

## DUS YA BHARA

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Q1 is a jackpot for the Revenue! With the hurried passage of the Finance Bill, nearly a month ahead of its usual date, the Government is in all smiles to garner huge revenue and is sure to beat the best of the Blue chips this quarter! And the prime reason would be the enhancement of the rate of service tax from 10.2 % to 12.24 %, w.e.f. 18<sup>th</sup> April 2006 (Service Tax plus the Education Cess thereon).

Like every change in taxation is a summons to Mr. Confusious, this enhancement of rate of service tax from 10.2% to 12.24% is also another invitation! A doubt has arisen as to what would be the rate of service tax payable, in cases where the services has been rendered prior to 18<sup>th</sup> April for which bills are going to be raised after 18<sup>th</sup> April. There is also a corollary query as to what would be the status of the advances received before 18<sup>th</sup> April, for the services partly rendered or yet to be rendered, for which the Service tax has already been paid @ 10.2%? If the services are going to be rendered on a date after 18<sup>th</sup> April, is it required to pay the differential Service tax between the 10.2% already paid and the present enhanced rate of 12.24%?

Reference is drawn to the CBEC's Circular 56/5/2003 dated 25.04.2003, wherein, it had been clarified as under:

A further question raised is relating to payments receivable in foreign exchange for the services performed prior to March 1, 2003 when the rate of service tax applicable was 5% but payments are received after March 1, 2003. The enhancement of the rate of service tax from 5% to 8% would be applicable only when the Finance Bill is passed. **If payments are received in the aforesaid case after the Finance Bill is passed, the rate of tax applicable would be 5% so long as the billing has been made prior to the date of passing of the Finance Bill. If the billing is made subsequent to the date of the passing of the Finance Bill, the service tax would be applicable at the enhanced rate of 8%.**

Though issued in the context of withdrawal of exemption for receipts in foreign exchange, the above Circular squarely addresses the issue on hand! It may be observed that the said Circular gives the stress on "raising of the bill" and distinguishes the receipt of payments, for determination of the applicable rates of Service tax. As per the above, in cases where the service provider has already raised his bills for his services prior to 18<sup>th</sup> April, 2006, he shall pay Service tax only @ 10.2, even if he receives the money after 18<sup>th</sup> April 2006, irrespective of the fact the services are already rendered or partly rendered or yet to be rendered.

Is it correct? If the issue is so simple, what shall happen to our beloved guest-of-honour, Mr. Confusious?

As per the charging section for Service Tax, viz., Section 66 of the Finance Act, 1994 Service tax shall be paid on the value of taxable service and the same shall be paid in the manner specified. As per Rule 6 of the Service Tax Rules, 1994, Service tax shall be paid to the credit of the Central Government by the 5<sup>th</sup> of the following

month immediately following the calendar month in which the payments are received. "Raising of the bill" has not been any recognition in the statutory provisions, except the provisions under Rule 4 A, whereby, raising of invoices within 14 days has been made mandatory.

In Central Excise, even though the levy of duty is on manufacture, the relevant date of payment of duty is the **date of removal of goods from the factory**. Similarly, in Service Tax, even though the tax is levied on the services provided, the relevant date for payment of the service tax has been the **date of receipt of payments**. In Central Excise, the Hon'ble Supreme Court in the case of Wallace Flour Mills Company Limited Vs Collector of C.EX as reported in **1989 (44) E.L.T. 598 (S.C.)** has held that in cases of enhancement of rates of duty, the rate prevailing on the date of clearance of goods from the factory alone would be relevant date for payment of duty. In other words, the enhanced rate would apply even for the goods manufactured prior to the enhancement of the rates, if the goods are cleared after the enhancement of the rates. The above ratio is squarely applicable to the Service tax too. Hence the relevant rate prevailing on the date of receipt of payments would be the applicable rate of Service tax.

Thus it appears that, in cases where payments are received after 18<sup>th</sup> April, 2006, the applicable rate of Service tax would be 12 %, plus 2% Education CESS thereon, irrespective of the fact that the bills are already raised or yet to be raised. In other words, if the above ratio is applied to the issue on hand, then:

- If the money is received after 18<sup>th</sup> April for which the bills are also raised after 18<sup>th</sup> April, then the enhanced rate of 12.24% shall be applicable.
- If the money is received after 18<sup>th</sup> April for which the bills have already been raised prior to 18<sup>th</sup> April, then also the enhanced rate of 12.24% shall be applicable.
- If the money has already been received prior to 18<sup>th</sup> April, then Service tax shall be payable only @10.2%, irrespective of the fact that the bills for such receipts are raised either before or after 18<sup>th</sup> April.

The anomalous results under the above two methods, can also be better illustrated by the following table:

S.No.	Situation	Result, if the Circular is applied.	Result, if the SC decision is applied.	Remarks
1	Bill raised on 10 <sup>th</sup> April 2006 and money received on 20 <sup>th</sup> April 2006.	ST payable @ 10.2 %	ST payable @ 12.24 %	Going to be SC vs SC! (Supreme Court vs Super Circular!)
2	Advances received on 10 <sup>th</sup> April 2006 and bill for such advance raised on 10 <sup>th</sup> April 2006	ST payable @ 10.2 %	ST payable @ 10.2 %	No difference.

3	Advances received on 10 <sup>th</sup> April 2006 and bill for such advances raised on 19 <sup>th</sup> April 2006	ST payable @ 12.24 %	ST payable @ 10.2 %.	As per Rule 4(3) the service provider shall raise an invoice within 14 days. In this case, even though he has raised the invoice within the permissible limit, unfortunately its after 18 <sup>th</sup> !
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Now one may wonder, as to what would prevail between these two alternatives? "Raising of bills" as per CBEC Circular or proper interpretation of the relevant provisions of law and application of the *ratio decidendi* of the decision of the Hon'ble Apex Court in the case of Wallace Flour Company (supra)?

**Before Parting...**

Even though it appears to be in contradiction to the provisions of Rule 6 and Section 67 *ibid*, the CBEC Circular shall always be binding on the department. In case of any conflict between the same, the Hon'ble Apex Court in the case of Collector of C.EX, Vadodara Versus Dhiren Chemical Industries as reported in **2002 (139) E.L.T. 3 (S.C.)** has held as under:

*"We need to made it clear that, regardless of the interpretation that we have placed on the said phrase, if there are circulars which have been issued by the Central Board of Excise and Customs which place a different interpretation upon the said phrase, that interpretation will be binding upon the Revenue."*