

# SERVICES PROVIDED BY SENIOR ADVOCATES



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**Q1) What is legal consultancy service?**

A1) As per Section 65(105)(zzzm), legal consultancy service is defined as under:

“Taxable service means any service provided or to be provided:

- (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.”

**Q2) What is the meaning of Advocate?**

A2) “**Advocate**” has the meaning assigned to it in Section 2(1)(a) of the Advocates Act, 1961, i.e. ‘an advocate means an advocate entered in any roll under the provisions of this Act’.

**Q3) What is the meaning of Senior Advocate?**

A3) “**Senior Advocate**” has the meaning assigned to it in section 16 of the Advocates Act, 1961 (25 of 1961) i.e. ‘An advocate may, with his consent, be designated as senior advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability or standing at the Bar or special knowledge or experience in law he is deserving of such distinction.’”

**Q4) What is a business entity?**

A4) As per Section 65B(17) of the Finance Act, 1994, 'Business entity' means "any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession"

**Q5) What are the provisions of exemption for senior advocates?**

A5) The provisions of exemption had undergone a sea change as per the Finance Bill, 2016. These exemptions have again been changed by the Government through Notification No. 32/2016-ST dated 6<sup>th</sup> June, 2016. A synopsis of the provisions is as below:

**Before Finance Bill, 2016**

Before the Finance Bill, 2016, the services provided by all advocates including senior advocates were liable to tax except the following which were exempt as per Entry no. 6(b) and 6(c) in the Mega Exemption Notification No. 25/2012-ST dated 20<sup>th</sup> June, 2012:

“6. Services provided by

(b) 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 rupees ten lakh in the preceding financial year; or
- (c) a person represented on an arbitral tribunal to an arbitral tribunal;”

#### **After the Finance Bill, 2016**

Through Notification No. 9/2016-ST dated 1<sup>st</sup> March, 2016, the entry no. 6(b) and (c) in the Mega Exemption Notification no. 25/2012-ST dated 20<sup>th</sup> June, 2012 was substituted. In effect, the following services were notified as exempt:

“Services provided by

(b) a partnership firm of advocates or an individual as an advocate **other than a senior advocate**, 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 rupees ten lakh in the preceding financial year; or

(c) a **senior advocate** by way of legal services to a person other than a person ordinarily carrying out any activity relating to industry, commerce or any other business or profession;”

The date of applicability of the notification was 1<sup>st</sup> April, 2016.

As a result, all the legal services provided by senior advocates except services provided to non-business entities were brought within the service tax net.

#### **After the amendment on 6<sup>th</sup> June, 2016**

Notification no. 32/2016-ST dated 6<sup>th</sup> June, 2016 has been brought out recently by the Central Government to further modify the entry no. 6(c) in the Mega Exemption Notification no. 25/2012-ST dated 20<sup>th</sup> June, 2012. Entry no. 6(b) was not modified. Hence, the following services were considered as exempt after the amendment:

“Services provided by

(b) a partnership firm of advocates or an individual as an advocate other than a senior advocate, 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 rupees ten lakh in the preceding financial year; or

(c) a senior advocate by way of legal services to-

- (i) any person other than a business entity; or
- (ii) a business entity with a turnover up to rupees ten lakh in the preceding financial year;”

As a result of the above amendment, all the legal services provided by a senior advocate to a business entity having a turnover of Rs. 10 lakhs in the preceding financial year will only be taxable. Legal services provided by senior advocates to non-business entity or business entity with a turnover of upto Rs. 10 lakhs in the preceding financial year will be exempt.

#### **Q6) Who is liable to pay service tax when the services are provided by senior advocates?**

A6) As per section 68(2) of the Finance Act, 1994, in respect of certain services notified by the Central Government, the person liable for paying service tax will be a person other than the service provider. The person who will be liable in these cases has also been stated in the Service Tax Rules. This payment mechanism is known as reverse charge.

Notification no. 30/2012-ST dated 20<sup>th</sup> June, 2012 covers all the services on which any person other than the service provider is liable to pay tax and also the extent to which that person is liable to pay tax.

Rule 2(1)(d)(i) of the Service Tax Rules, 1994 talks about the person who is liable to pay service tax in case he is covered under Section 68(2) of the Finance Act, 1994.

#### **Before the Finance Bill, 2016**

##### Service under reverse charge

The relevant extract of the Notification no. 30/2012-ST dated 20<sup>th</sup> June, 2012 which shows the service on which reverse charge is applicable has been reproduced below:

“The taxable services,-

(A)(iv) provided or agreed to be provided by,-

(B) an individual advocate or a firm of advocates by way of legal services,”

Sl.No.	Description of a service	Percentage of service	Percentage of service tax payable by service provider	Percentage of service tax payable by any person liable for paying service tax other than the service provider
5	In respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services	Nil	0%	100%

#### Person liable to pay tax

Also, as per item no. D of Rule 2(1)(d)(i) of the Service Tax Rules, 1994, the person liable for paying service tax:

“in relation to service provided or agreed to be provided by,-

(II) an individual advocate or a firm of advocates by way of legal services,

to any business entity located in the taxable territory, will be the recipient of such service;”

On a combined reading of the above, it could be interpreted that in respect of all taxable legal services provided by an advocate or a firm of advocates including senior advocates, the person liable for paying tax was the service receiver i.e. the business entity located within the taxable territory.

#### **After the Finance Bill, 2016**

##### Service under reverse charge

As per the Notification No. 18/2016-ST dated 1<sup>st</sup> March, 2016, the entries in Notification no. 30/2012-ST dated 20<sup>th</sup> June, 2012 have been amended.

After the amendment, the following service was only subjected to reverse charge:

“The taxable services,-

(A)(iv) provided or agreed to be provided by,-

“(B) a firm of advocates or an individual advocate **other than senior advocate**, by way of legal services,”

The modified entry as per the table was as follows:

Sl.No.	Description of a service	Percentage of service	Percentage of service tax payable by service provider	Percentage of service tax payable by any person liable for paying service tax other than the service provider
5	in respect of services provided or agreed to be provided by a firm of advocates or an individual advocate <b>other than a senior advocate</b> by way of legal services	Nil	0%	100%

#### Person liable to pay service tax

As per notification no. 19/2016 dated 1<sup>st</sup> March, 2016, in the Service Tax Rules, 1994, Item (D) of Rule 2(1)(d)(i) of Service Tax Rules, 1994 was modified. So, the person liable to pay service tax:

“in relation to service provided or agreed to be provided by,-

(II) a firm of advocates or an individual advocate **other than a senior advocate** by way of legal services

to any business entity located in the taxable territory, will be the recipient of such service;”

On interpretation of the above, it could be seen that the senior advocates had now become chargeable to service tax under forward charge from 1<sup>st</sup> April, 2016. However, the Honourable High Court of Delhi, Gujarat and Kolkata granted an interim stay on the applicability of service tax on the senior advocates under forward charge. So, for the time being, the service tax was continued to be paid by the business entity under reverse charge mechanism.

#### After amendment on 6<sup>th</sup> June, 2016

##### Service under reverse charge

As per the Notification No. 34/2016 dated 6<sup>th</sup> June, 2016, the entries in Notification no. 30/2012-ST dated 20<sup>th</sup> June, 2012 have been amended.

Hence after the amendment, the following services are taxable under reverse charge:

“The taxable services,-

(A)(iv) provided or agreed to be provided by,-

(B) an individual advocate or a firm of advocates by way of legal services other than representational services by senior advocates, or

(iva) provided or agreed to be provided by 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, and the senior advocate is providing such services, to such business entity who is litigant, applicant, or petitioner, as the case may be”

Please find below the amended entry as per the table:

Sl.No.	Description of a service	Percentage of service	Percentage of service tax payable by service provider	Percentage of service tax payable by any person liable for paying service tax other than the service provider
5	“in respect of services provided or agreed to be provided by an individual advocate or firm of advocates by way of legal services, directly or indirectly”;	Nil	0%	100%

Explanation III has also been inserted below the table to clarify the meaning of litigant, applicant or petitioner. As per explanation III – “The business entity located in the taxable territory who is litigant, applicant or petitioner, as the case may be, shall be treated as the person who receives the legal services for the purpose of this notification.”

#### Person liable to pay tax

As per notification no. 33/2016-ST dated 6<sup>th</sup> June, 2016, in the Service Tax Rules, 1994, Item (D) of Rule 2(1)(d)(i) of Service Tax Rules, 1994 was modified and a new item (DD) has been inserted. So, the person liable to pay service tax:

“in relation to service provided or agreed to be provided by,-

(II) an individual advocate or a firm of advocates by way of legal services other than representational services by senior advocates to any business entity located in the taxable territory, will be the recipient of such service;”

“in relation to service provided or agreed to be provided by 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, and the senior advocate is providing such services, the recipient of such services, which is the business entity who is litigant, applicant, or petitioner, as the case may be”.

On a combined interpretation of all the current provisions of service tax, the legal position of services provided by senior advocates under reverse charge now stands as follows:

- 1) In respect of any representational service provided by senior advocate before any court, tribunal or any other authority to any business entity within the taxable territory, the person liable to pay tax will be the business entity i.e. the litigant or petitioner or applicant under reverse charge mechanism even though the contract for such service has been entered through an advocate or firm of advocates.
- 2) If any other legal service apart from a representational service is provided by a senior advocate to a business entity in the taxable territory, the person liable to pay service tax will be the recipient of the service i.e. the business entity under reverse charge mechanism. It is to be noted here that if the service recipient is an advocate or a firm of advocates in respect of services provided by senior advocate, then such advocate or firm of advocates will be liable under reverse charge even though the service is ultimately used for the benefit of the clients.

**Q7) What is the legal position when the services are provided by senior advocate to an advocate or a firm of advocates and is there a scope of tax planning here?**

A7) As per the practice of this industry, clients usually approach advocates or solicitor firms for legal consultancy services who in turn engage senior advocates for their services. There are two types of services which can be provided by senior advocates to these advocates or solicitor firms:

- 1) Representational services – When a representational service is provided by a senior advocate before any court, tribunal or any authority, the person liable to pay tax will be the litigant, petitioner or applicant and not the advocate or solicitor firm which has engaged the said senior advocate.



2) Other than representational service - If a legal service apart from a representational service (e.g. consultancy) is provided by a senior advocate to an advocate or a firm of advocates, the person liable to pay tax will be the advocate or the firm of advocates as the case may be.

Usually these advocates or firm of advocates do not have any output service against which they can the Cenvat Credit on the input services provided. So, if they pay any tax under reverse charge, their Cenvat Credit will lapse. If they decide to pass on the burden of these taxes, the value charged for providing service will increase. So, in order to save themselves from these hassles, the advocate or firm of advocates should plan their taxes. As part of tax planning, if an advocate or a firm of advocates receiving services from senior advocates wants to avoid the burden of service tax, they should ask the senior advocate to directly raise a bill on the final client for such service. In that case, the client will be liable to pay service tax under reverse charge and not the advocate or firm of advocates.

### **Conclusion**

An attempt by the Central Government to levy service tax on senior advocates under forward charge has effectively been rolled back. This was against the backdrop of very strong protests and representation by the senior advocates against the applicability of service tax on them under forward charge. With this, there are bound to be questions raised against the move adopted by the Finance Ministry to levy service tax on senior advocates in the first place. With a move as bold as this, it was expected that the Government would be putting forward a strong argument to support their contention. However, a feeble rollback of the levy on senior advocates within a little over three months definitely puts a blot in the policy making motives of the Central Government.

**This publication contains information for general guidance only. It is not intended to address the circumstances of any particular individual or entity. Although the best of endeavour has been made to provide the provisions in a simpler and accurate form, there is no substitute to detailed research with regard to the specific situation of a particular individual or entity. S. Khaitan & Associates or any of its officials do not accept any responsibility for loss incurred by any person for acting or refraining to act as a result of any matter in this publication.**