

GST on Lawyers - Succeeded by Comma

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By Vijay Kumar

LAURENCE E. Lipsher, an American tax expert, writer and speaker wrote in a column more than ten years ago:

Vijay Kumar, editor in chief of taxindiaonline and an attorney, questioned about how one can impose a service tax on Indian attorneys - after all, what true service do they perform? The statement aroused laughter from an audience that largely consisted of lawyers.

He was referring to a speech where I quoted the former Finance Minister P. Chidambaram. When asked why Service Tax was not imposed on lawyers, Chidambaram asked, "which lawyer provides service?"

But his successor Pranab Mukherjee had other ideas when he said in his budget speech,

"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."

That's how lawyers were caught in the Service Tax net. In the Finance Act, 2009 a new clause zzzzm was added to the list in service tax, which read:

Taxable service means any service provided or to be provided 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.

When service tax was planned to be imposed on lawyers in 2007, I wrote:

On a personal note, as a lawyer, I would prefer to be taxed. If a barber can be taxed, there seems to be no reason why a lawyer cannot be taxed and as all my clients are Central Excise or Service Tax assesseees, they would be eligible to take credit of Service Tax paid on the fee paid to me only after they pay my fees, I hope to get paid promptly and the credit would really be an incentive for the clients to pay my fees.

Lawyers should welcome the move to impose a tax on their service - service is of course a bad name to what they provide to their clients.

And I suggested that our Godmen should also be taxed.

Godmen do provide the service of mental peace and perhaps they should be taxed and maybe Sai Baba will become the biggest Service Tax assessee. Just imagine a Superintendent summoning Sai Baba and recording a statement from him. The Statement may turn into ashes before the Show Cause Notice is issued.

Lawyers have gone on strike in several parts of the country and also did what they know best - petitioned the courts. Though Chidambaram's retort was taken as a joke, he was actually stating a solemn truth. Lawyers are officers of the court and their duty is to assist the court; so, this service of assisting the court should not be really taxed.

Several High Courts have stayed the Service Tax on lawyers, but the Bombay High Court took a different view and upheld the levy of Service Tax. While upholding the levy [2014-TIOL-2279-HC-MUM-ST](#), the High Court observed,

Profession is noble but the professional is not necessarily so.

The Supreme Court stayed [Special Leave to Appeal (C)...CC No(s).13944/2015, dated 10/08/2015] the Bombay High Court order and the stay continues.

One of the grounds urged before the Supreme Court was that the High Court ought to have considered that Service Tax being a Central levy, should be same all over the country and since other High Courts have stayed the levy, this High Court should not have hastily upheld the tax. It was also argued that:

1. The relation between a lawyer and a litigant is not that of service provider and service recipient.
2. Rendering assistance to the court of law as an officer of the court does not amount to service at all.
3. Levy of Service Tax on the provision of assistance to the court will hit the provision of justice guaranteed under the constitution.

Came 2012 and the negative list. Anyway, if lawyers were themselves not ready to pay service tax, the liability to pay tax was fastened on the recipient of services under the Reverse Charge Mechanism. Yet, this created a lot of confusion and litigation.

And when GST came, there was again a doubt as to whether advocacy was taxable and how. The Government of India clarified the position, not by a Circular but by a Press Release on 15.07.2017, which stated,

There are points being raised about the applicability of GST on legal services provided by advocates - whether it is in forward charge or reverse charge. It may be mentioned that there is no change made in taxation of legal services in the GST era.

In this context, it is further clarified that legal service has been defined to mean any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority.

It is further clarified that notification No. 13/2017-Central Tax (Rate) dated 28.6.2017 (Serial No. 2) specifies, inter alia, the following service under reverse charge mechanism,-

'Services supplied by an individual advocate including a senior advocate by way of representational services before any court, tribunal or authority, directly or indirectly, to any business entity located in the taxable territory, including where contract for provision of such service has been entered through another advocate or a firm of advocates, or by a firm of advocates, by way of legal services, to a business entity.'

The words "by way of legal services" are preceded and succeeded by comma

. Therefore, the said words apply to an individual advocate including a senior advocate and a firm of advocates. Legal services provided by either of them are liable for payment of GST under reverse charge by the business entity. The words "by way of representational services before any court, tribunal or authority" appear in conjunction with senior advocate without a comma and merely describe the nature and mode of representational services provided by a senior advocate to a business entity.

It, therefore, follows that legal services, which includes representational services, provided by advocates are under reverse charge.

Doubts cleared! Lawyers need not pay GST; their clients will. The comma saved the lawyers!

Four years later, the Orissa High Court noted that lawyers are being issued notices by the GST Department. The High Court [[2021-TIOL-823-HC-ORISSA-GST](#)] observed,

What the Court is concerned about is the department insisting that the Petitioner should have submitted "documentary evidence to prove his claim that he is a practicing individual lawyer and does not come under the provision of GST or service tax."

A reference is made to a Notification dated 20th June 2012, in terms of which service tax liability of an individual advocate is Nil for legal services rendered to any of business entities located in the taxable territory. However, even for this, the Department appears to insist that the burden to prove it lies on the Petitioner. The counter affidavit filed acknowledges that a similar notice was issued to the Petitioner in 2017 to which he replied, pointing out how he was not liable to pay any service tax.

Mr. P. K. Parhi, learned Assistant Solicitor General of India, has fairly admitted that no notice in the first instance ought to have been issued to the Petitioner, who is a practising

advocate. However, when specifically asked whether the clear instructions have been issued by the Department to all the officers involved in the enforcement of the GST regime that practising advocates should not be issued notices, he sought time for instructions.

During the hearing, certain other advocates present in the Court stated that they too have received such notices. It appears that despite knowing fully well that advocates are not liable to pay service tax or GST, notices continue to be issued to them by the GST Commissionerate.

The Court expresses its concern that practising advocates should not have to face harassment on account of the Department issuing notices calling upon them to pay service tax/GST when they are exempted from doing so, and in the process also having to prove they are practising advocates.

The Commissioner GST is directed to issue clear instructions to all the officers in the GST Commissionerates in Odisha that no notice demanding payment of service tax/GST will be issued to lawyers rendering legal services and falling in the negative list, as far as GST regime is concerned. Copies of such instructions be placed before the Court on the next date.

On the next date, a compliance affidavit has been filed by the Principal Commissioner, GST & Central Excise Commissionerate, Bhubaneswar enclosing the copies of instructions issue don 9th April, 2021 and 15th April, 2021 as:

It is clearly instructed to all the field formations that utmost diligence may be taken while initiating verification against the entities on the basis of third party information, if it is found that income so reflected is on account of provision of exempted service / negative service, no further action under Section 73 of the Finance Act, 1994 may be initiated.

Further, it is noticed that in the process of verification, letters were issued to the same entity by the different field formations causing unnecessary hardship to the party supplying the information. So coordination among the field formations may be maintained so that if information is called for by one of the field formation from a particular entity no further enquiry may be initiated against the same entity by the others.

Please see [2021-TIOL-965-HC-ORISSA-GST](#)

Just day before yesterday, (on 07.03.2022) an identical case came up before the Gujarat High Court, where the petition was filed by the Gujarat High Court Advocates Association, as several lawyers have received notices from the GST Department.

GST has kept the lawyers busy, even if it is in their own defence.

Until Next Week