

Service Tax On Lawyers: A Levy Short Lived?

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The history of ever expanding horizon of service tax law in India has extensive sub-chapters of its own. The levy being unique and unprecedented in the country, the Finance Act, 1994 has made a number of experiments for the levy and collection of service tax from various sectors. Sometimes owing to the invalidation by the Courts and sometimes due to administrative contingencies, the Act has been subject to numerous amendments in its almost two decade old voyage. Since the levy has also been dubbed as the precursor to the fundamental realignment of indirect taxes in the form of a harmonized 'Goods and Service Tax', the Finance Act, 1994 has also been the testing ground for rules relating to point and time of supply etc.

This paper deals with levy of service tax on individual lawyers, which given the frequent amendments in the statutory provisions and the manner of enforcement, can rightly be dubbed as one of the experiments in the Finance Act, 1994. The author has made an attempt to trace the legislative history right from 2009 when the levy of service tax was first enforced upon individual lawyers up to the changes made by Finance Act, 2012 whereby fundamental changes have been made to the scope of the service tax law and the manner of its collection. In view of the author the Finance Act, 2012 has effectively closed the chapter of service tax on individual lawyers.

2009: Introduction Of The Service Tax On Legal Services

Service tax on legal services was introduced for the first time by way of amendment to Finance Act, 1994 by the Finance Act, 2009¹. In terms of the amendment, service tax was levied on legal services provided by persons (other than individuals) on legal advisory and consultancy services other than services by way of appearances in courts and tribunals. The relevant statutory provisions defining the coverage of the levy provided as under:

(105) "taxable service" means any service provided or to be provided:

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(zzzzm) to a business entity, by any other business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner:

Provided that any service provided by way of appearance before any court, tribunal or authority shall not amount to taxable service.

Explanation — For the purposes of this sub-clause, "business entity" includes an association of persons, body of individuals, company or firm, but does not include an individual.

The Finance Minister's speech during the introduction of the aforesaid amendment, explaining the rationale for the introduction of the levy, stated as under:

133. As the Hon'ble Members are aware, services provided by chartered accountants, cost accountants, and company secretaries as well as by engineering and management consultants are presently charged to Service tax. Although there is a school of thought that legal consultants do not provide any service to their client, I hold my distinguished predecessor in high esteem and disagree. As such, I propose to extend Service tax on advice, consultancy or technical assistance provided in the field of law. This tax would not be applicable in case the service provider or the service receiver is an individual.

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Thus, the intent was clearly to levy service tax on legal services but individual service providers were exempt from payment of service tax. Further, services by way of court appearances were also exempt. Resultantly professional firms providing legal consultancy were obliged to pay service tax.

A minor tinkering with these statutory provisions was made by Finance Act, 2010 but the essence remained the same. This legal position continued till 2011 when the scope of the levy was expanded.

2011: Service Tax On Individual Lawyers

Amending the Finance Act, 1994, the Finance Act, 2011 expanded the scope of service tax on legal services so as to cover within its ambit even individual lawyers. The amended statutory provision² provided as under;

(105) “taxable service” means any service provided or to be provided, -

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(zzzzm) (i) to any person, by a business entity, in relation to advice, consultancy or assistance in any branch of law, in any manner;

(ii) to any business entity, by any person, in relation to representational services before any court, tribunal or authority;

(iii) to any business entity, by an arbitral tribunal, in respect of arbitration.

Thus, individuals providing legal service were covered within the scope of service tax for the first time under the provisions of the Finance Act, 2011. However the coverage was not omnibus. The scope of the amendment was explained by the Finance Minister in his budget speech for 2011-12 in the following terms:

188. Services provided by life insurance companies in the area of investment are also proposed to be brought into tax net on the same lines as ULIPs. I propose to expand the scope of legal services to include services provided by business entities to individuals as well as representational and arbitration services by individuals to business entities. There shall, however, be no tax on services provided by individuals to other individuals.

The resultant legal position was complex and can be best understood in terms of the following table;

Nature of Activity	Service Receiver	Service Provider	Taxable
Legal consultancy service i.e. advice, consultancy or assistance in any branch of law.	(a) Individual	(a) Individual	No
		(b) Others	Yes
	(b) Others	(a) Individual	No
		(b) Others	Yes
Representational Service i.e. representation before any court, tribunal or authority in Courts / Tribunal.	(a) Individual	(a) Individual	No
		(b) Others	No
	(b) Others	(a) Individual	Yes
		(b) Others	Yes
Services by an arbitral tribunal, in respect of arbitration	(a) Individual	(a) Individual	No
		(b) Others	No
	(b) Others	(a) Individual	Yes
		(b) Others	Yes

Thus the legal position was changed and individual lawyers were brought within the fold of service tax towards providing representational services to business entities (other than individuals) and services by way of acting as an arbitral tribunal.

Ensuing Protests And Judicial Intervention

While other business entities such as law firms etc. had been subject to service tax since 2009 onwards, the Government sought to cover within the taxable base the hitherto untapped professional fees charged by individual lawyers. This extension of service tax levy on individuals created huge uproar in the legal fraternity. The Government was forced to exempt³ services provided by an arbitral tribunals but was unrelenting as far as

service tax on individual lawyers for representational services was concerned. This led to strenuously fought legal battle before the Courts.

Taking note of the submissions made by the Gauhati Bar Association made on the strength of the decisions of the Supreme Court that “services rendered by the members of the legal profession can by no means be brought within the realm of commercial activities” so as to be liable to service tax, the Gauhati High Court granted interim protection to lawyers from levy of service tax. The Delhi High Court also, on a petition filed by the Delhi High Court Bar Association⁴ stayed the amendment made by the Finance Act, 2011. Similar orders were passed by the Andhra Pradesh High Court on petition filed by individual lawyers⁵; by the Madras High Court on petition filed by Revenue Bar Association⁶; and by the Calcutta High Court on petition filed in representative capacity by a Solicitor Firm⁷. Since thereafter the interim orders have been extended but no final decision has been rendered in any of these cases challenging the validity of service tax levy on lawyers. Thus service tax compliance was effectively avoided by lawyers on the strength on these orders.

Changes Made By Finance Act, 2012

The first and foremost major change effected by the Finance Act, 2012⁸ was to provide a new basis for levy of service tax under the Finance Act, 1994. The levy of service tax under Section 66 (being the charging provision) read with the definition clauses under Section 65 was discontinued and a negative list⁹ based regime now forms the basis for levy of service tax under Section 66B¹⁰. Prior to the enactment of Finance Act, 2012, service tax was levied on basis of a separately defined taxable service. In terms of the negative list, except the services enumerated in the negative list all other services¹¹ will be liable to subject tax.¹² Since legal consultancy or legal representational services are not specified in the negative list, they continue to be liable to service tax. However in the process of shifting to a negative list based regime the Government has made a fundamental change as regard levy of service tax on lawyers in concerned.

To determine the correct legal position one is required to examine two notifications issued by the Ministry of Finance (Government of India) while presentation of the Finance Bill, 2012 in the Parliament. The first notification exempts¹³ services provided by an individual as an advocate or a person represented on and as arbitral tribunals to any person other than a business entity where ‘business entity’ refers to a person¹⁴ who “ordinarily carrying out any activity relating to industry, commerce or any other business or profession”. However, it is to be seen that the exemption is to ‘advocates’ only expression has been defined¹⁵ to refer only to a person who is enrolled as an Advocate under the Advocates Act. This implies that other than enrolled Advocates other persons providing legal services (either consultancy, representational or otherwise) continue to remain liable to service tax. Does this mean that the Government has decided to forego the service tax on legal services provided by individual lawyers? The answer is no in view of the legal effect of the second notification.

The second notification¹⁶ shifts the liability of payment of service tax “in respect of services provided or agreed to be provided by an arbitral tribunal” and “in respect of services provided or agreed to be provided by individual advocate” upon the person receiving the service. Thus instead of the advocates providing services the service receiver is now made liable to pay service tax on his own volition. This mechanism of shifting the liability from the service provider to the service receiver is already well prevalent under the existing provisions of the Finance Act, 1994 and is known as ‘reverse charge’ method.¹⁷

The net effect of the two notifications read in conjunction with each other and the provisions of the Finance Act, 1994 as amended by Finance Act, 2012 (with effect from 01.07.2012) can be summarized as under:

- (a) The distinction between legal consultancy and representations services has been done away with;
- (b) Individual Advocates and arbitral tribunals have been exempted from payment of service tax altogether;
- (c) Non-business entities receiving services of individual Advocates and arbitral tribunals are not liable to pay service tax;
- (d) Business entities receiving services of individual Advocates and arbitral tribunals are liable to pay service tax on reverse charge basis.

In all, be the service receiver a business entity or otherwise, individual advocates have been exempted from payment of service tax. Legal firms and other entities will, as hitherto before, shall continue to be liable to

collect and pay service tax. There is a change, however, from the perspective of the service receiver. Earlier an individual service recipient was exempt from payment of service tax on services provided by individual advocates. However now that is not necessarily the case. The service receiver (including an individual) will have to determine on his own volition whether or not it qualifies as a 'business entity'. If the service receiver qualifies as business entity service tax has to be paid on reverse charge basis by the receiver of services of an individual advocate even if the service receiver is an individual.

Conclusion

The attempt on the part of the legislature to collect service tax from individual lawyers and then shifting the burden of collection and payment of tax within a year of levy reflects the unspoken fact that the Finance Act, 1994 levying service tax has been an experiment-ground for the Government to device mechanisms for tax collection. One can only hope that the annual tinkering with the Finance Act, 1994 would cease after the introduction of the negative list based regime for levy and collection of service tax, unless the Government of the day intends to further experiment for ascertaining the legal position it seeks to adopt for the much-awaited "Goods and Service Tax".

The inability to collect service tax from individual lawyers and the consequent shift of the liability to service receivers has a strikingly resemblance with the fate of service tax liability on goods transport operators. Even in that case upon the invalidation of levy by the Supreme Court¹⁸ the Government shifted the liability¹⁹ of service tax to service receivers. That illustration, coupled with the factum of the shift of liability to collect and pay service tax from individual lawyers to service receivers is a clear reflection of the fact that the Government also takes into account the competence of its administrative machinery to realize tax due as per law.

While the levy of service tax on legal services had been in vogue since 2009 and with a fair bit of certainty, it can be predicted that it is going to stay given the intent of the Government to move ahead with the negative list model. Nonetheless as far as service tax on individual lawyers are concerned, whatever may have been the legal provisions and their effect, the net outcome is that the levy of service tax on services provided by individual lawyers has been a failed experiment of the Government. The Government has decided within a year to abandon its attempt of subjecting individual lawyers to comply with service tax provisions. Thus, the levy of service tax on individual lawyers has indeed been a short-lived one to serve as a quintessential illustration for the policy-makers and students of public administration to study 'how not to tax'.

Endnotes

- 1 Applicable with effect from 01.09.2009 in terms of Notification No. 26/2009-ST dated 19.08.2009.
- 2 Applicable with effect from 01.05.2011 in terms of Notification No. 29/2011-ST dated 25.04.2011.
- 3 Vide Notification No. 45/2011-ST dated 12.09.2011.
- 4 WP(C) No. 2792/2011 order dated 23.05.2011: MANU/DE/2055/2011: 2011 (185) ECR 293 (Delhi).
- 5 WP No. 14251/2011 order dated 18.5.2011: MANU/AP/0172/2011.
- 6 WP No. 12922/2011 order dated 24.06.2011: MANU/TN/2281/2011: 2011 (186) ECR 33 (Madras)
- 7 WP No. 15613(W)/2011 order dated 26.09.2011.
- 8 Applicable with effect from 01.07.2012 in terms of Notification No. 19/2012-ST dated 05.06.2012.
- 9 Enumerated in Section 66D of the Finance Act, 1994 as inserted by Finance Act, 2012.
- 10 Section 66B provides that "there shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve 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."
- 11 Section 65B(44) defines service as "any activity carried out by a person for another for consideration, and includes a declared service".
- 12 Paragraph B.1(1)&(2) of the Circular dated 16.03.2012 issued *vide* DOF No. 334/1/2012-TRU by the Ministry of Finance (Government of India) explains this change in the following terms; "There is a paradigm shift in the way services are proposed to be taxed in future. Taxation will be based on what is popularly known as 'Negative List of Services'. In simple words, it means that if an activity meets the characteristics of a 'service' it is taxable unless specified in the negative list".
- 13 Notification No. 12/2012-ST dated 17.03.2012 vide Serial No. 6.
- 14 Section 65B(17).
- 15 Notification No. 12/2012-ST dated 17.03.2012 vide Serial No. 35(1).
- 16 Notification No. 15/2012-ST dated 17.03.2012 vide Serial No. 4 & 5 in the Table thereof.

- 17 See the decision of the Bombay High Court in *Indian National Shipowners' Association v. Union of India* MANU/MH/1312/2008: [2009] 16 STJ 175 (Bombay): (2009) 13 STR 235 (Bom) [Affirmed by the Supreme Court *vide* order dated 14.12.2009 reported at (2010) 17 STR J57 (SC) and agreed with by the Central Board of Excise & Customs (CBEC) *vide* Instruction F. No. 276/8/2009-CX-8A dated 26.09.2011] and decision of the Larger Bench of the Customs, Excise & Service Tax Appellate Tribunal (CESTAT) in *Hindustan Zinc Ltd. v. Commissioner of Central Excise, Jaipur* MANU/CE/0464/2008: [2008] 15 STJ 115 (Cestat-New Delhi): (2008) 11 STR 338 (T-LB) [Affirmed by the Supreme Court *vide* order dated 23.01.2009 reported at (2009) 14 STR J125 (SC)] for an erudite discussion on the scope and ability of the Government to shift the liability of service tax from service provider to service receiver by way of statutory rules.
 - 18 *Laghu Udyog Bharati v. Union of India* MANU/SC/0444/1999: 1999 (65) ECC 687: 1999 ECR 53 (SC): (2006) 2 STR 276 (SC).
 - 19 Rule 2(1)(d)(v) of the Service Tax Rules, 1994.
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