 4 provides for determination of PoT in such cases in the following manner:

Rule	Event prior to change of effective rate	Event subsequent to change of effective rate	Point of Taxation
	Provision of service, issuance of Invoice and receipt of payment	N.A.	N.A.
4(a)(i)	Services rendered	Invoice issued and payment received	Issuance of Invoice or receipt of payment, whichever is earlier
4(a)(ii)	Services rendered and invoice issued	Payment received	Issuance of Invoice
4(a)(iii)	Services rendered and payment received	Invoice issued	Receipt of Payment
4(b)(i)	Invoice issued	Payment received and Services rendered	Receipt of payment
4(b)(ii)	Invoice issued and payment received	Service provided	Issuance of Invoice or receipt of payment, whichever is earlier
4(b)(iii)	Payment received	Invoice issued and services rendered	Issuance of Invoice

Assumptions:

- The earlier rate was 12%, changed rate is 14% w.e.f. 1st July 2015.
- Words used in table: Before is in relation to the service, invoice or payment as mentioned in the header.

The rate changes from 12% to 14% as on 1st July 2015

Rule	Service Provided	Invoice Issued	Payment	Point of Taxation	Remarks
4(a)(i)	Before (12%) (30th April)	After (14%) (15 th June)	After (14%) (31 st June)	Date of invoice or payment, whichever is earlier i.e. 15 th June	As service was already taxable, and the tax point invoice issued date, ST charged @ 14%
4(a)(ii)	Before (12%) (30 th April)	Before (12%) (5 th May)	After (14%) (10 th June)	Date of invoice i.e. 5 th May	ST shall be charged @

					12%
4(a)(iii)	Before (12%) (10 th April)	After (14%) (5 th June)	Before (12%) (31 st May)	Date of payment i.e. 31 st May	ST shall be charged @ 12%
4(b)(i)	After (14%) (5 th June)	Before (12%) (30 th March)	After (14%) (15 th May)	Date of payment i.e. 15 th May	ST shall be charged @ 14%
4(b)(ii)	After (14%) (31 st May)	Before (12%) (30 th March)	Before(12%) (20 th March)	Date of invoice or payment, whichever is earlier i.e. 20 th March	ST shall be charged @ 12%
4(b)(iii)	After (14%) (30 th May)	After (14%) (10 th June)	Before (12%) (30 th April)	Date of Invoice i.e. 30 th May	ST shall be charged @ 14%

Taxability of services coming into service tax net for first time-Rule 5:

Rule 5 states the taxability of a transaction being chargeable to Service tax for the first time. It provides if the invoice has been issued & payment has been received before the service becoming taxable, then service tax need not be paid.

If payment has been received before the service becoming taxable & invoice has been issued within 14 days of the date when the service is taxed for the first time. Then service tax need not be paid.

Point of Taxation in case of Continuous Supply Service-(Rule 6- Omitted)

Rule 6 of Point of Taxation rules earlier provided to determine Point of Taxation pertaining to continuous supply services. However, with effect from 01.04.2012 the same is deleted making corresponding changes in Rule 3 itself. Therefore, irrespective of whether continuous supply service or one time service, the determination of point of taxation as discussed above would be applicable.

Service Tax payment on receipt basis continues in specified cases-Rule 7:

In respect of the persons required to pay service tax as recipients of service in terms of Section 68(2) of the Finance Act, 1994, the Point of Taxation shall be the date of receipt or payment of consideration. However, this shall be subject to condition that the payment is made before **three months from the date of Invoice [w.e.f., 1.10.2014, six months has been amended to 3 months]**. In case the payment is not made within three months of the date of invoice, the point of taxation shall be the date immediately following the said period of three months. It may be noted that the above provisions under Rule 7 is notwithstanding Rule 3, 4 or 8.

Both the service provider and service recipient are governed by the Point of Taxation Rules 2011 in respect of the service provided or received by him. Usually it is the invoice or date of receipt of payment which is the point of taxation for the service provider. However, as mentioned above, for the service recipient, the point of taxation shall be the date of payment.

For Example: In case where the invoice is issued in say July 2015 and the service recipient pays for the same in August 2015 the point of taxation for the service provider will be the date of issue of invoice in July 2015. But, the point of taxation for the service recipient shall be the date of payment in August 2015. The service provider would be required to pay tax (to the extent liability is affixed on him) by 6th August, 2015 or 6th October 2015 depending upon the admissibility of benefit under the proviso to Rule 6 of the Service Tax Rules 1994. On the other hand, the service recipient would be required to pay service tax (to the extent liability is affixed on him) by 6th September 2015.

Associated Enterprises: proviso 2 to Rule 7

Further in case of associated enterprises, where the service provider is located outside India, the point of taxation shall be

- a. the **date of debit in the books of account** of the person receiving the service or
- b. the **date of making the payment**, whichever is earlier.

Determination of PoT in case of certain intangibles [Rule 8]

Rule 8 determines the PoT in cases of Copyright, trademarks, designs or patents, etc. As per this rule, payments relating to use of copyrights, trademarks, etc., such as royalties, would be taxable at the time of each such payment, regardless of whether the service was provided only once at a single point of time. Where an invoice is issued by the provider, prior to such receipt of payment, it would be considered as Point of Taxation. In other words, point of taxation shall be

- a. **Payment in respect of such IPR**
- b. **Issue of invoice by the service provider**

Determination of Point of Taxation in any other case [Rule 8A]

After rule 8 of the said rules, Rule 8A has been inserted vide Notification No.4/2012-ST, dated 17th March, 2012.

It provides that where the point of taxation cannot be determined as per these rules as the date of invoice or the date of payment or both are not available the **Central Excise officer**, may, gather evidence and determine the point of taxation after giving an opportunity of being heard to assessee.

Corresponding Changes in Service Tax Rules, 2002

- a. The invoice, bill or challan shall be issued within 30 days from the date of completion of service.
- b. In case of continuous supply of service, it requires that an invoice, bill or challan, as the case may be, within thirty days from the milestone date for payment mentioned in the contract.
- c. If the amount of invoice is renegotiated due to deficient provision or in any other way changed in terms of conditions of the contract (e.g. contingent on the happening or non-happening of a future event), the tax will be payable on the revised amount provided the excess amount is either refunded or a suitable credit note is issued to the service receiver. It is not covering bad debts. Further Board Clarification clearly says that this concession is not available for bad debts.

Transition provision – Rule 9 & 10

The point of Taxation Rules would not apply to services provided or invoices raised prior to 01.04.2011. Further for the services provided or invoice raised before 30th June 2011 the assessee may at their option continue to follow the existing system i.e. payment of service tax on receipt basis.

In respect of the services for which service recipients are liable to pay tax (under reverse charge/ partial reverse charge mechanism), if the invoice is issued prior to 1.10.2014 but the payment has not been made, then the point of taxation shall be as follows-

- a) If the payment is made within a period of 6 months of the date of invoice – POT shall be the date of payment.
- b) If the payment is not made within a period of 6 months of the date of invoice – POT shall be determined as if Rule 7 and 10 does not exist.

Common Errors:

1. Service tax paid on different basis without considering point of taxation of services rules.
2. Considering the limit for raising of invoice in case of services coming into service tax for the first time as 30 days instead of 14 days.
3. Not availing the benefit of paying tax on receipt basis in case of person liable to pay service tax under reverse charge
4. Not considering date of credit in the books of account as point of taxation in case of Associated Enterprises when payment is received on later date.
5. Following the Rule 3 of Point of Taxation in case of change in effective rate of tax and payment of taxation of new services.

Case Law Analysis:

1. All India Federation of Tax Practitioners [(2007) 7 STR 625 (SC)]

Fact: Service tax is a destination based consumption tax i.e. it is a commercial activity and it is not a charge on the business but on the consumers. **It can be levied only on services provided within the country.**

Issue: Whether activity other than provision would attract tax?

Decision: Only on services provided in India. Rendition is important.

2. Delhi Chartered Accountants Society Vs. UOI and Ors.

Facts: The petition deals with the case where CA services were rendered before 1st April 2012, invoice raised before the same date but payment was received after that date i.e. after 01.04.2012. Chartered accountants filed petition which contains a prayer for

- a) quashing Circular no. 158/9/2012 ST dtd 08.05.2012 and Circular no. 154/5/2012 ST dtd 28.03.2012 as null and void and an order/direction that taxable event is rendition of service and the rate applicable is the rate on providing service.

In Association of leasing and financial service companies Vs UOI & ors 2011, the supreme court had held that taxable event was rendition of service. Point of Taxation (POT) rules 2011 notified on 1.04.2011 defined point of taxation as the point of time when a service shall be deemed to have been provided. Rate of service tax was enhanced from 10 % to 12 % w.e.f 01.04.2012. Rule 7C of POT rules which provides that point of taxation shall be the date on which payment was received/made, was amended vide notification dated 17.03.2012 w.e.f. 01.04.2012 and accordingly the POT for CA services will be date of receipt of payment for which sec 68(2) of Finance act applies ie. Reverse charge. Later on this rule was extended vide notification dated 17.03.2012 amending Rule 6 (1) to all services (earlier it applied to 8 services including CA services).

Issue: CBEC Circulars on CA's liability to pay higher service tax rate on services rendered/ invoice raised before 01.04.2012 but payment received thereafter is ultra-vires?

Decision & Reason: High court held that since the service of CA was rendered before 01.04.2012 and invoice also issued before that date, payment being received after 01.04.2012, the rate applicable would be 10% and not 12%. Court relied upon Rule 4 which provides for rate of tax applicable in case of change in effective rate of tax. Rule 4

provides for charging rate applicable on date of issue of invoice, even though effective rate changes after **issue** of invoice.

3. *Vistar Construction P Ltd. V UOI (2013) 31 STR 129 (Del) and CST v Consulting Engineering Service I P Ltd. (2013) 30 STR 586 (Delhi)*

The rate of works contract from 01.06.2007 was fixed at 2% and was enhanced to 4% from 01.03.2008. CBEC Circular specified receipt date whether or not service provided is wrong and invalid. Taxable event is **rendition of service** and not date of receipt. Therefore for service provided till 01.03.2008 the rate applicable would be only 2%.

4. *British Airways Plc v Commissioner of Service Tax, New Delhi 2013 (029) STR 0177 Tri-Del.*

No connection between levy of tax and receipt of payment – at time of journey levy of Service Tax in force therefore tax payable on tickets sold prior to impugned date.

Conclusion:

The Point of Taxation Rules has brought significant changes in the tax legislation. The Rule will require ongoing changes in accounting systems, invoicing, input and output service records, credit registers, tax payment records, tax computation reports etc. These changes require businesses to reengineer their entire processes and systems pertaining to tax payment and compliances. Moreover, though the POT Rules, 2011 comprises of some 5 Rules [(i.e) Rule 3, 4, 5, 7 & 8] for all the Services taxable under Sec 66B of the Finance Act, each Service is having different characteristics, these Rules will have different implications for each of them.