

POTS for Krishi Kalyan Cess and Its Impact

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Krishi Kalyan Cess (hereinafter referred as **KKC**) has been introduced vide section 161 of the Finance Act, 2016. KKC has been levied on any or all the taxable services at the rate of 0.5% of the value of taxable services with effect from 1st June, 2016. KKC is in addition to any cess or service tax leviable on such taxable service and the proceeds of which would be used for financing initiatives relating to improvement of agriculture and welfare of farmers the objective of behind introducing KKC is to fund the financing & promotion initiatives to improve agricultural or related activities.

As per **Article 270 of the Constitution of India** cesses imposed by the Parliament for earmarked purposes need to be utilized for the designated purpose and should not be shared with State Governments. Even if there is an unspent amount, it is simply carried forward for use in the following year. While the Centre has to mandatorily share the revenue from other taxes with the States, it enjoys the privilege to retain the entire kitty in respect of cesses. Further, introduction of new Cess has raised eyebrows amongst experts. Levy of Cess seems to be contradictory to the overall vision of GST. With the applicability of GST, all indirect taxes shall be subsumed with an attempt to establish uniformity in structure and reduce cascading effect of taxes. This move is a step backward and it shows lack of vision on the part of Government of the day. After this cess, the service tax has increased to 15 per cent because of which all the services have become dearer.

Further, erstwhile section 67A of the Finance Act, 1994 [which was applicable upto 13.05.2016] used to specify that the **rate of tax, value of taxable service and rate of exchange** if any shall be the rate in force or as applicable at the time when taxable service has been provided or agreed to be provided. In other words, rate of tax or exchange prevailing at the time of provision of service should be considered for determination of tax. However aforesaid section 67A did not have any reference to determine when the service has been provided whereas Point of Taxation Rules, 2011(hereinafter referred as **POTR**), determines the point of time when service tax needs to be levied.

Thus, in the absence of any reference to point of taxation in section 67A in Finance Act 1994, there existed an anomaly especially in regards to new levy whether to consider 67A or Point of taxation. To arrest or curb this anomaly, following amendment has been brought by Finance Act, 2016 **with effect from 14.05.2016**:

The erstwhile section 67A has been renumbered as section 67(1). And section 67A(2) has been inserted w.e.f. 14.05.2016 to provide as under:

The time or the point in time with respect to the **rate of service tax** shall be such as may be prescribed.

Resultantly, Central Government has also amended Rule 5 of POTR w.e.f 01.03.2016. The amended Rule 5 of Point of Taxation Rules, 2011 is as follows:

“Where a service is taxed for the first time, then,—

- (a) no tax shall be payable to the extent the invoice has been issued and the payment received against such invoice before such service became taxable;*
- (b) no tax shall be payable if the payment has been received before the service becomes taxable and invoice has been issued within fourteen days of the date when the service is taxed for the first time.*

Explanation 1- This rule shall apply mutatis mutandis in case of new levy on services

Explanation 2- New levy or tax shall be payable on all the cases other than specified above”

Prior to 01.03.2016, none of the above explanations were provided to the Rule 5 of POTR. Thus, from the above, it very clear that this rule is beneficial in as much as for change in old rate to new rate.

S. No.	Service provided	Invoice issued	Payment received	KKC leviable?	Reason
1	20 th May (before KKC)	22 th May (before KKC)	28 th May (before KKC)	No	Invoice issued and payment received before imposition of KKC. Covered under Rule 5(a)
2	20 th May (before KKC)	10 th June (within 14 days of levy of KKC)	28 th May (before KKC)	No	Payment received before KKC and invoice issued within 14 days of KKC. Covered under Rule 5(b)
3	20 th May (before KKC)	30 th June (after 14 days of levy of KKC)	28 th May (before KKC)	Yes	Payment received before KKC but invoice issued after 14 days of KKC. Not covered by Rule 5(a) or 5(b) and Explanation 2 become applicable.
4	20 th May (before KKC)	22 th May (before KKC)	10 th June (after KKC)	Yes	Payment received after KKC. Not covered by Rule 5(a) or 5(b) and explanation 2 become applicable. This indicates levy of KKC on outstanding debtors as on 31st May
5	5 th June (After KKC)	22 th May (before KKC)	28 th May (before KKC)	No	Covered under Rule 5 (a). No KKC

6	5 th June (After KKC)	10 th June (within 14 days of levy of KKC)	28 th May (before KKC)	No	Payment received before KKC and invoice issued within 14 days of KKC. Covered under Rule 5(b)
7	5 th June (After KKC)	30 th June (after 14 days of levy of KKC)	28 th May (before KKC)	Yes	Payment received before KKC but invoice issued after 14 days of KKC. Not covered by Rule 5(a) or 5(b) and Explanation 2 become applicable.
8	5 th June (After KKC)	22 th May (before KKC)	10 th June (after KKC)	Yes	Payment received after KKC. Not covered by Rule 5(a) or 5(b) and explanation 2 become applicable.

As per the above explanations, **new levy** shall be governed by the provisions of Rule 5 of POTR which specifies two conditions and if neither of the conditions gets satisfied then new levy needs to be paid. The two conditions under which new levy shall not attract are, either

- a. before the levy of new tax becomes effective, if invoice is issued and payment is also received then to the extent of payment received
- or
- b. if the payment has been received before the levy of new tax becomes effective and invoice has been issued within 14 days from the date of levy of new tax become effective, then new levy should not be paid.

In other words, new tax should not be paid to the extent of payment received and invoice is also issued either before the levy of new tax becomes effective or within 14 days from the date of levy of new tax become effective. Thus, KKC shall not be required to be paid to the extent of payment received and invoice raised before 1st June 2016 or the payment is received before 1st June 2016 and invoice is raised within 14 days from 1st June 2016 on any service or all taxable services. In all other cases, KKC should be paid.

The implication of the above explanations under different situations has been illustrated below

Thus, from the above examples shown in the table, if services are rendered before 1st June 2016, whether invoice has been raised or not but payment has not been received before 1st June 2016 because of any reason like credit period given, industry practice, financial crises or any other reason i.e. sundry debtor balance as on 31.05.2016, **whether KKC needs to be paid?** In this context, it shall be worthwhile to discuss following two land mark judgments:

Firstly, in **Collector of C.Ex Hyderabad Vs Vazir Sultan Tobacco Co. Ltd 1996 (83) ELT 3 (SC)** case Finance Act 1978 levied special duty of excise equal to 5% of amount of excise duty chargeable on goods. The levy came into effect on and from March 1, 1978, Sub-section (3) provided that the said levy shall be in addition to the duties of excise chargeable on such goods under the law in force. Sub-section (4) provided that the provisions of the Central Excise

Act and the rules made there under shall apply, as far as may be, in relation to the levy and collection of the special duties of excise levied under the said section. As per the provisions of Central Excise and rules framed there under the levy of excise is on manufacture or production of goods though collection/payment of duty is on removal of goods. In this case, Assessee was engaged in manufacture of cigarettes, had manufactured the cigarettes before 01.03.1978 but removed the goods after 01.03.1978. Department wanted to levy tax on goods which were manufactured prior to the levy but cleared after the levy from the factory, in such a case Honorable Supreme Court held that levy of excise duty is on manufacture or production of goods and not at the stage of removal. The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal. The removal of goods is not the taxable event. Taxable event is the manufacture or production of goods. In such a case where are manufactured prior to the levy are concerned, chargeability of tax cannot be applied for reason that there was no levy of duty on such goods at the stage and at the time of manufacture/production.

In a nutshell, it means new levy shall not be attracted to the goods manufactured when the levy was not in existence though removal of goods took place after the introduction of levy.

Though the above case is respect to the provision of Central Excise it will be equally applicable to the provisions of service tax. In the above stated case, taxable event is 'manufacture', though collection or payment of duty is deferred and the taxable event took place before the introduction of new levy. Thus, it was held that new levy would not be attracted. In the similar way, taxable event in case of service tax is provision of service i.e. service provided or agreed to be provided, though collection or payment of duty is deferred. So based on the judgement in case of Vazir Sultan case, if the service are provided i.e. taxable event occurred before the introduction of new levy, **the new levy of KKC shall not attract.**

Thus from the above, case it can be safely inferred that where the services are provided before the introduction of KKC though payment is received after introduction of KKC, the provision of KKC i.e. payment of KKC should not attract in respect to services which are already provided.

Secondly, in **Wallace Flour Mills Company Ltd Vs Collector of C .Ex 1989 (44) ELT 598 (SC)** case excisable goods were enjoying nil rate of duty vide exemption at the time of manufacturing. However at the time of removal exemption was removed and goods became subject to duty @ 15%, in such a case Honorable Supreme Court held that nil rate is also a rate of duty and when the goods were unconditionally exempted from duty on the date of manufacture but were dutiable on the date of their removal they would be liable to duty at the rates prevalent on the date of removal.

In a nutshell, even if the excisable goods are exempted vide notification at the time of manufacture but at the time of removal exemption is removed and goods became subjected to duty. Duty prevalent at the time of removal of goods needs to be paid. However this case law is not relevant in the context of KKC because KKC is **new levy and there was no exemption prevailing** for the levy of KKC before 1st June 2016.

Thus, from the above two case laws, in context of KKC, as per strict interpretation of Rule 5 of Point of Taxation Rules, 2011, KKC should be discharged on all the amounts collected after 1st June 2016. However KKC being new levy which

would be effective from 1st June 2016, all the services rendered before 1st June 2016 should not attract KKC taking shelter of Supreme Court judgment in Vazir Sultan Tobacco case however the same needs to be tested judicially in the context of KKC.

Alternatively, if the service provider decides to pay KKC then a service provider would be having following options which are follows:

- a. To discharge KKC liability from Service Provider's pocket- in such a case total amount of KKC would become cost to Service Provider.
- b. To intimate to the customer about the provision of KKC and urge them to make payment before 01.06.2016 in which case to the payment received before 01.06.2016 there will no KKC. To the extent payment is not received, Service Provider can raise a supplementary invoice. To the extent of payment received from customers, discharge it to the credit of Central government and for the balance amount of KKC, Service Provider can pay from its pocket.

Implication of KKC on services liable to tax under Reverse Charge Mechanism

Liability to pay service tax under reverse charge arises on the date of payment of consideration by service receiver to service provider. There has been amendment in the Rule 7 of the POTR [vide notification no. 21/2016-ST, Dated 30.03.2016] whereby following **third** proviso has been inserted:

“Provided also that where there is change in the liability or extent of liability of a person required to pay tax as recipient of service notified under sub-section (2) of section 68 of the Act, in case service has been provided and the invoice issued before the date of such change, but payment has not been made as on such date, the point of taxation shall be the date of issuance of invoice.

The implications of above-mentioned third proviso to Rule 7 could be understood with the help of following illustration:

Services provided	Invoice issued	Payment made	KKC applicable	Reason
20 th May (before KKC)	22 nd May (before KKC)	28 th May (before KKC)	No	All events prior to date of levy of KKC
20 th May (before KKC)	10 th June (after KKC)	28 th May (before KKC)	No	Date of payment prior to levy of KKC
20 th May (before KKC)	22 nd May (before KKC)	8 th June (after KKC)	No	Third Proviso to Rule 7
20 th May (before KKC)	2 nd June (after KKC)	8 th June (after KKC)	Yes	Date of payment after levy of KKC

