

# Discriminative Levy of Service Tax on Chartered Accountants



This article deals with the discriminative levy of service tax (ST) on practising Chartered Accountants (CA) *vis-à-vis* the practising advocates. All services provided by a CA are subject to levy of ST. There are certain similar services rendered by advocates, which are not subject to any levy of ST. There lies the professional discrimination and discriminatory treatment, which is unjustified. The author seeks to discuss this (unjustified) discrimination in a democracy. It may be noted that though the discussion pertains to two professionals here, the discussion in principle would apply to all other professionals also who are similarly placed, e.g. company secretaries, cost accountants, etc. Read on...



**CA. Sivadas Chettoor**

(The author is a member of the Institute. He may be contacted at siva208@yahoo.com.)

All services provided by a chartered accountant (CA) are subject to levy of ST. There are certain similar services which are rendered by professionals like advocates and are not subject to levy of ST, e.g. a CA is authorised to act as an authorised representative (AR) before any Tax the income tax authorities and the fee charged by him attracts service tax (ST), whereas an advocate's fee to act as an AR is not taxed and, in fact, he enjoys specific exemption to the extent

specified in this regard It would mean therein. This means higher cost to a person who avails the services of a CA compared to that of an advocate. There lies the discrimination, which is unreasonable and unjustified.

It may be noted that in this article, the discussion pertains to two professionals only but the author feels that it would apply to all other professionals also who are similarly placed like company secretaries, cost accountants etc.

### The History of the Levy

The levy of ST on practising Chartered Accountants was brought on 16-10-1998 was imposed in by the Finance (No. 2) Act, 1998 vide Notification No. 53/98-ST dated 07-10-1998.

#### Relevant Statutory Provisions

*“Taxable Services means any service provided or to be provided to any person, by a practising chartered accountant in his professional capacity, in any manner”* {Section 65(105)(s) of the Finance Act, 1994}

*"Practising Chartered Accountant" means a person who is a member of the Institute of Chartered Accountants of India and is holding a certificate of practice granted under the provisions of the Chartered Accountants Act, 1949 ( 38 of 1949) and includes any concern engaged in rendering services in the field of chartered accountancy; {Section 65(83) of the Finance Act, 1994}*

Note: The definition as provided above got rescinded w.e.f 1<sup>st</sup> July, 2012 in the light of paradigm shift in taxation of service under the Negative list regime of Service Tax.

All the services provided by a practising chartered accountant in his professional capacity in any manner were brought into the tax net. But, he got some consolation vide the notification No. 59/98-ST dated 16-10-98 (Notification No. 59/98), whereby all services provided by a CA were granted exemption except the two services in relation to accounting and auditing. Unfortunately, the benefits or bounty by the Government did not last long. Notification No. 59/98 was withdrawn and by Notification with the notification No. 02/2006-ST dated 1-3-2006, all services of a practicing CA were brought to the tax net. But on the basis of strong representations, the Government has exhibited some leniency by issuing a notification, i.e. No. 25/2006-ST dated 13-07-2006, whereby exemption was granted to services relating to representing the client before any Statutory authority in the course of proceedings initiated

under any law for the time being in force, by way of issue of notice (known among CA circles as notice cases) to be effective from 13-07-2006. But it is unfortunate that the said benefit was taken away by the notification No. 32/2011-ST dated 25-04-2011. So, a CA is now in the same position as he was in the beginning of the levy in 1998.

### Tax Practice

Though auditing and accounting are considered the core areas of the Chartered Accountants but traditionally tax practice was also considered to be an important area traditionally, where CAs played a key role.

The Institute of Chartered Accountants of India (ICAI) in its website has observed:

*With a number of taxes on the statute book, current and continuing tax information has become vital to the effective economics of business management. The assessment of taxes is very closely linked with financial accounts. The Chartered Accountant with his experience in accounts is in an advantageous position for preparing the returns for tax purposes, representing assessee before the Income-Tax authorities and rendering general advice on taxes to his clients.*

Thus, it is clear that a major area of practice is taxation which would include both direct taxes, e.g. income tax, wealth tax, etc., and indirect taxes, e.g. excise duty, Customs duty, Service tax ,CST, VAT, etc.

### Authorised Representative

Attention is invited to the Section 288 of the Income-tax Act, 1961 (“the Act”) which permits a CA as well as other professionals including an advocate to represent the assessee before the Income Tax authorities. It may be noted that the Section 44 of Wealth Tax Act, 1957 and the Section 43 of Gift Tax Act, 1958 (now kept under suspension) permit a CA and an advocate to act as an AR.

As per Rule 12 of the Central Excise (Appeals) Appeal Rules, 2001, a CA is qualified to represent or act

**As per Rule 12 of the Central Excise Appeal Rules, 2001, a CA is qualified to represent or act as an AR for the purposes of Clause (c) of sub-section (2) of the Section 35Q of the Act, and an advocate is also granted the same privilege.**

as an AR for the purposes of Clause (c) of sub-section (2) of the Section 35Q of the Central Excise Act, 1944 (1 of 1944) and an advocate is also granted the same privilege. In terms of Section 83 of the Finance Act 1994, similar provisions would be applicable under the Service tax as applicable for certain provisions of Central Excise Act 1944(1 of 1944).

Similarly, Rule 9 of the Customs (Appeals)(appeals) Rules, 1982 read with the Section 146A of the Customs Act, 1962 provides for appearance by both a CA and an advocate before all customs authorities.

Regulation 19(2) of the Company Law Board Regulations, 1991 also allows both the CA and advocate to appear in proceedings before it. Likewise Section 16 of the Foreign Exchange Management Act, 1999 permits both to represent parties. There are so many other legislations, which grant similar privileges to both the professionals.

The above discussions clearly show that both CAs and advocates are treated at par and as equals so far as their entitlement and qualification to act as an AR are concerned.

#### Position from 01-07-2012

The law has undergone substantial changes effective from July 1, 2012. Hitherto, the levy was based on positive list where services sought to be taxed were specifically listed out. But from 1-7-2012 onwards, it became negative list based levy, i.e. all services are taxable except those specified in the negative list under Section 66D of the Finance Act, 1994 or in the Mega exemption notification.

The law now defines service under Section 65B(44) of the Finance Act, 1994 and means *any activity* carried out by a person for another *for consideration*, and includes a declared service, but shall not include certain items specified therein like mere transfer of property in goods, actionable claims, money transactions, services of employees, etc. The law declares certain services to be taxable known as declared services. Then there are services which are exempt as per Mega exemption notification vide Notification No.25/2012-St dated. 20-6-2012 (Notification No. 25/2012), issued by the Central Government in exercise of its vested power under the Section 93(1) of Finance Act, 1994.

On a bare look at the new definition of service, the conclusion is irresistible that the services rendered by a CA as well as an advocate shall be squarely covered. The services carried out by CAs/advocates to a client can be regarded as an *activity for consideration*. The levy also cannot be disputed, as the Apex Court has

**There was a controversy regarding whether a advocate's firm is a *Commercial Establishment* as per the Shops and Establishment Act and it was settled by the decision of the Supreme court in *V. Sasidharan [1984] 65 FJR 374*, wherein it was held that it is neither a *Shop* nor a *Commercial Establishment*.**

already upheld the constitutional validity. There is no exemption to the services rendered by a CA as per the mega exemption notification and it does not appear in the negative list also. Hence the burden of tax clearly falls on his shoulders.

#### But a Practicing Lawyer is Exempt!

Alas...The exemption notification No. 25/2012-ST, grants exemption in respect of services provided by an individual as an advocate or a partnership firm of advocates by way of legal services to

- (i) an advocate or partnership firm of advocates providing legal services;
- (ii) any person other than a business entity; or
- (iii) a business entity with a turnover up to ₹10 lakh in the preceding financial year; (Serial No. 6(b) of the said notification).

Thus, the discrimination is very clear. An advocate or a firm of advocates is given a blanket exemption if they render services to non-business entities and partial exemption if they do so to business entities having a turnover up to ₹10 lakh in the preceding financial year.

The legal service means “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”. This definition in the notification is wide enough to cover the services rendered by an advocate as an *authorised representative* (AR) under various enactments specified in the above paragraph under the heading **Authorised Representative**. But, same services rendered by a practising practicing CA are taxable whether rendered to a business entity or a non-business entity.

Are there any reasons or basis for granting exemption only to advocates while putting the burden of tax on CAs for performing the same activities? It is difficult to find a justification. Although advocates are not given complete immunity, a majority of the practicing lawyers doing services as ARs are

individual advocates or a firm of lawyers. Please note that the exemption is not available in case the services are rendered to a business entity having its turnover over Rs 10 lakhs in the preceding financial year. But it is well known that a considerable portion of the clients are not business entities and hence in respect of those services, advocates enjoy total exemption.

### Full Reverse Charge Mechanism

In addition to the above, another advantage of full reverse charge mechanism is granted only to individual advocate/ a firm of advocates in respect of legal services, which is denied to a CA vide notification No 30/2012-ST dated 20-06-2012. By virtue of the said notification, 100% service tax liability connected with the legal services rendered by an advocate. Firm of advocates is to be discharged only by the client receiving the services.

### Services of Lawyer and CA

Services rendered by a CA and an advocate while acting as an AR are very similar and almost identical. The first decision which supports the view is that of the Madras High court in *CIT vs. G. M. Dandekar [1952] 22 ITR 235 (Mad)* wherein the Division Bench clearly held:

*Mr. Ramamurthi Iyer the learned advocate for the Council contended that the respondent was a representative of the assessee in the income-tax proceedings; that his position was analogous to that of an advocate appearing for a party in court and that he owed a duty to the income-tax department to act fairly in the presentation of the case of the assessee. We agree that the position of Chartered Accountants representing the income-tax assessee is similar to that of Advocates representing parties in court and that their obligations are similar to those of advocates.*

Attention is also invited to the observations of the Hon'ble Karnataka High Court in *Philipose and company vs. State of Karnataka* reported in 67 Compca 154 wherein the court observed:

*In view of the fact that the profession of accountancy is not very much different from the profession of a lawyer, I am clear in my mind that the law laid down by the Supreme Court in the case of V. Sasidharan [1984] 65 FJR 374 is applicable to the facts of the petitioner's case." Thus the Hon'ble Court clearly held that the functions of a CA and an advocate are very much similar.*

There was a controversy regarding whether a

**The doctrine of equality before law does not lead to the conclusion that all the laws should have universal application and all the persons must under all circumstances be treated equally. Some persons may require special treatment before law because of social or economic reasons, e.g. imposition of income tax only on persons having income above a particular limit can be justified since if it is imposed on all that will definitely cause considerable difficulties to really poor persons.**

advocate's firm is a *Commercial Establishment* as per the Shops and Establishment Act and it was settled by the decision of the Hon'ble Supreme Court in *V. Sasidharan [1984] 65 FJR 374*, wherein it was held that it is neither a *Shop* nor a *Commercial Establishment*. A similar controversy arose in the case of a CA firm and on the analogy that both the professions have common characteristic features the said decision was applied to CA firm also.

Incidentally, let us refer to the following observations of the Court in *Merchant M.E vs. Bombay Municipal Corporation (1968) 111 ITR 187 (Bom)*, wherein CA was equated with other professionals and it was emphasised that a CA should also be added to the list of traditionally-recognised three learned professions, i.e. church, medicine and law:

*"The three learned professions referred to in the above quotation cannot be the only professions for all time. Times change. The sphere of human activity and endeavour is constantly expanding, giving rise to problems which require specialization and expertise. In the course of last two centuries, trade, commerce and industry have vastly developed bringing in their wake problems which have to be tackled by experts. The old crystallized learned professions of the Church, Medicine and Law were, by the very nature of their training, unable to solve the problems of the new developments in trade, commerce and industry, which, inter alia, threw up a team of experts in the shape of chartered accountants having specialized knowledge.*

From the above brief analysis, it can be fairly concluded that both professions are to be treated at par with each other and cannot be separated as a totally unconnected class of professionals.

### Article 14 of the Constitution

Let us see what Article 14 provides, which is reproduced below for the ease of reference.

**Equality before law:** *The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

Article 14 enjoins upon the State not to deny to any person equality before the law or the equal protection of the laws within the territory of India. Most constitutions speak of either equality before the law or the equal protection of the laws, but rarely of both. Article 14 imposes twin duties on the State. The first is to treat persons equally before law and the second to extend equal legal protection of laws to all persons without discrimination. It has been held by the Apex Court in *Dalmia Cement Ltd vs. UOI (1996) 10 SCC 104* that twin concepts in its proper spectrum encompasses social and **economic justice** in a political democracy.

### Equality before Law

Let us pay attention to the observations of the Hon'ble Supreme Court in *Indra Sawhney vs. UOI reported in AIR 1993 SC 477* (at Para 3, 4 and 5):

The doctrine of equality has many facets. **It is a dynamic, and an evolving concept.** Its main facets, relevant to Indian Society, have been referred to in the preamble and the articles under the sub-heading "Right to equality"-(Articles 14 to 18). In short, the goal is equality of status and of opportunity. Articles 14 to 18 must be understood not merely with reference to what they say but also in the light of the several articles in Part IV (Directive Principles of State Policy). "Justice, Social, Economic and Political", is the sum total of the aspirations incorporated in part IV.



Indeed, in a society where equality of status and opportunity do not obtain and where there are glaring inequalities in incomes, there is no room for equality—either equality before law or equality in any other respect. **Equality has been and is the single greatest craving of all human beings** at all points of time. It has inspired many a great thinker and philosopher. All religious and political schools of thought swear by it, including the Hindu religious thought.....”

The doctrine of equality before law does not lead to the conclusion that all the laws should have universal application and all the persons must under all circumstances be treated equally. Some persons may require special treatment before law because of social or economic reasons, e.g. imposition of income tax only on persons having income above a particular limit can be justified since if it is imposed on all that will definitely cause considerable difficulties to really poor persons.

### Equal Protection of Law

The scope of the equality clause is explained in *Basheshar Nath v CIT*:

The underlying object of this Article is undoubtedly **to secure to all persons, citizens or non-citizens, the equality of status and of opportunity** referred to in the glorious preamble of our Constitution. It combines the English doctrine of the **rule of law** and the equal protection clause of the 14<sup>th</sup> Amendment to the American Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this Article is founded on a sound public policy recognised and valued in all civilised States...

Article 14 only prohibits unequal treatment of persons similarly situated and equal protection means the right to equal treatment under similar circumstances (see *Shrikishan Singh vs. State of Rajasthan AIR 1955 SC 795*).

— ■ —

**There is also a clear discrimination. If an individual advocate renders services to a business entity with turnover less than ₹10 lakh, he is exempt from tax whereas the very same services rendered by a CA attracts the levy. Is it not discriminative?**

— ■ —

The principle does not take away from the State the power of classifying persons for legitimate purposes. Every classification is in some degree likely to produce some inequality, and mere production of inequality is not enough.

While reasonable *classification is permissible*, such classification must be based upon some real and substantial distinction bearing a reasonable and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis ( see *State of Bombay vs. F.N Balsara 1951 AIR SC 318*).

What then is the scope of *permissible classification*?

Classification is permitted provided it fulfils two conditions 1) that the classification must be founded on *intelligible differentia* which distinguishes, persons or things that are grouped together from others left out of the group and 2) that the differential must have a rational relation to the object sought to be achieved by the law (see *Budhan Choudhary v State of Bihar AIR 1955 SC 191*).

#### Article 14 of the Constitution Discriminatory?

Yes. On reading of the Article, it is clear that the State is duty bound to extent equality before law as well as equal protection of law. The State denies to a CA not only equality but also equal protection of laws.

The State denied equality by granting a special treatment to individual advocate/firm of advocates. The notification grants exemption even in respect of services rendered by advocates to business entities having turnover below ₹10 lakh per annum. The object of the Act is to impose service tax on all services by all persons. Therefore, granting exemption to advocates while denying the same to similarly placed CAs and other professionals is plainly a situation of unequal treatment of persons in the matter of levy of tax. Hence, the law suffers from the vice of constitutionality as it clearly violates Article 14.

The State also denies *equal protection of laws* by denying the protection to CA while extending the same to an advocate. It has already been explained that CAs as a class is similar to that of advocates. If that be so, there is no *intelligible differentia*. There is no rational relation between the classification and the objects sought to be achieved as the object of the levy is to impose tax on all services in general.

There is also a clear discrimination. If an individual advocate renders services to a business entity with turnover less than ₹10 lakhs, the said service lakh,



is exempt from service tax whereas the very same services rendered by a CA attracts the levy of ST. Is it not discriminative?

Take another instance. In the case of a service rendered by an individual advocate or firm of advocates which attracts service tax, still he is not liable to pay any service tax as the 100% service tax has to be borne by the service receiver i.e. ie the client(s).client. The similar facility is denied to CA. Is it not a clear case of discrimination?

It may be noted that the law does not enjoin on the person challenging the State action under the Article 14 to prove that the law has been enacted with an intentional or purposeful discrimination. It was observed in *State Of West Bengal vs. Anwar All Sarkar 1952 AIR 75 (SC)*:

*...if it is established that the person complaining has been discriminated against as a result of legislation and denied equal privileges with others occupying the same position, I do not think that it is incumbent upon him, before he can claim relief on the basis of his fundamental rights, to assert and prove that in making the law, the legislature was actuated by a hostile or inimical intention against a particular person or class.*

#### Conclusion

In view of the discussions above, it is submitted that the action of the State in granting certain benefits only to advocates while denying the same to Chartered Accountants is hit by Article 14 of the Constitution and hence unsustainable. The action clearly results denial of equality and equal protection of laws which constitutes one of the fundamental principles enshrined in our Constitution. It is suggested that the Central Government may by amending Constitution. Central government should amend the notifications and extend the same benefits to Chartered Accountants as well including other professionals like Company Secretaries, Cost Accountants, tax practitioners, etc. Sooner the better. ■