NEGATIVE LIST BASED TAXATION OF SERVICES

CA. Brijesh Verma & CA. Alka Choudhary

(Conceptual Analysis of the New Levy)
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This is an academic compilation on the basis of various circulars and guidance notes issued by the Government from time to time. This work doesn’t aim towards solicitation of work in any manner.

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PREFACE

The comprehensive taxation of services, that appeared a pipedream less than a year back, is now ready to be implemented. In perhaps the most transparent exercises in Indian budget making, the idea of the Negative List originated in the first concept paper in August, 2011. This was fiercely debated by all, some understandably cautious or even skeptical, a few ruthlessly opposed, while a large majority displayed the foresight to look at the larger canvas; all making many valuable suggestions.

This work of our aims at bringing together all the relevant pieces of law relevant with the new levy. We acknowledge that the basic structure of the book as well as text is largely governed by the guidance note on negative list based taxation of service issued by CBEC.

We wish to thank CA. Aditi Jain, Sagarika Sarin, Deepti Singh, Ritu Gulati & Anil Sharma.
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CHAPTER 1:
INTRODUCTION

THE concept of negative list in services initiated last year by the government is now taking up shape with draft concept papers and finally announcement in the budgetary proposals 2012-13. In pre-enactment period, the rationale behind the introduction of negative list and formulation of legislation needs to be thoroughly examined so as to adopt it when it comes into force.

With rapid growth in service sector and its lion's share in the GDP, the Tax resource needs to be evolved in a way where revenue collection from services can be increased without having ambiguity and hindrances which the department and taxpayers are facing due to interpretations of statute, challenge of constitutional validity of levy, federal structure, legislative compulsions, pending litigations etc. The dynamic changes worldwide in the nature of transactions in trade and industry particularly in the service sector needs re-definition from the tax administrators' perspective. Simultaneously, the compliances by the taxpayers were also required to be simplified with the aim of avoiding cascading and multiple levies. The contemporary service tax provisions were gradually getting out-dated and insufficient either to enhance the tax resource of the government or to benefit taxpayers and consumers at large. For the last several years, the implementation of GST has been considered as panacea of all the diseases. Unfortunately, implementation of GST has still a long way to go. In the circumstances it was imperative to introduce the legislation which will be best suited in the GST regime. The draft concept paper for discussions and information were brought in the public domain in November 2011. It was made clear that there will not be any service specific taxing statute. Avoiding any further confusion and litigation in one of the significant priorities in indirect tax levy. One important thing to be noted in the whole process of introduction of negative list is the impetus given to avoid litigations, which could arise due to fundamental departure in service tax provisions. Almost all relevant judicial precedence has been followed. Overlapping powers of the Centre and the States in same transactions are thoroughly analyzed and well demarcated apart from the stand alone transactions having dual characteristics. The modalities and procedure for tax compliances and corresponding rules have
been proposed to be amended in tune with the objective to bringing in clarity and transparency in the era of negative list.

The process starts from defining the service with the exclusion clause and continues with the changes brought in the compliances by the taxpayers. Service specific references are being done away to avoid multiple tasking and cumbersome job of classification of a particular activity and to ascertain if service tax is leviable or not. The definition of service itself has been made illustrative and indicative of tax incidence. The concept of provider, recipient, consideration and declared services has been incorporated in the definition of service for better clarity. Further, the charging Section is proposed along with the jurisdictional limitation and possible tax implication in any given transaction between two persons. The idea of taxing jurisdiction will have great implication in the GST regime. Similarly "agreed to be provided" spell out the situation when if the other ingredients (e.g. receipt of advance) are present, then there will be charge of service tax on the agreement of provision of service. Most of the entries in the negative list and declared to have been carved out on the basis of settled position of law. Other modalities including abatements and valuation are being changed in tune with the nature of the activities proposed to be taxed in the negative list era.

It is pertinent to mention that making of an unambiguous legislation benefits all strata of the society including the tax collector and the taxpayer. Drafting of law is unpleasant job, subjected to various type of scrutiny and criticism. Intent and background if brought out clearly in the knowledge of general public, leads to smooth implementation of the legislation. The department apparently came up with great research work to shape a full proof system beneficial to all.
CHAPTER 2:

THE RATIONALE BEHIND TAXATION OF SERVICES ON THE BASIS
OF NEGATIVE LIST

1.0 Background:
1.1 In the Parliament, while presenting the Union Budget 2011, the Finance Minister proposed that:

“Many experts have argued that it will be desirable to tax services based on a small negative list, so that many untapped sectors are brought into the tax net. Such an approach will be very conducive for a nationwide GST. I propose to initiate an informed public debate on the subject to help us finalize the approach to GST.”

1.2 Pursuant to the announcement made by the Honorable Finance Minister, it has become imperative to initiate an informed public debate on widening the tax base by introducing a negative list of services

2.0 What is a negative list?

2.1 To a lay person, not initiated into the rigors of tax policy, a negative list of services implies two things: firstly, a list of services which will not be subject to service tax; secondly, other than the services mentioned in the negative list, all other services will become taxable which fall within the definition of the ‘supply of services’. This can be contrasted from the present method of taxation that has detailed description for each taxable service and all other unspecified services are not liable to tax. The latter method of taxation is also referred to as taxation by way of a positive list.

2.2 The selective taxation of services by way of incremental additions over the years served well in the past in acclimatizing both the tax payers and tax administrators to the new levy. However, with considerable expansion of the list, the administrative challenge has multiplied manifold. Service tax has now gained considerable maturity and many practitioners of the subject believe that incremental approach to taxation is not suitable for providing a stable system for taxation of services that is at the threshold of getting subsumed into a comprehensive GST.
3.0 Contours of public debate:

3.1 Broadly the following questions can arise in a public debate on introduction of a negative list based comprehensive approach to taxation of services. Feedback based on these questions from all stakeholders can further enlighten Government’s approach to this important tax reform initiative:

i. Negative vs positive list: should the country adopt a negative list? What will be the proper timing: at the time of GST or even earlier?
ii. How to define ‘service’, for the purpose of taxation?
iii. What are the services which should be placed in the negative list?
iv. How comprehensive the coverage should be while drawing the negative list? What should therefore be the policy on taxation of important sectors e.g. education, health, public services, charitable and NGOs, infrastructure etc.?
v. What are the likely revenue implications?

4.0 Negative vs Positive list

4.1 The issue that which of the two lists is more desirable can be argued both ways with each having its own pros and cons. Positive list has the advantage of definitiveness, which is an essential pre-requisite for a good taxation law. However this very advantage starts getting eroded as the number of services increase. The possibilities of overlaps amongst definitions lead to innumerable administrative issues resulting in litigation and higher compliance costs. Some of the definitions could be so wide that they lead to unintended taxation requiring either clarifications or exemptions.

4.2 On the other hand the fact that many services are outside the tax net invariably leads to unintended exemptions, thus keeping the tax base narrow with all the accompanying consequences. Such unintended exemptions at intermediate stages lead to breakage of the input tax chain adding costs for the tax-payers and end-users. This will be clear from the following illustration:
### Situation 1: No exemption

<table>
<thead>
<tr>
<th></th>
<th>Taxable Inputs</th>
<th>Output</th>
<th>Input Tax Credit</th>
<th>Output Tax @ 10%</th>
<th>Net liability</th>
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<td>Origin Suppliers</td>
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<tr>
<td>Service Provider I</td>
<td>100</td>
<td>200</td>
<td>10</td>
<td>exempted</td>
<td>0</td>
</tr>
<tr>
<td>Service Provider II</td>
<td>200</td>
<td>400</td>
<td>0</td>
<td>40</td>
<td>40</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td><strong>40</strong></td>
</tr>
</tbody>
</table>

### Situation 2: With exemption

<table>
<thead>
<tr>
<th></th>
<th>Taxable Inputs</th>
<th>Output</th>
<th>Input Tax Credit</th>
<th>Output Tax @10%</th>
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<tr>
<td><strong>Total</strong></td>
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<td></td>
<td></td>
<td></td>
<td><strong>50</strong></td>
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4.3 It is evident from the illustration that when the Service Provider I is kept outside the tax chain the effective tax on the total supply goes up from 40 to 50 as the taxes paid at the previous stages are not available as tax credit at the subsequent stage.

4.4 As the untaxed supplies are treated exempt for the purpose of input tax credit rules, taxes paid on the inputs used in their supplies are required to be reversed under the prescribed rules. This further adds complexities both for the tax-payers and the administrators.

4.5 Such exclusions also lead to distortion of economic neutrality across similar or substitute supplies e.g. road vs. rail transportation or discourage
outsourcing by incentivizing self-supplies, and are thus not conducive to making the optimal choices in the economy. Moreover the one-time taxation of the service sector obviates the need for year-after-year incremental changes.

4.6 On the other hand there are significant advantages of positive list in so far it has already attained a certain level of awareness and stability in administration. The categorizations of services is also useful for a variety of purposes e.g. import and export rules, Cenvat Rules and Point of Taxation Rules or where ever any differential treatment is required to be given to any service as also for statistical purposes.

4.7 The proper timing for the launch of negative list can also be argued either way. GST will give the advantage of a wider constitutional mandate for comprehensive taxation of goods and services. Undoubtedly that will be far more conducive for the launch of taxation based on a negative list. On the other hand there are advantages in moving towards negative list at an earlier time in order to gain useful experience in its implementation and minimize the impact of the mammoth changes that GST may usher.

5.0 Definition of Service:

5.1 As the new concept envisages taxation of the whole, unless otherwise something is excluded, it is necessary to capture that universe such that it does not infringe upon either the powers to tax of another legislature in a specific area or taxes such areas as are subjected to like taxes as goods. To initiate a public debate and obtain feedback, a definition of ‘service’ is proposed as follows:

5.2 A “service” means anything which does not constitute supply of goods, money or immovable property—and includes-

A. right to use an immovable property;

B. construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of certificate of completion by a competent authority;
C. temporary transfer or permitting the use or enjoyment of any intellectual property right;

D. obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

E. service in relation to lease or hire of goods; and

F. right to enter any premises

but excludes a supply-

A. by an employee to an employer in the course of or in relation to the employment of the person;

B. by a constitutional authority under the Indian Constitution or a member of an Indian legislature or a local self-government in that capacity;

C. that amounts to manufacture of excisable goods or is chargeable as part of the value of goods to a duty in terms of the provisions of Central Excise Act, 1944;

5.3 In the attempted definition, a supply of service is defined as ‘anything which does not constitute supply of goods, money or immovable property’. The key words are goods, money and immovable property. Tax will be imposed on supply of services. A supply is a transaction and transaction involves two persons. Transaction involving goods, money and immovable property is excluded from the meaning of supply of service. Inclusions and exclusions support and clarify the above definition of supply of services.

6.0 Exclusions:

6.1 Supplies of goods, money and immovable property are the principal exclusions, in the proposed scheme. The expression ‘goods’ as defined in clause (7) of section 2 of the Sale of Goods Act, 1930, can continue to be part of the service tax framework as at present. According to the Sale of Goods Act, 1930:
“Goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

6.2 It is important to mention that supplies which are deemed to be sale of goods in terms of Article 366 (29A) of the Constitution in the case of specified contracts will stand excluded as goods. These relate to goods portion of the supplies in a works contract, contracts of hire purchase and catering. The remaining portion of the supply in the specified composite contracts shall be considered as supply of service. Under the proposed negative list approach, where supplies of services are bundled alongwith supply of goods in situations other than those stated in Article 366 of the constitution, nature of the transaction will have to be judged by what the Honorable Supreme Court has called the “dominant nature test” in the case of Bharat Sanchar Nigam Ltd. Vs UOI [2006(2) STR 161 (SC) para 43]. The test requires: “did the parties have in mind or intend separate rights arising out of the sale of goods. If there was no such intention there is no sale (of goods) even if the contract could be disintegrated.”

6.3 The expression “money” is meant to capture transactions where Indian legal tender is exchanged from one form to another.

6.4 The expression ‘Immovable property’ as defined in clause 26 of section 3 of the General Clauses Act, 1897 can be borrowed to support the proposed scheme:

“Immovable property” shall include land, benefits arising out of land and things attached to the earth, or permanently fastened to anything attached to the earth.”

6.5 In addition to the above, certain exclusions are provided to clarify the concept of ‘supply of service’. For instance, it is provided in the definition of ‘supply of service’ that, sale of immovable property in fully complete form i.e. after issuance of the completion certificate, will not be counted as supply of service. However, all agreements to sell a complex, building, civil structure or a part thereof to intending buyers, wholly or partly, where a part of the consideration is received before the completion certificate is obtained shall constitute service, as is the case even at present. Similarly, it is proposed that a transaction involving right to use immovable property e.g. renting shall constitute a supply of service.
6.6 A transaction takes place between two persons. Therefore self-supplies will not constitute a service. The word "Person" shall include any company or association or body of individuals, whether incorporated or not (section 2(42) of the General Clauses Act, 1897) and hence services by or to unincorporated associations and joint ventures will constitute a valid transaction.

6.7 Supply of services by an employee to an employer in the course of or in relation to the employment of the person is an important exclusion. However any service rendered by an employee in another capacity will constitute a supply of service. Similar position is proposed in respect of constitutional functionaries, some of whom may not be strictly in the position of an employee, as also members of Union and State legislatures and local self-government.

6.8 Any supply that amounts to manufacture or is includible in the value of the goods under the Central Excise Act is also kept outside the purview of the definition of service as this is liable to Central Excise duty as goods.

7.0 Inclusions:

7.1 A number of specific entries have been specified in the inclusive portion to provide greater clarity to the new approach to taxation of services. Right to use immovable property falls within the domain of services. Also temporary transfer or permitting the use or enjoyment of any intellectual property will constitute supply of service. The obligation to refrain from an act, or to tolerate an act or a situation, or to do an act will also constitute service. Delivery of goods by way of hire purchase or instalments is declared by the Constitution to be deemed sale of goods. But services provided in relation to lease or hire of goods have been held to be a service [Association of Leasing & Financial Services Companies vs. UOI (2010-TIOL-87-SC-ST-LB)]. Right to enter any premises e.g. museums; art galleries or botanical gardens will also constitute service.

7.2 To bring certainty and clarity in certain areas where goods and services aspects may overlap, it is proposed to empower the Central Government to specify certain supplies as supply of service or otherwise, whether in full or part. Services so declared will be taxed as a supply of service notwithstanding anything to the contrary. This is not meant to be unbridled power and shall operate within the existing legal restraints on the subject.
7.3 In the light of the discussions in the previous paragraph, supplies of electricity, power, heat, refrigeration and ventilation may be specified as not comprising supply of services. Sale of SIM card with talk time [Idea Mobile Communication Ltd Vs CCEC, Cochin (2011-TIOL-71-SC-ST)], downloadable on-site software and similar supplies through the internet may be specified as services. Service element involved in the supplies in respect of works contracts, restaurants, outdoor catering may be subject to tax as services at the prescribed rates, so that goods portion falling within the taxation powers of state governments, will stand excluded.

8.0 Negative list of services:

8.1 An indicative negative list is given in the Annexure. This is only a proposition to initiate a discussion. While drawing the indicative negative list some of the considerations found relevant are as follows:

(i) Administrative considerations: taxation of Government, difficult to tax sectors e.g. margin-based financial services.

(ii) Under contractual obligations: Specified international bodies and diplomatic missions

(iii) Welfare considerations: welfare of vulnerable sections of society, essential education, public health; public transport, services by non-profit entities, religious services, promotion of art, culture and sports.

(iv) Economic considerations: transport of export goods, services meant for agriculture, animal husbandry and infrastructure development.

(v) Explicit activities in the nature of services, which are within the taxing powers of States: betting and lotteries, tolls.

8.2 Most of the services provided by government are provided without a specific charge to the recipient and thus shall not be liable to tax. However the other supplies could be classified as follows:
ii. Where services are provided at concessional rates but compete with private entities;
iii. Where services are provided exclusively or predominantly by government.
8.3 When Government is engaged in providing services in purely commercial areas or where similar services are provided by private enterprise, it is necessary to provide equitable tax treatment. When government supplies compete with the supplies made by private enterprise, if tax is levied only on supplies made by private enterprise, it amounts to discrimination and economic distortions will be inevitable.

8.4 Where services are provided by Government or its extended agencies more or less exclusively many experts argue that such services should also be subjected to tax. The counter argument is that such taxation would lead to increase in administrative work load without commensurate increase in net revenue when the same amount can be collected by increased user charges. With increasing privatization and outsourcing the dividing line between government functions for a fee or charge and somewhat similar functions elsewhere is diminishing. For example the driving licenses in many states are now issued by private bodies though the approval continues to be given by government agencies. It is thus proposed to confine negative list only to services provided in select few areas and the matter is left open at this stage for public debate as to what precise exclusions should be made.

8.5 Even though the definition of goods includes stocks and shares, the sale and purchase of securities and debts on a principal-to-principal basis is also separately excluded by a specific entry in the proposed negative list. This may require discussion whether mere exclusion at the definition stage of stocks and shares will capture all the various instruments that are sold and purchased on principal-to-principal basis in financial markets. However, services in relation to sale and purchase of securities e.g. stock broking will come under the tax net.

8.6 Renting of personal dwellings for the residential use of any person is commonly included in negative list in most parts of the world. Due to wide divergence in income levels in India a case is made for bringing opulent living within the tax net. A reasonably high threshold will ensure that the effect is felt largely by the very well to do sections of the society.

8.7 On the subject of taxation of health services, diverse views have been expressed in the recent past. While appreciating that health services are absolutely essential for all persons, some tax policy experts do argue that only
the basic or public health services should be kept in the negative list. All health and medical services other than these health services, particularly the high-end medical services provided by private enterprise, should be brought within the tax fold. Among other arguments they justify the same on grounds of the sanctity of the tax-chain so that taxes paid at the previous stage are allowed to be set off at the subsequent stages of consumption (in particular for the health insurance sector) and the need to use the resources so made available for upgrading the facilities for the poor in the public health system. Another model of taxation could be to exempt health care up to a decent threshold so as to confine it to large entities that are commonly accessed by persons with insurance cover or other affluent sections of society. Services provided by such establishments to needy and economically weaker sections could be exempted as per agreed criteria. Public hospitals could be kept outside the levy as they largely address the needs of the weaker sections. The issue thus requires a well-rounded debate on all the various aspects. For the moment two options are indicated but there can be many varied variants for the treatment of this sector.

8.8 Similar arguments are also made in respect of certain streams of education. Services provided by international schools and expenses recovered by certain educational institutions over and above the prescribed charges, including capitation fees or donations are areas that are often cited for the purpose of levy of service tax.

8.9 It is acknowledged that some of the areas specified in the proposed negative list require greater elaboration. However the same has not been attempted at this stage in order to obtain diverse and unbiased views during the course of the public debate.

9. Revenue Impact

9.1 It is well known that nearly 57% of India GDP comes from services. After including construction, the contribution from services will come to about 63%. At current prices the contribution from services during 2010-11 comes to about Rs 50 lakh crore.

9.2 The national income statistics do not capture the break-up of the service sector in the manner it is being taxed or sought to be taxed. However some broad indications are available of the contribution of services from certain
sectors. Based on these indications contribution from services that are proposed to be kept in the negative list e.g. trading of goods, transportation of passengers, education and health sectors as also portions of construction, real estate and financial sectors can be estimated. In addition to exclusions by way of negative list, export of services valued at about nearly US$ 130 billion at present will also remain exempt. The import of services meant for direct consumptions by individuals are at present not largely subjected to tax. Remaining services from abroad may not make any major net contribution to tax being available for credit set off.

9.3 On a rough estimate nearly 40% of the total services will come into the tax net as a result of the proposed negative list. However a large part of the informal sector would also remain outside the tax net due to the threshold exemption. This would leave only about 60% of the sector not covered by negative list actually available for tax payment. Thus the potential for effective taxation of services may be confined to about 20-25% of the service sector contribution. This is still a sizable number and will add significant numbers to the revenue though may not sound astounding as some sections believe it to be.

10.0 Conclusion:

10.1 For the purpose of operationalizing the proposed negative list, certain changes will be necessary in the current service tax framework, importantly in the rules relating to import and export of services and to a lesser extent Cenvat Credit Rules, 2004, Service Tax Rules, 1994 and Point of Taxation Rules, 2011.

10.2 Exemptions which are operational within the current positive list regime have not been discussed in this paper. It is possible that some of these may be retained by the Government of India in public interest and some others may be withdrawn as not necessary, being covered by the negative list. In this connection, remarks column of the annexure may be perused.
CHAPTER 3
LEGAL FRAMEWORK OF THE NEW LEVY

The new levy, negative list based taxation of services, has confined itself to very few sections in the act, thereby deleting a bunch of over 288 definitions, being service specific definitions.

CHARGING SECTION

Under the new regime, taxation shall be ignited by the new charging section 66B. Since all the earlier definitions have been struck down w.e.f. 01-07-2012, hence the new definition section (known by the name “interpretations”) 65B will become effective from that date.

PLACE OF PROVISION

From the start of service tax in India, there have been divergent views on the taxation of services provided in non-taxable areas or cross border services. Similarly, with assesses having more than one place of business, there was always a prevalent confusion as regard the place where they must obtain registration and thereafter comply with legal formalities.

This arose due to the following factors:

• Service tax is a destination based consumption tax.

• “Service” is an abstract aspect and is not like goods which travel physically beyond boundaries to get consumed.

• Service can be performed at one place, delivered at another and still consumed at a third place.

• Thus there arises a definite need for such rules which can clearly define the exact place where a service can be said to have been consumed.
In view of the above, therefore, section 66C containing legal provisions regarding the ‘Place of provision’ of taxable services has been enacted which would provide the answer to the ever existing question “where is the service actually provided”. The rules made under this section in this regard (named ‘Place of Provision of Service Rules’) would play a vital role in answering this question.

NEGATIVE LIST OF SERVICES

The feature that gives this new taxing regime its present name i.e. the Negative List based taxation of services, is the section 66D read with section 66B. Section 66D provides a list of 17 services which shall be considered as non-taxable i.e. not forming part of the definition of the term ‘Service’ as defined u/s 65B(44) of the Finance Act 1994. One must not confuse these 17 services to be ‘exempt’ services. These 17 services have found place in the “Negative List” of services which has been specifically kept out of the service tax net within the Charging Section 66B itself. As far as other exemptions are concerned, Notification No. 25/2012 provides a comprehensive list of 38 items which have been kept out of the tax net by virtue of the Mega Exemption provided therein.

The negative list shall comprise of the following services, namely:

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere—

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government;

(ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport;

(iii) transport of goods or passengers; or

(iv) support services, other than services covered under clauses (i) to (iii) above, provided to business entities;

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission located in India;

(d) services relating to agriculture or agricultural produce by way of—
(i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;

(ii) supply of farm labour;

(iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;

(iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

(v) loading, unloading, packing, storage or warehousing of agricultural produce;

(vi) agricultural extension services;

(vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;

(e) trading of goods;

(f) any process amounting to manufacture or production of goods;

(g) selling of space or time slots for advertisements other than advertisements broadcast by radio or television;

(h) service by way of access to a road or a bridge on payment of toll charges;

(i) betting, gambling or lottery;

(j) admission to entertainment events or access to amusement facilities;

(k) transmission or distribution of electricity by an electricity transmission or distribution utility;

(l) services by way of—

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force;

(iii) education as a part of an approved vocational education course;
(m) services by way of renting of residential dwelling for use as residence;

(n) services by way of—
   
   (i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

   (ii) inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers;

(o) service of transportation of passengers, with or without accompanied belongings, by—
   
   (i) a stage carriage;

   (ii) railways in a class other than—
      
      A. first class; or

      B. an airconditioned coach;

   (iii) metro, monorail or tramway;

   (iv) inland waterways;

   (v) public transport, other than predominantly for tourism purpose, in a vessel, between places located in India; and

   (vi) metered cabs, radio taxis or auto rickshaws;

(p) services by way of transportation of goods—
   
   (i) by road except the services of—
      
      A. a goods transportation agency; or

      B. a courier agency;

   (ii) by an aircraft or a vessel from a place outside India upto the customs station of clearance in India; or

   (iii) by inland waterways;

(q) funeral, burial, crematorium or mortuary services including transportation of the deceased.]

21
DECLARED SERVICES

Till now we have seen that the charge has been newly created under section 66B, exclusion has been provided under section 66D by way of negative list and exemption has been provided to 38 items vide Notification No. 25/2012.

Though, academically, any activity which falls under the definition of service as enunciated u/s 65B (44) and is not under the negative list or exemption, is a taxable service but nine services have been specifically highlighted to be ‘taxable’ by naming them as ‘Declared Services’. This seems to be an action in order to overcome the possible interpretive issues or anomalies that might arise in times to come.

The declared services are:

(a) renting of immovable property;
(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

Explanation. — For the purposes of this clause, —

(I) the expression "competent authority" means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of nonrequirement of such certificate from such authority, from any of the following, namely:—

(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; (20 of 1972.) or
(B) chartered engineer registered with the Institution of Engineers (India); or
(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;

(II) the expression "construction" includes additions, alterations, replacements or remodeling of any existing civil structure;

(c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;
(e) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

(f) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

(g) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

(h) service portion in the execution of a works contract;

(i) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as a part of the activity.

CLASSIFICATION & INTERPRETATION
With the insertion of the new taxing system vide section 65B, 66B to 66E all earlier provisions have been deleted from the Finance Act 1994. Likewise, the existing section 65A dealing with ‘Classification of Services’ has also been deleted.

Under the new tax structure, a concept of bundled services has been introduced. Hence, a new section 66F has been introduced to provide the technical mechanism of taxing such bundle of services.

APPLICABLE RATE OF TAX
With the new charging section, classification mechanism, negative list, point of taxation and such other new legislation becoming effective, there arises a need to embed in the law itself, a section that would clearly define the methodology to determine the rate of tax, value of taxable services and rate of exchange in any given transaction.

For this purpose new section 67A has been inserted in the Finance Act 1994.

REVERSE CHARGE & JOINT CHARGE
The negative list based taxation has been introduced with a view to make tax compliance more user-friendly and less adverse. Another big reason for the introduction of this Negative List based taxation, is a gradual convergence to the much awaited Goods & Service Tax (GST).
As a matter of safeguard and to avoid unnecessary tax evasion, a new scheme of reverse & joint charge has been introduced. Under this scheme, few identified services have been notified in respect of which the liability of compliances, tax payments etc. has been casted upon the service receiver. This casting of liability has been done in two ways viz. complete shift and partial shift. This dual nature gives this scheme its present name i.e. **Reverse Charge & Joint Charge** mechanism.

*** *** ***
CHAPTER 4
THE NEGATIVE LIST
(Source: Guidance Note No. 4)

Negative List of Services
In terms of Section 66B of the Act, service tax will be leviable on all services provided in the taxable territory by a person to another for a consideration other than the services specified in the negative list. The services specified in the negative list therefore go out of the ambit of chargeability of service tax. The negative list of service is specified in the Act itself in Section 66 D. In all, there are seventeen heads of services that have been specified in the negative list. The scope and ambit of these is explained in paras below.

1. SERVICES PROVIDED BY GOVERNMENT OR LOCAL AUTHORITY
(Sec 66D(a))

A. Are all services provided by Government or local authority covered in the negative list?
   No. Most services provided by the Central or state Government or local authorities are in the negative list except the following:
   - services provided by the Department of Posts by way of speed post, express parcel post, life insurance and agency services carried out on payment of commission on non government business;
   - services in relation to a vessel or an aircraft inside or outside the precincts of a port or an airport;
   - transport of goods and/or passengers;
   - support services, other than those covered by clauses (a) to (c) above, to business entities.

B. Would the taxable services provided by the Government be charged to tax if they are otherwise exempt or specified elsewhere in the negative list?
   No. If the services provided by the government or local authorities that have been excluded from the negative list entry are otherwise specified in the negative list then such services would also not be taxable.
C. ‘Government’ has not been defined in the Act. What is the meaning of Government?
   Since ‘Government’ has not been defined in the Act, the definition of ‘Government’ as contained in the General Clauses Act, 1897 would be applicable as per which ‘Government’ includes both State Government and Central Government. Further as per the General Clause Act 1897, State includes Union Territory.

D. Are various corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act, 1956 or autonomous institutions set up by a special Acts covered under the definition of ‘Government’?
   No. In terms of the definition of ‘Government’ as contained in the General Clause Act, 1897 and as per the settled position of law such corporations or authorities or companies are not included in the definition of ‘Government’. Services provided by such entities would, therefore, not be entitled to the negative list entry relating to the ‘Government’. It would also not include regulatory bodies.

E. What entities are then covered under ‘Government’?
   ‘Government’ would include various departments and offices of the Central or State Government or the U.T. Administrations which carry out their functions in the name and by order of the President of India or the Governor of a State.

F. Would a department of the Government need to get itself registered for each of the services listed in answer to Q. No. 1.1 above?
   For the support services provided by the Government to business entities government departments will not have to get registered because service tax will be payable on such services by the service receiver i.e. the business entities receiving the service under reverse charge mechanism in terms of the provisions of section 68 of the Act and the notification no. 30/2012 issued under the said section. For services mentioned at (a) to (c) of the list (point 1.1 above refers) tax will be payable by the concerned department.

G. What is the meaning of “support services” which appears to be a phrase of wide ambit?
   Support services have been defined in section 65B of the Act as ‘infrastructural, operational, administrative, logistic marketing or any
other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis’. Thus services which are provided by government in terms of their sovereign right to business entities are not support services e.g. grant of mining or licensing rights.

**H. What is the meaning of local authority?**

Local authority is defined in 65B and means the following:-

- A Panchayat as referred to in clause (d) of article 243 of the Constitution
- A Municipality as referred to in clause (e) of article 243P of the Constitution
- A Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund
- A Cantonment Board as defined in section 3 of the Cantonments Act, 2006
- A regional council or a district council constituted under the Sixth Schedule to the Constitution
- A development board constituted under article 371 of the Constitution, or
- A regional council constituted under article 371A of the Constitution.

2. **SERVICES PROVIDED BY RESERVE BANK OF INDIA Sec 66D(b)**

A. Are all services provided by the Reserve Bank of India in the negative list?

Yes. All services provided by the Reserve Bank of India are in the negative list.
B. What about services provided to the Reserve Bank of India?

Services provided to the Reserve Bank of India are not in the negative list and would be taxable unless otherwise covered in any other entry in the negative list.

3. SERVICES BY A FOREIGN DIPLOMATIC MISSION LOCATED IN INDIA
Sec 66D(c)

Any service that is provided by a diplomatic mission of any country located in India are in the negative list. This entry does not cover services, if any, provided by any office or establishment of an international organization.

4. SERVICES RELATING TO AGRICULTURE Sec 66D(d)

The services relating to agriculture that are specified in the negative list are services relating to –

i. agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;

ii. supply of farm labour;

iii. processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter essential characteristics of agricultural produce but makes it only marketable for the primary market;

iv. renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

v. loading, unloading, packing, storage and warehousing of agricultural produce;

vi. agricultural extension services;

vii. services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;
A. **What is the meaning of ‘agriculture’?**

‘Agriculture’ has been defined in the Act as cultivation of plants and rearing or breeding of animals and other species of life forms for foods, fibre, fuel, raw materials or other similar products but does not include rearing of horses.

B. **Are activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry included in the definition of agriculture?**

Yes. These activities are included in the definition of agriculture.

C. **What is the meaning of agricultural produce?**

Agricultural produce has also been defined in section 65B of the Act which means any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market. It also includes specified processes in the definition like tending, pruning, grading, sorting etc. which may be carried out at the farm or elsewhere as long as they do not alter the essential characteristics.

D. **Would plantation crops like rubber, tea or coffee be also covered under agricultural produce?**

Yes. Such plantation crops are also covered under agricultural produce.

E. **Would potato chips or tomato ketchup qualify as agricultural produce?**

No. In terms of the definition of agricultural produce, only such processing should be carried out as is usually done by cultivator producers which does not alter its essential characteristics but makes it marketable for primary market. Potato chips of tomato ketchup are manufactured through processes which alter the essential characteristic of farm produce (potatoes and tomatoes in this case).

F. **Would leasing of vacant land with a greenhouse or a storage shed meant for agricultural produce be covered in the negative list?**

Yes. In terms of the specified services relating to agriculture ‘leasing’ of vacant land with or without structure incidental to its use’ is covered in the negative list. Therefore, if vacant land has a structure
like storage shed or a green house built on it which is incidental to its use for agriculture then its lease would be covered under the negative list entry.

G. **What is the meaning of agricultural extension services?**
Agricultural extension services have also been defined in section 65B of the Act as application of scientific research and knowledge to agricultural practices through farmer education or training.

H. **What are the services referred to in the negative list entry pertaining to Agricultural Produce Marketing Committee or Board?**
Agricultural Produce Marketing Committees or Boards are set up under a State Law for purpose of regulating the marketing of agricultural produce. Such marketing committees or boards have been set up in most of the States and provide a variety of support services for facilitating the marketing of agricultural produce by provision of facilities and amenities like shops, sheds, water, light, electricity, grading facilities etc. They also take measures for prevention of sale or purchase of agricultural produce below the minimum support price. APMCs collect market fees, license fees, rents etc. Services provided by such Agricultural Produce Marketing Committee or Board are covered in the negative list.

5. **TRADING OF GOODS Sec 66D(e)**

A. **Would activities of a commission agent or a clearing and forwarding agent who sells goods on behalf of another for a commission be included in trading of goods?**
No. The services provided by commission agent or a clearing and forwarding agent are not in the nature of trading of goods. These are auxiliary for trading of goods. In terms of the provision of clause (1) of section 66F reference to service does not include reference to a service used for providing such service.(For guidance on clause (1) of section 66F please refer to point no 7.1.1 of this Guidance Paper) Moreover the title in the goods never passes on to such agents to come within the ambit of trading of goods.

B. **Would future contracts in commodities be covered under trading of goods?**
Yes. Futures contracts would be covered under trading of goods as these are contracts which involve transfer of title in goods on a future date at a pre-determined price.

C. Would commodity futures be covered under trading of goods?
Yes. In commodity futures actual delivery of goods does not normally take place and the purchaser under a futures contract normally offsets all obligations or closes out by selling an equal quantity of goods of the same description under another contract for delivery on the same date. There are, therefore, two contracts of sale/purchase involved which would fall in the category of trading of goods.

D. Would auxiliary services relating to future contracts or commodity futures be covered in the negative list entry relating to trading of goods?
No. Such services provided by commodity exchanges clearing houses or agents would not be covered in the negative list entry relating to trading of goods.

6. PROCESSES AMOUNTING TO MANUFACTURE OR PRODUCTION OF GOODS Sec 66D(f)

The phrase ‘processes amounting to manufacture or production of goods’ has been defined in section 65B of the Act as a process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 (1 of 1944) or any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any State Act. This entry, therefore, covers manufacturing activity carried out on contract or job work basis provided duties of excise are leviable on such processes under the Central Excise Act, 1944 or any of the State Acts.

A. Would service tax be leviable on processes which do not amount to manufacture or production of goods?
Yes. Service tax would be levied on processes, unless otherwise specified in the negative list, not amounting to manufacture or production of goods carried out by a person for another for consideration. Some of such services relating to processes not amounting to manufacture are exempt as specified in entry no. 30 of Exhibit A2.
B. Would service tax be leviable on processes on which Central Excise Duty is leviable under the Central Excise Act, 1944 but are otherwise exempted?

No. If Central Excise duty is leviable on a particular process as the same amounts to manufacture then such process would be covered in the negative list even if there is a central excise duty exemption for such process.

7. SELLING OF SPACE OR TIME SLOTS FOR ADVERTISEMENTS OTHER THAN ADVERTISEMENTS BROADCAST BY RADIO OR TELEVISION Sec 66D(g)

‘Advertisement’ has been defined in section 65 B of the Act as form of presentation for promotion of, or bringing awareness about, any event, idea, immovable property, person, service, goods or actionable claim through newspaper, television, radio or any other means but does not include any presentation made in person.

A. Sale of space of time for advertisements not including sale of space for advertisement in print media and sale of time by a broadcasting agency or organization is currently taxed under clause (zzzm) of sub-section (105) of the Finance Act,1944. So what kind of sale of space or time would become taxable and what would be not taxable?

<table>
<thead>
<tr>
<th>TAXABLE</th>
<th>NON TAXABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sale of space or time for advertisement to be broadcast on radio or television</td>
<td>Sale of space for advertisement in print media</td>
</tr>
<tr>
<td>Sale of time slot by a broadcasting organization.</td>
<td>Sale of space for advertisement in bill boards, public places, buildings, conveyances, cell phones, automated teller machines, internet</td>
</tr>
<tr>
<td></td>
<td>Aerial advertising</td>
</tr>
</tbody>
</table>
B. Would services provided by advertisement agencies relating to preparation of advertisements be covered in the negative list entry relating to sale of space for advertisements?

No. Services provided by advertisement agencies relating to making or preparation of advertisements would not be covered in this negative list entry and would thus be taxable. This would also not cover commissions received by advertisement agencies from the broadcasting or publishing companies for facilitating business, which may also include some portion for the preparation of advertisement.

C. In case a person provides a composite service of providing space for advertisement that is covered in the negative list entry coupled with taxable service relating to design and preparation of the advertisement how will its taxability be determined?

- This would be a case of bundled services taxability of which has to be determined in terms of the principles laid down in section 66F of the Act.
- Bundled services have been defined in the said section as provision of one type of service with another type or types of services.
- If such services are bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle.
- If such services are not bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which attracts the highest liability of service tax.

8. ACCESS TO A ROAD OR A BRIDGE ON PAYMENT OF TOLL CHARGES Sec 66D(h)

A. Is access to national highways or state highways also covered in this entry?

Yes. National highways or state highways are also roads and hence covered in this entry.

B. Are collection charges or service charges paid to any toll collecting agency also covered?

No. The negative list entry only covers access to a road or a bridge on payment of toll charges. Services of toll collection on behalf of an agency authorized to levy toll are in the nature of services used for
providing the negative list services. As per the principle laid down in sub section (1) of section 66F of the Act the reference to a service by nature or description in the Act will not include reference to a service used for providing such service.

9. **BETTING, GAMBLING OR LOTTERY Sec 66D(i)**

“Betting or gambling’ has been defined in section 65B of the Act as ‘putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring’.

A. **Are auxiliary services that are used for organizing or promoting betting or gambling events also covered in this entry?**

No. These services are in the nature of services used for providing the negative list services of betting or gambling. As per the principle laid down in sub section (1) of section 66F of the Act the reference to a service by nature or description in the Act will not include reference to a service used for providing such service.

10. **ENTRY TO ENTERTAINMENT EVENTS AND ACCESS TO AMUSEMENT FACILITIES. Sec 66D(j)**

‘Entertainment events’ has been defined in section 65B of the Act ‘as an event or a performance which is intended to provide recreation, pastime, fun or enjoyment, by way of exhibition of cinematographic films, circus, concerts, sporting events, pageants, award functions, dance performances, musical performances, theatrical performances including cultural programs, drama, ballets or any such event or programme’.

‘Amusement facility’ has been defined in the Act as ‘a facility where fun or recreation is provided by means of rides, gaming devices or bowling alleys in amusement parks, amusement arcades, water parks, theme parks or such other place but does not include a place within such facility where other services are provided’.

A. **If a cultural programme, drama or a ballet is held in an open garden and not in a theatre would it qualify as an entertainment event?**

Yes. The words used in the definition are ‘theatrical performances’ and not ‘performances in theatres’. A cultural programme, drama or a ballet preformed in the open does not cease to be a theatrical
A performance provided it is preformed in the manner it is preformed in a theatre, i.e. before an audience.

B. Would a standalone ride set up in a mall qualify as an amusement facility?
Yes. A standalone amusement ride in a mall is also a facility in which fun or recreation is provided by means of a ride. Access to such amusement ride on payment of charges would be covered in the negative list.

C. Would entry to video parlors exhibiting movies played on a DVD player and displayed through a TV screen be covered in the entry?
Yes. Such exhibition is an exhibition of cinematographic film.

D. Would membership of a club qualify as access to an amusement facility?
No. A club does not fall in the definition of an amusement facility.

E. Would auxiliary services provided by a person, like an event manager, for organizing an entertainment event or by an entertainer for providing the entertainment to an entertainment event organizer be covered in this entry?
No. Such services are in the nature of services used for providing the service specified in this negative list entry and would not be covered in the ambit of such specified service by operation of the rule of interpretation contained in clause (1) of section 66F of the Act.

11. TRANSMISSION OR DISTRIBUTION OF ELECTRICITY
Sec 66D(k)

A. What is the meaning of electricity transmission or distribution utility?
An ‘electricity transmission or distribution utility’ has also been defined in section 65B of the act. It includes the following –
- the Central Electricity Authority
- a State Electricity Board
- the Central Transmission Utility (CTU)
- a State Transmission Utility (STU) notified under the Electricity Act, 2003 (36 of 2003)
- a distribution or transmission licensee under the said Act
any other entity entrusted with such function by the Central or State Government

B. If charges are collected by a developer or a housing society for distribution of electricity within a residential complex then are such services covered under this entry?
No. The developer or the housing society would be covered under this entry only if it is entrusted with such function by the Central or a State government or if it is, for such distribution, a distribution licensee licensed under the Electricity Act, 2003.

C. If the services provided by way installation of gensets or similar equipment by private contractors for distribution of electricity covered by this entry?
No. the entry does not cover services provided by private contractors. Moreover the services provided are not by way of transmission or distribution of electricity.

12. SPECIFIED SERVICES RELATING TO EDUCATION Sec 66D(l)

The following services relating to education are specified in the negative list –
- pre-school education and education up to higher secondary school or equivalent
- education as a part of curriculum for obtaining a qualification recognized by law for the time being in force;
- education as a part of an approved vocational education course

A. Are services provided by international schools giving international certifications like IB also covered in this entry?
Yes. Services by way of education up to higher secondary school or equivalent are covered in this entry.

B. Are services provided by boarding schools covered in this entry?
Boarding schools provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in section 66F of the Act. Such services in the case of boarding schools are bundled
in the ordinary course of business. Therefore the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle. In this case since dominant nature is determined by the service of education other dominant service of providing residential dwelling is also covered in a separate entry of the negative list, the entire bundle would be treated as a negative list service.

C. Are services provided to educational institutions also covered in this entry?
   No. Such services are not covered under the negative list entry. However certain services provided to educational institutions are separately exempted by a notification:
   - Services to an educational institution by way of catering under the centrally assisted mid–day meals scheme sponsored by government.
   - Transport to and fro such exempt institutes.
   - Services to or by an institution in relation to educational services, where the educational services are exempt from the levy of service tax, by way of services in relation to admission to such education.

D. Are private tuitions covered in the entry relating to education?
   No. However, private tutors can avail the benefit of threshold exemption.

E. Are services provided by way of education as a part of a prescribed curriculum for obtaining a qualification recognized by a law of a foreign country covered in the negative list entry?
   No. To be covered in the negative list a course should be recognized by an Indian law.

F. If a course in a college leads to dual qualification only one of which is recognized by law would the service provided by the college by way of such education be covered in this entry?
   Provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are prescribed separately. Service in respect of each qualification would, therefore, be assessed separately. If an artificial bundle of service is created by clubbing two courses together, only one of
which leads to a qualification recognized by law, then by application of the rule of determination of taxability of a service which is not bundled in the ordinary course of business contained in section 66F of the Act it is liable to be treated as a course which attracts the highest liability of service tax. However incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well being will be an example of naturally bundled course. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognized component vis-à-vis the recognized course.

G. Are placement services provided to educational institutions for securing job placements for the students covered in this negative list entry?
No. Such services do not fall in the category of exempt services provided to educational institutions.

H. Are services of conducting admission tests for admission to colleges exempt?
Yes in case the educational institutions are providing qualification recognized by law for the time being in force.

I. What are the courses which would qualify as an approved vocational education courses?
Approved vocational education courses have been specified in section 65B of the Act. These are –

- a course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training, offering courses in designated trades as notified under the Apprentices Act, 1961 (52 of 1961)
- a Modular Employable Skill Course, approved by the National Council of Vocational Training, run by a person registered with the Directorate General of Employment and Training, Union Ministry of Labour and Employment.

13. SERVICES BY WAY OF RENTING OF RESIDENTIAL DWELLING FOR USE AS RESIDENCE Sec 66D(m)
‘Renting’ has been defined in section 65B as “allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property’.

A. What is a ‘residential dwelling’?
The phrase ‘residential dwelling’ has not been defined in the Act. It has therefore to be interpreted in terms of the normal trade parlance as per which it is any residential accommodation, but does not include hotel, motel, inn, guest house, camp–site, lodge, house boat, or like places meant for temporary stay.

B. Would renting of a residential dwelling which is for use partly as a residence and partly for non residential purpose like an office of a lawyer or the clinic of a doctor be covered under this entry?
This would also be a case of bundled services as renting service is being provided both for residential use and for non residential use. Taxability of such bundled services has to be determined in terms of the principles laid down in section 66F of the Act.

C. Would the nature of renting transactions explained in column 1 of the table below be covered in this negative list entry?

<table>
<thead>
<tr>
<th>If.....</th>
<th>Then......</th>
</tr>
</thead>
<tbody>
<tr>
<td>(i) a residential house taken on rent is used only or predominantly for commercial or non-residential use.</td>
<td>the renting transaction is not covered in this negative list entry.</td>
</tr>
<tr>
<td>(ii) if a house is given on rent and the same is used as a hotel or a lodge</td>
<td>the renting transaction is not covered in this negative list entry because the person taking it on rent is using it for a commercial purpose.</td>
</tr>
<tr>
<td>(iii) rooms in a hotel or a lodge are let out whether or not for temporary stay</td>
<td>the renting transaction is not covered in this negative list entry because a hotel or a lodge is not a residential dwelling.</td>
</tr>
<tr>
<td>(iv) government department allots houses to its employees and charges a license fee</td>
<td>such service would be covered in the negative list entry relating to services provided by</td>
</tr>
</tbody>
</table>
(v) furnished flats given on rent for temporary stay

| government and hence non-taxable. | these are in the nature of lodges or guest houses and hence not treatable as a residential dwelling |

14. FINANCIAL SECTOR Sec 66D(n)

A. What are the “services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount”?

Illustrations of such services are -

- Fixed deposits or saving deposits or any other such deposits in a bank for which return is received by way of interest.
- Providing a loan or over draft facility for in consideration for payment of interest.
- Mortgages or loans with a collateral security to the extent that the consideration for advancing such loans or advances are represented by way of interest.
- Corporate deposits to the extent that the consideration for advancing such loans or advances are represented by way of interest or discount.

B. If any service charges or administrative charges or entry charges are recovered in addition to interest on a loan, advance or a deposit would such charges be also a part of this negative list entry?

No. The services of loans, advances or deposits are exempt in so far as the consideration is represented by way of interest or discount. Any charges or amounts collected over and above the interest or discount amounts would represent taxable consideration.

C. To what extent is invoice discounting covered in the negative list entry?

Invoice discounting is covered only to the extent consideration is represented by way of discount.

D. Would services provided by banks or authorized dealers of foreign exchange by way of sale of foreign exchange to general public be covered in this entry?
No. This entry only covers sale and purchase of foreign exchange between banks or authorized dealers of foreign exchange or between banks and such dealers

15. **SERVICE RELATING TO TRANSPORTATION OF PASSENGERS Sec 66D(o)**

The following services relating to transportation of passengers, with or without accompanied belongings, have been specified in the negative list. Services by:
- a stage carriage;
- railways in a class other than (i) first class; or (ii) an AC coach;
- metro, monorail or tramway;
- inland waterways;
- public transport, other than predominantly for tourism purpose, in a vessel of less than fifteen tonne net, between places located in India; and
- metered cabs, radio taxis or auto rickshaws.

A. **Are services by way of giving on hire of motor vehicles to state transport undertakings covered in this negative list entry?**
No. However such services provided by way of hire of motor vehicle meant to carry more than 12 passengers to a State transport undertaking is exempt.

B. **In some cases contract carriages get permission or temporary permits to ply as stage carriages. Would such services be taxable?** Specific exemption is available to services of transport passengers by a contract carriage for transportation of passengers, excluding tourism, conducted tours, charter or hire.

C. **Are national waterways covered in the definition of inland waterways?**
Yes.

16. **SERVICE RELATING TO TRANSPORTATION OF GOODS Sec 66D(p)**
The following services provided in relation to transportation of goods are specified in the negative list. Services:-
by road, except the services of
  ✓ a goods transportation agency; or
  ✓ a courier agency
by aircraft or vessel from a place outside India to the first customs station of clearance in India; or
by inland waterways.

A. Are all services provided by goods transport agency excluded from the negative list?
Yes. However, there are separate exemptions available to the services provided by the goods transport agency. These are services by way of transport of –
  ✓ fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;
  ✓ goods where gross amount charged on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or
  ✓ goods where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty.

B. Are goods transport agencies liable to pay tax in all cases or are provisions relating to reverse charge also applicable after introduction of negative list?
The provisions relating to reverse charge, i.e. service tax is liable to be paid by the consigner or consignee in specified cases, are applicable even after the introduction of negative list.

C. Are the following services of transportation of goods covered in the negative list entry?

<table>
<thead>
<tr>
<th>Nature of service relating to transportation of goods</th>
<th>Whether covered in the negative list entry?</th>
</tr>
</thead>
<tbody>
<tr>
<td>By railways</td>
<td>No</td>
</tr>
<tr>
<td>By air within the country or abroad</td>
<td>No</td>
</tr>
<tr>
<td>By a vessel in the coastal waters</td>
<td>No</td>
</tr>
<tr>
<td>By a vessel on a national waterway</td>
<td>Yes</td>
</tr>
<tr>
<td>Services provided by a GTA</td>
<td>No</td>
</tr>
</tbody>
</table>
D. Are services provided as agents for inland waterways covered by this entry?
   No. these are in the nature of services used for providing the negative list entry service of transport of goods on inland waterways and would not be covered by application of the rule for interpretation where services are specified by way of description contained in clause (1) of section 66F of the Act.

17. FUNERAL, BURIAL, CREMATORIUM OR MORTUARY SERVICES INCLUDING TRANSPORTATION OF THE DECEASED Sec 66D(q)

   This negative list entry is self-explanatory.
CASE CAPSULE
NEGATIVE LIST

1. **AGARWAL v. HINDUSTAN STEEL (1970) AIR 1150 (SUPREME COURT)**

It was held that the manpower of such statutory authorities or bodies do not become officers subordinate to the president under article 53(1) of the constitution and similarly to the governor under article 154(1).

Such a statutory body, corporation or an authority as a juristic entity is separate from the state and cannot be regarded as Central or state Government and also do not fall in the definition of ‘Local Authority’. Thus regulatory bodies and other autonomous entities which attain their entity under an act would not comprise either government or local authority. It may be noted that a statutory body, corporation or an authority created by the parliament or a state Legislature is neither ‘Government’ nor a ‘local Authority’. Such statutory body, corporation or an authority are normally created by the parliament or a State legislature in exercise of the powers conferred under article 53(3)(b) and article 154(2)(b) of the Constitution respectively.

2. **UNION OF INDIA v. DCM (1977) I ELT J199 (SUPREME COURT)**

It was held that the manufacture means to bring into existence new substance and does not mean merely to produce some change in substance. The produce which arises out of process must be commercially a distinct commodity different from that out of which it is processed.

The nature and extent of processes may vary from case to case. When a change takes place and a new and distinct article comes into existence known consumers and the commercial community as a commercial product, which can no longer be regarded as the original commodity, such a change constitutes manufacture.


It was held that goods manufactured are subject to excise duty in India. Two conditions have to be cumulatively satisfied, namely, that the process by which an
item is obtained is a process of manufacture and that the item so obtained is commercially marketable and bought and sold in the market or known to be so in the market. Marketability is essentially a question of fact.

4. CCE, MUMBAI v. JOHNSON & JOHNSON Ltd. (2006) 4 STJ 96 (SUPREME COURT)

It was held that mere repacking of medicines imported for being marketed does not amount to manufacture. Repacking have to be from bulk packs to retail packs so as to render product marketable directly to consumer.

5. CCE, CHENNAI-II v. TARPAULIN INTERNATIONAL (2010) 28 STT 53 (SUPREME COURT)

It was held that the process of cutting of tarpaulin sheets and fabrics to the required size, stitching edges and fixing eyelets does not bring total transformation in the original commodity so as to make a new and distinct product known to market and it continues to be tarpaulin fabrics or sheets. It held that conversion of tarpaulin made-ups would not amount to manufacture. However, if fabrication result in manufacture (as defined in Central Excise Act, 1994), it will not be covered for service tax purpose.

6. INTERTOLL INDIA CONSULTANTS (P) Ltd. v. CCE, NOIDA (2011) 24 STR 611 (CESTAT, DELHI)

It was held in the absence of repeated dealings, users of bridge cannot be considered as customers of either person collecting toll or owner of bridge: also collector of toll could not be said to be the client of the owner of the bridge, as they were not promoting any customer care services of owner. Therefore, collection of toll could not be said to be liable to service tax as “Business Auxiliary Service”.

7. RAL (CHANNEL ISLANDS) Ltd. v. CCE & C (2012) 36 STT 383 (ECJ)

It was held that entertainment or similar activities do not require artistic input by supplier of services. Hence an activity including that of making available machines, in respect of which principal objective pursued by supplier of services is entertainment of its customers amounts to ‘entertainment or similar activities’.
In the definition of ‘service’ contained in clause (44) of section 65B of the Act it has been stated that service includes a declared service. The phrase ‘declared service’ is also defined in the said section as an activity carried out by a person for another for consideration and specified in section 66E of the Act. The following nine activities have been specified in section 66E:

1. renting of immovable property;
2. construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of certificate of completion by the competent authority;
3. temporary transfer or permitting the use or enjoyment of any intellectual property right;
4. development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software;
5. agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;
6. transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods;
7. activities in relation to delivery of goods on hire purchase or any system of payment by instalments;
8. service portion in execution of a works contract;
9. service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the activity.

If the above activities are carried out by a person for another for consideration it would amount to provision of service. Most of these services are presently also being taxed except in so far as is concerned. In our view, these services are already amply covered by the definition of service but have been declared with a view to remove any ambiguity for the purpose of uniform application of law all over the country.
1. **RENTING OF IMMOVABLE PROPERTY Sec 66E(a)**

Renting has been defined in section 65B as “allowing, permitting or granting access, entry, occupation, usage or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property’.

A. **Is renting of all kinds of immovable property taxable?**

No. Renting of certain kinds of property is specified in the negative list. These are –

- renting of vacant land, with or without a structure incidental to its use, relating to agriculture. (sl no 4 of Appendix 1)
- renting of residential dwelling for use as residence (sl no 13 of appendix 1)
- renting out of any property by Reserve Bank of India
- renting out of any property by a Government or a local authority to all non-business entity.

Renting of all other immovable properties would be taxable unless covered by an exemption.

B. **Are there any exemptions in respect of renting of immovable property?**

Yes. These are:

- Threshold level exemption up to Rs. 10 lakh.
- Renting of precincts of a religious place meant for general public is exempt.
- Renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a room below rupees one thousand per day or equivalent is exempt.
- Renting to an exempt educational institutions.

C. **Would permitting usage of a property for a temporary purpose like conduct of a marriage or any other social function be taxable?**
Yes. As per definition allowing or permitting usage of immovable property, without transferring possession of such property, is also renting of immovable property.

D. Would activities referred to in column 1 of a table below be chargeable to service tax?

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Nature of Activity</th>
<th>Taxability</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Renting of property to educational body</td>
<td>Exempted if provided to an educational institution for the purpose of education which is exempt from the levy of service tax; to others will be taxable.</td>
</tr>
<tr>
<td>2.</td>
<td>Renting of vacant land for animal husbandry or floriculture</td>
<td>Not chargeable to service tax as it is covered in the negative list entry relating to agriculture</td>
</tr>
<tr>
<td>3.</td>
<td>Permitting use of immoveable property for placing vending/dispensing machines</td>
<td>Chargeable to service tax as permitting usage of space is covered in the definition of renting</td>
</tr>
<tr>
<td>4.</td>
<td>Allowing erection of communication tower on a building for consideration.</td>
<td>Chargeable to service tax as permitting usage of space is covered in the definition of renting</td>
</tr>
<tr>
<td>5.</td>
<td>Renting of land or building for entertainment or sports</td>
<td>Chargeable to service tax as there is no specific exemption.</td>
</tr>
<tr>
<td>6.</td>
<td>Renting of theatres by owners to film distributors (including under a profit-sharing arrangement)</td>
<td>Chargeable to service tax as the arrangement amounts to renting of immovable property.</td>
</tr>
</tbody>
</table>
E. Would service tax be chargeable on renting of property located outside the taxable territory but where the property is owned by a person located in the taxable territory?

In respect of a service relating to immovable property the place of provision of service is the location of immovable property. If the immovable property is located outside taxable territory then it becomes a service provided outside the taxable territory even if the property owners is located in the taxable territory and would hence not be taxable.

F. Whether hotels/restaurants/convention centers letting out their halls, rooms etc. for social, official or business or cultural functions fall within the scope of this declared list service?

Halls, rooms etc. let out by hotels/restaurants for a consideration for organizing social, official or business or cultural functions are covered within the scope of renting of immovable property and would be taxable if other elements of taxability are present.

2. CONSTRUCTION OF A COMPLEX, BUILDING, CIVIL STRUCTURE OR A PART THEREOF, INCLUDING A COMPLEX OR BUILDING INTENDED FOR SALE TO A BUYER, WHOLLY OR PARTLY, EXCEPT WHERE THE ENTIRE CONSIDERATION IS RECEIVED AFTER ISSUANCE OF CERTIFICATE OF COMPLETION BY A COMPETENT AUTHORITY. Sec 66E(b)

This service is already taxable as part of construction of residential complex service under clause (zzzh) of sub-section 105 of section 65 of the Act and as part of service in relation to commercial or industrial construction under clause (zzq) of sub-section 105 of section 65 of the Act. This entry covers the services provided by builders or developers where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

A. What would be the liability to pay service tax on flats/houses agreed to be given by builder/developer to the land owner towards the land /development rights and to other buyers. If payable, how would the services be valued?

Here two important transactions are identifiable: (a) sale of land by the landowner which is not a taxable service; and (b) construction service provided by the builder/developer. The builder/developer receives
consideration for the construction service provided by him, from two
categories of service receivers: (a) from landowner: in the form of
land/development rights; and (b) from other buyers: normally in cash.
Construction service provided by the builder/developer is taxable in
case any part of the payment/development rights of the land was
received by the builder/developer before the issuance of completion
certificate and the service tax would be required to be paid by
builder/developers even for the flats given to the land owner.
It may be pointed out that in a recent judgment passed by the Mumbai
High Court in the case of Maharashtra Chamber of Housing Industry
and Others vs. Union of India [012-TIOL-78-HC-Mum-ST] has upheld
the Constitutional validity of levy of service tax, under clauses (zzzh)
and (zzzzu) of section 65, on similar construction services provided by
a builder. A relevant portion of the judgement is reproduced below-

"29. The charge of tax under Section 66 of the Finance Act is on the taxable
services defined in clause (105) of Section 65. The charge of tax is on the
rendering of a taxable service. The taxable event is the rendering of a service
which falls within the description set out in sub-clauses (zzq), (zzzh) and
(zzzzu). The object of the tax is a levy on services which are made taxable.
The fact that a taxable service is rendered in relation to an activity which
occurs on land does not render the charging provision as imposing a tax on
land and buildings. The charge continues to be a charge on taxable services.
The charge is not a charge on land or buildings as a unit. The tax is not on
the general ownership of land. The tax is not a tax which is directly imposed
on land and buildings. The fact that land is subject to an activity involving
construction of a building or a complex does not determine the legislative
competence of Parliament. The fact that the activity in question is an activity
which is rendered on land does not make the tax a tax on land. The charge is
on rendering a taxable service and the fact that the service is rendered in
relation to land does not alter the nature or character of the levy. The
legislature has expanded the notion of taxable service by incorporating
within the ambit of clause (zzq) and clause (zzzh) services rendered by a
builder to the buyer in the course of an intended sale whether before, during
or after construction. There is a legislative assessment underlying the
imposition of the tax which is that during the course of a construction related
activity, a service is rendered by the builder to the buyer. Whether that
assessment can be challenged in assailing constitutional validity is a separate
issue which would be considered a little later. At this stage, what merits
emphasis is that the charge which has been imposed by the legislature is on
the activity involving the provision of a service by a builder to the buyer in
the course of the execution of a contract involving the intended sale of
immovable property."
30. Parliament, in bringing about the amendment in question has made a legislative assessment to the effect that a service is rendered by builders to buyers during the course of construction activities. In our view, that legislative assessment does not impinge upon the constitutional validity of the tax once, the true nature and character of the tax is held not to fall within the scope of Entry 49 of List II. So long as the tax does not fall within any head of legislative power reserved to the States, the tax must of necessity fall within the legislative competence of Parliament. This is a settled principle of law, since the residuary power to legislate on a field of legislation which does not fall within the exclusive domain of the States is vested in Parliament under Article 248 read with Entry 97 of List I.”

Also See: Circular no 151/2/2012 ST dated 10/2/12 issued from F.No. 332/13/2011 TRU. The said circular may be referred to for guidance on this point.

B. What would be the service tax liability in the following model - land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. Society/individual flat owners give ‘No Objection Certificate’ (NOC) or permission to the builder/developer, for re-construction. The builder/developer makes new flats with same or different carpet area for original owners of flats and additionally may also be involved in one or more of the following: (i) construct some additional flats for sale to others; (ii) arrange for rental accommodation or rent payments for society members/original owners for stay during the period of reconstruction; (iii) pay an additional amount to the original owners of flats in the society. Under this model, the builder/developer receives consideration for the construction service provided by him, from two categories of service receivers. First category is the society/members of the society, who transfer development rights over the land (including the permission for additional number of flats), to the builder/developer. The second category of service receivers consist of buyers of flats other than the society/members. Generally, they pay by cash. Re-construction undertaken by a building society by directly engaging a builder/developer will be chargeable to service tax as works contract service for all the flats built now.

C. When a certain number of flats are given by the builder/developer to a land owner in a collaborative agreement to construct, in lieu of the
land or development rights transferred, will such transferee be required to pay service tax on further sale of flats to customers?
Yes. The service tax will be required to be paid by such transferee if any consideration is received by him from any person before the receipt of completion certificate.

D. What would be the service tax liability on conversion of any hitherto untaxed construction of complex or part thereof into a building or civil structure to be used for commerce or industry, after lapse of a period of time?
Mere change in use of the building does not involve any taxable service. If the renovation activity is done on such a complex on contract basis the same would be a works contract as defined in clause (54) of section 65B service portion, which would also be taxable if other ingredients of taxability are present.

E. What would be the service tax liability on Build-Operate-Transfer (BOT) Projects?
Many variants of this model are being followed in different regions of the country, depending on the nature of the project. Build-Own-Operate-Transfer (BOOT) is a popular variant. Generally under BOT model, Government, concessionaire (who may be a developer/builder himself or may be independent) and the users are the parties. Risk taking and sharing ability of the parties concerned is the essence of a BOT project. Government by an agreement transfers the ‘right to use’ and/or ‘right to develop’ for a period specified, usually thirty years or near about, to the concessionaire. Transactions involving provision of service take place usually at three different levels: firstly, between Government and the concessionaire; secondly, between concessionaire and the contractor and thirdly, between concessionaire and users. At the first level, Government transfers the right to use and/or develop the land, to the concessionaire, for a specific period, for construction of a building for furtherance of business or commerce (partly or wholly). Consideration for this taxable service may be in the nature of upfront lease amount or annual charges paid by the concessionaire to the Government. Such services provided by the “Government” would be in the negative list entry contained in clause (a) of section 66D unless these services qualify as ‘support services provided to business entities’ under exception sub-clause (iv) to clause (a) of section 66D. ‘Support services have been defined in clause (49) of section 65B as
‘infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in the ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis’. If the nature of concession is such that it amounts to ‘renting of immovable property service’ then the same would be taxable. The tax is required to be paid by the government as there is no reverse charge for services relating to renting of immovable property.

In this model, though the concessionaire is undertaking construction of a building to be used wholly or partly for furtherance of business or commerce, he will not be treated as a service provider since such construction has been undertaken by him on his own account and he remains the owner of the building during the concession period. However, if an independent contractor is engaged by a concessionaire for undertaking construction for him, then service tax is payable on the construction service provided by the contractor to the concessionaire.

At the third level, the concessionaire enters into agreement with several users for commercially exploiting the building developed/constructed by him, during the lease period. For example, the user may be paying a rent or premium on the sub-lease for temporary use of immovable property or part thereof, to the concessionaire. At this third level, concessionaire is the service provider and user of the building is the service receiver. Service tax would be leviable on the taxable services provided by the concessionaire to the users if the ingredients of taxability are present.

There could be many variants of the BOT model explained above and implications of tax may differ. For example, at times it is possible that the concessionaire may outsource the management or commercial exploitation of the building developed/constructed by him to another person and may receive a pre-determined amount as commission. Such commission would be a consideration for taxable service and liable to service tax.

F. If the builder instead of receiving consideration for the sale of an apartment receives a fixed deposit, which it converts after the completion of the building into sales consideration, will it amount to receiving any amount before the completion of service.
This may be a colorable device wherein the consideration for provision of construction service is disguised as fixed deposit, which is unlikely to be returned. In any case the interest earned by the builder on such fixed deposits will be a significant amount received prior to the completion of the immovable property. Further, interest in such cases would be considered as part of the gross amount charged for the provision of service and the service of construction will be taxable.

G. In certain States requirement of completion certificate are waived for certain specified types of buildings. How would leviability of service tax be determined in such cases?
In terms of explanation in section 66E in such cases the completion certificate issued by a architect or a chartered engineer or a licensed surveyor of the respective local body or development or planning authority would be treated as completion certificate for the purposes of determining chargeability of service tax.

H. If the person who has entered into a contract with the builder for a flat for which payments are to be made in 12 installments depending on the stage of construction and the person transfers his interest in the flat to a buyer after paying 7 installments, would such transfer be an activity chargeable to service tax?
Such transfer does not fall in this declared service entry as the said person is not providing any construction service. In any case transfer of such an interest would be transfer of a benefit to arise out of land which as per the definition of immovable property given in the General Clauses Act, 1897 is part of immovable property. Such transfer would therefore be outside the ambit of ‘service’ being a transfer of title in immovable property. Needless to say that service tax would be chargeable on the seven installments paid by the first allottee and also on subsequent installments paid by the transferee.

3. TEMPORARY TRANSFER OR PERMITTING THE USE OR ENJOYMENT OF ANY INTELLECTUAL PROPERTY RIGHT Sec 66E(c)

A. What is the scope of the term ‘intellectual property right’?
‘Intellectual property right’ has not been defined in the Act. The phase has to be understood as it is understood in normal trade parlance as per which intellectual property right includes the following –
B. Is the IPR required to be registered in India? Would the temporary transfer of a patent registered in a country outside India also be covered under this entry?

Since there is no condition regarding the law under which an intellectual right should be registered, temporary transfer of a patent registered outside India would be covered in this entry. However, it will become taxable only if the place of provision of service of temporary transfer of intellectual property right is in taxable territory.

4. DEVELOPMENT, DESIGN, PROGRAMMING, CUSTOMIZATION, ADAPTATION, UPGRADE, ENHANCEMENT, IMPLEMENTATION OF INFORMATION TECHNOLOGY SOFTWARE Sec 66E(d)

The term ‘information technology software’ has been defined in section 65B of the Act as ‘any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment’.

A. Would sale of pre-packaged or canned software be included in this entry?

No. It is a settled position of law that pre-packaged or canned software which is put on a media is in the nature of goods [Supreme Court judgment in case of Tata Consultancy Services vs State of Andhra Pradesh [2002(178) ELT 22(SC) refers]]. Sale of pre-packaged or canned software is, therefore, in the nature of sale of goods and is not covered in this entry.

B. Is on site development of software covered under this entry?
Yes. On site development of software is covered under the category of development of information technology software.

C. Would providing advice, consultancy and assistance on matters relating to information technology software be chargeable to service tax?

These services may not be covered under the declared list entry relating to information technology software. However, such activities when carried out by person for another for consideration would fall within the definition of service and hence chargeable to service tax if other requirements of taxability are satisfied.

D. Would providing a license to use prepackaged software be a taxable service?

The following position of law needs to be appreciated to determine whether a license to use pre packaged software would be goods-

- As held by the Hon’ble Supreme Court in the case of Tata Consultancy Services vs. State of Andhra Pradesh [2002(178) ELT 22(SC)] pre-packaged software or canned software or shrink wrapped software put on a media like is goods. Relevant portion of para 24 of the judgment is reproduced below-

  “A software programme may consist of various commands which enable the computer to perform a designated task. The copyright in that programme may remain with the originator of the programme. But the moment copies are made and marketed, it becomes goods, which are susceptible to sales tax. Even intellectual property, once it is put on to a media, whether it be in the form of books or canvas (in case of painting) or computer discs or cassettes, and marketed would become “goods”. We see no difference between a sale of a software programme on a CD/floppy disc from a sale of music on a cassette/CD or a sale of a film on a video cassette/CD. In all such cases, the intellectual property has been incorporated on a media for purposes of transfer. Sale is not just of the media which by itself has very little value. The software and the media cannot be split up. What the buyer purchases and pays for is not the disc or the CD. As in the case of paintings or books or music or films the buyer is purchasing the intellectual property and not the media i.e. the paper or cassette or disc or CD. Thus a transaction sale of computer software is clearly a sale of “goods” within the meaning of the term as defined in the said Act. The term “all materials, articles and commodities” includes both tangible and intangible/incorporeal property which is capable of abstraction, consumption and use and which can be transmitted, transferred, delivered, stored, possessed etc. The software programmes have all these attributes.”
Therefore, in case a pre-packaged or canned software or shrink wrapped software is sold then the transaction would be in the nature of sale of goods and no service tax would be leviable.

The judgment of the Supreme Court in Tata Consultancy Service case is applicable in case the pre-packaged software is put on a media before sale. In such a case the transaction will go out of the ambit of definition of service as it would be an activity involving only a transfer of title in goods.

As per the definition of ‘service’ as contained in clause (44) of section 65(B) only those transactions are outside the ambit of service which constitute only a transfer of title in goods or such transfers which are deemed to be a sale within the meaning of Clause 29(A) of article 366 of the Constitution. The relevant category of deemed sale is transfer of right to use goods contained in sub-clause (d) of clause (29A) of the Constitution.

‘Transfer of right to use goods’ is deemed to be a sale under Article 366(29A) of the Constitution of India and transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods is a declared service under clause (f) of section 66E.

Transfer of right to use goods is a well-recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods.

A license to use software which does not involve the transfer of ‘right to use’ would neither be a transfer of title in goods nor a deemed sale of goods. Such an activity would fall in the ambit of definition of ‘service’ and also in the declared service category specified in clause (f) of section 66E.

Therefore, if a pre-packaged or canned software is not sold but is transferred under a license to use such software, the terms and conditions of the license to use such software would have to be seen to come to the conclusion as to whether the license to use packaged software involves transfer of ‘right to use’ such software in the sense the phrase has been used in sub-clause (d) of article 366(29A) of the Constitution. (See point no 5.6.1).

In case a license to use pre-packaged software imposes restrictions on the usage of such licenses, which interfere with the free enjoyment of the software, then such license would not result in transfer of right to use the software within the meaning of Clause 29(A) of Article 366 of the Constitution. Every condition imposed in this regard will not make it liable to service tax. The condition should be such as restraints the
right to free enjoyment on the same lines as a person who has otherwise purchased goods is able to have. Any restriction of this kind on transfer of software so licensed would tantamount to such a restraint.

- Whether the license to use software is in the paper form or in electronic form makes no material difference to the transaction.
- However, the manner in which software is transferred makes material difference to the nature of transaction. If the software is put on the media like computer disks or even embedded on a computer before the sale the same would be treated as goods. If software or any programme contained is delivered online or is down loaded on the internet the same would not be treated as goods as software as the judgment of the Supreme Court in Tata Consultancy Service case is applicable only in case the pre-packaged software is put on a media before sale.
- Delivery of content online would also not amount to a transaction in goods as the content has not been put on a media before sale. Delivery of content online for consideration would, therefore, amount to provision of service.

E. In case contract is given for customized development of software and the customized software so developed is delivered to the client on media like a CD then would the transaction fall in this declared entry or would it be covered by the TCS Judgement?

In such a case although the software is finally delivered in the form of goods, since the contract is essentially for design and development of software it would fall in the declared list entry. Such a transaction would be in the nature of composite transaction involving an element of provision of service, in as much as the contract is for design and development of software and also an element of transfer of title in goods, in as much as the property in CD containing the developed software is transferred to the client. However, the CD remains only a media to transmit or deliver the outcome of which is essentially and pre-dominantly a contract of service. Therefore, such a transaction would not be excluded from the ambit of the definition of ‘service’ as the transaction does not involve ‘only’ transfer of title in goods and dominant nature of the transaction is that of provision of service.
5. **AGREETING TO THE OBLIGATION TO REFRAIN FROM AN ACT, OR TO TOLERATE AN ACT OR A SITUATION, OR TO DO AN ACT**

**Sec 66E(e)**

In terms of this entry the following activities if carried out by a person for another for consideration would be treated as provision of service.

- Agreeing to the obligation to refrain from an act.
- Agreeing to the obligation to tolerate an act or a situation.
- Agreeing to the obligation to do an act.

A. Would non-compete agreements be considered a provision of service?
Yes. In case a company or any other person enters into a non-compete agreement with another person for a consideration then it would be a provision of service.

6. **TRANSFER OF GOODS BY WAY OF HIRING, LEASING, LICENSING OR ANY SUCH MANNER WITHOUT TRANSFER OF RIGHT TO USE SUCH GOODS**

**Sec 66E(f)**

A. What is the meaning and scope of the phrase ‘transfer of right to use such goods’?
Transfer of right to use goods is a well recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. ‘Transfer of right of goods’ involves transfer of possession and effective control over such goods in terms of the judgement of the Supreme Court in the case of State of Andhra Pradesh vs Rashtriya Ispat Nigam Ltd [Judgment dated 6/2/2002 in Civil Appeal no. 31 of 1991]. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control.

The test laid down by the Supreme Court in the case of Bharat Sanchar Nigam Limited vs. Union of India [2006(2)STR161(SC)] to determine whether a transaction involves transfer of right to use goods, which has been followed by the Supreme Court and various High Courts, is as follows:

- There must be goods available for delivery;
- There must be a consensus ad idem as to the identity of the goods;
The transferee should have legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;

For the period during which the transferee has such legal right, it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute, viz., a ‘transfer of the right to use’ and not merely a license to use the goods;

Having transferred, the owner cannot again transfer the same right to others.

Whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction.

B. Whether the transactions listed in column 1 of the table below involve transfer of right to use goods?

<table>
<thead>
<tr>
<th>Sr. No.</th>
<th>Nature of transaction</th>
<th>Whether transaction involves transfer of right to use</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>A car is given in hire by a person to a company along with a driver on payment of charges on per month/mileage basis</td>
<td>Right to use is not transferred as the car owner retains the permissions and licenses relating to the cab. Therefore possession and effective control remains with the owner (Delhi High Court Judgment in the case of International Travel House in Sales Tax Appeal no 10/2009 refers). The service is, therefore covered in the declared list entry.</td>
</tr>
<tr>
<td></td>
<td>Description</td>
<td>Details</td>
</tr>
<tr>
<td>---</td>
<td>------------------------------------------------------------------------------</td>
<td>-------------------------------------------------------------------------</td>
</tr>
<tr>
<td>2</td>
<td>Supply of equipment like excavators, wheel loaders, dump trucks, cranes, etc for use in a particular project where the person to whom such equipment is supplied is subject to such terms and conditions in the contract relating to the manner of use of such equipment, return of such equipment after a specified time, maintenance and upkeep of such equipment.</td>
<td>The transaction will not involve transfer of right to use such equipment as in terms of the agreement the possession and effective control over such equipment has not been transferred even though the custody may have been transferred along with permission to use such equipment. The receiver is not free to use such equipment in any manner as he likes and conditions have been imposed on use and control of such equipment.</td>
</tr>
<tr>
<td>3</td>
<td>Hiring of bank lockers</td>
<td>The transaction does not involve the right to use goods as possession of the lockers is not transferred to the hirer even though the contents of the locker would be in the possession of the hirer. (refer to Andhra Pradesh High Court Judgment in the case of State Bank of India Vs State of Andhra Pradesh)</td>
</tr>
<tr>
<td>4</td>
<td>Hiring out of vehicles where it is the responsibility of the owner to abide by all the laws relating to motor vehicles</td>
<td>No transfer of right to use goods as effective control and possession is not transferred ( Allahabad High Court judgement in Ahuja Goods Agency vs State of UP [(1997)106STC540] refers)</td>
</tr>
<tr>
<td>5</td>
<td>Hiring of audio visual equipment where risk is of the owner</td>
<td>No transfer of right to use goods as effective control and possession is not transferred</td>
</tr>
</tbody>
</table>
Note: The list in the table above is only illustrative to demonstrate how courts have interpreted terms and conditions of various types of contracts to see if a transaction involve transfer of right to use goods. The nature of each transaction has to be examined in totality keeping in view all the terms and condition of an agreement relating to such transaction.

7. **ACTIVITIES IN RELATION TO DELIVERY OF GOODS ON HIRE PURCHASE OR ANY SYSTEM OF PAYMENT BY INSTALMENTS Sec 66E(g)**

A. **Is the delivery of goods on hire purchase of any system of payment by installments taxable?**
   No. The delivery of goods on hire purchase or any system of payment on installment is not chargeable to service tax because as per Article 366(29A) of the Constitution of India such delivery of goods is deemed to be a sale of goods. However activities or services provided in relation to such delivery of goods are covered in this declared list entry.

B. **What is the scope of the phrase delivery of goods on hire purchase or any system of payment by installments?**
   Section 2 of the Hire Purchase Act, 1972 defines a “hire purchase agreement’ as ‘an agreement under which goods are let out on hire and under which the hirer has the option to purchase them in accordance with the terms of the agreement and includes an agreement under which-
   
   i. possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical installments, and
   
   ii. the property in the goods is to pass to such person on the payment of the last of such installments, and
   
   iii. such person has a right to terminate the agreement at any time before the property so passes.

As per the Sales of Goods Act by Mulla (Seventh Edition. Page 14) delivery is ‘voluntary dispossession in favour of another’ and that ‘in all cases the essence of delivery is that the deliverer, by some apt and manifest act, puts the delivery in the same position of control over thing, either directly or through a custodian, which he held himself
immediately before the act’. The nature of such arrangements has been explained by the Supreme Court in the case of Association of Leasing & Financial Service Companies Vs Union of India [2010 (20) S.T.R. 417 (S.C.)]. The relevant extract in para 20 of the said judgment is reproduced below:

“20. According to Sale of Goods Act by Mulla [6th Edition] a common method of selling goods is by means of an agreement commonly known as a hire-purchase agreement which is more aptly described as a hiring agreement coupled with an option to purchase, i.e., to say that the owner lets out the chattel on hire and undertakes to sell it to the hirer on his making certain number of payments.”

Key ingredients of the deemed sale category of ‘delivery of goods on hire-purchase or any system of payment by installments’, therefore are-

- Transfer of possession (and not just of custody)
- The hirer has the option or obligation to purchase the goods in accordance with the terms of the agreement.

C. What is the difference between a normal hiring agreement and a hire-purchase agreement?

In a mere hiring agreement the hirer has no option to purchase the goods hired and the risks and rewards incidental to ownership of goods remain with the owner and are not transferred to the hirer. In a hire-purchase agreement the hirer has an option or an obligation to purchase goods.

D. Are ‘finance leases’, ‘operating leases’ and ‘capital leases’ covered as ‘delivery of goods on hire purchase or any system of payment of installments’?

Such leases would be covered only if the terms and conditions of such leases have the ingredients as explained above. Normally in an ‘operating lease’ the lease is for a term shorter than property’s useful life and the lessor is typically responsible for taxes and other expenses on the property. The lessee does not have an option to purchase the property at the end of the period of lease. Such arrangements do not qualify as ‘delivery of goods on hire purchase or any system of payment of installments’.

On the other hand ‘financial leases’ or ‘capital leases’ strongly resemble security arrangements and are entered into for financing the asset. The lessee pays maintenance costs and taxes and has the option
of purchasing the lease end. Such arrangements resemble a hire-purchase agreement and would fall under the said ‘deemed sale’ category. The essence of this deemed sale category is that the arrangement under which the goods are ‘delivered’ should be in the nature of a financing arrangement wherein the lessee pays maintenance costs and taxes and has the option of purchasing the asset so delivered at lease end.

It may, however, be pointed out that in case an ‘operating lease’ has elements of transfer of ‘right to use’ then the same would be covered in the other ‘deemed sale’ category pertaining to ‘transfer of right to use any goods’

E. If delivery of goods on hire purchase or any system of payment on installment is deemed to be sale of goods what are the activities in relation to such delivery which are covered in the declared service?

It has been held by Supreme court in the case of Association Of Leasing & Financial Service Companies Vs Union Of India [2010 (20) S.T.R. 417 (S.C.)] that in equipment leasing/hire-purchase agreements there are two different and distinct transactions, viz., the financing transaction and the equipment leasing/hire-purchase transaction and that the financing transaction, consideration for which was represented by way of interest or other charges like lease management fee, processing fee, documentation charges and administrative fees, which is chargeable to service tax. Therefore, such financial services that accompany a hire-purchase agreement fall in the ambit of this entry of declared services.

F. Is service tax leviable on the entire quantum of interest and other charges received in relation to a hire purchase?

No. In terms of the exemption notification relating to such activities, service tax is leviable only on 10% of the amount representing interest. No exemption is available in respect of other charges.

8. SERVICE PORTION IN EXECUTION OF A WORKS CONTRACT Sec 66E(h)

Works contract has been defined in section 65B of the Act as a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning,
installation, completion, fitting out, repair, maintenance renovation, alteration of any building or structure on land or for carrying out any other similar activity or a part thereof in relation to any building or structure on land.

Typically every works contract involves an element of sale of goods and provision of service. In terms of Article 366 (29A) of the Constitution of India transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods. It is a well settled position of law, declared by the Supreme Court in BSNL’s case [2006(2) STR 161 (SC)], that a works contract can be segregated into a contract of sale of goods and contract of provision of service. This declared list entry has been incorporated to capture this position of law in simple terms.

It may be pointed out that prior to insertion of clause (29A) in article 366 of the Constitution defining certain categories of transactions as ‘deemed sale’ of goods the position of law, as declared by the Supreme Court in Gannon Dunkerley’s case (AIR1958SC560) was that a works contract was essentially a contract of service and no sales tax could be levied on goods transferred in the course of execution of works contract. It is only after the constitutional amendment that VAT or sales tax is leviable on such goods. The remaining portion of the contract remains a contract for provision of service.

Further, with a view to bring certainty and simplicity, the manner of determining the value of service portion in works contracts has been given in rule 2A of the Valuation Rules.

For details on valuation please refer Chapter 7 of this book.

A. Would labour contracts in relation to a building or structure treated as a works contract?

No. Labour Contracts do not fall in the definition of works contract. It is necessary that there should be transfer of property in goods involved in the execution of such contract which is leviable to tax as sale of goods. Pure labour contracts are therefore not works contracts and would be leviable to service tax like any other service and on full value.

B. Would contracts for repair or maintenance of motor vehicles be treated as ‘works contracts’? If so, how would the value be determined for ascertaining the value portion of service involved in execution of such a works contract?
Yes. Contracts for repair or maintenance of moveable properties are also works contracts if property in goods is transferred in the course of execution of such a contract. Service tax has to be paid in the service portion of such a contract.

C. Would contracts for construction of a pipe line or conduit be covered under works contract?
Yes. As pipeline or conduits are structures on land contracts for construction of such structure would be covered under works contract.

D. Would contracts for erection commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise be treated as a works contract?
Such contracts would be treated as works contracts if –
- Transfer of property in goods is involved in such a contract; and
- The machinery equipment structures are attached or embedded to earth after erection commissioning or installation.

E. What is the scope of ‘building or structure on land’?
Buildings and structures on land means not only buildings or structures attached to earth but also things permanently fastened to a building or structure attached to earth.

F. Would contracts for painting of a building, repair of a building, renovation of a building, wall tiling, flooring be covered under ‘works contract’?
Yes, if such contracts involve provision of materials as well.

G. What is the way to segregate service portion in execution of a works contract from the total contract?
For detailed discussion on this topic please refer to Chapter 7 of this book.

H. Is the definition of ‘works contract’ in clause (54) of section 65B in line with the definition of ‘works contract’ in various State VAT laws?
The definition of ‘works contract’ in clause (54) of section 65B covers such contracts which involve transfer of property in goods and are for carrying out the activities specified in the said clause (54) in respect of both moveable and immovable properties. This is broadly in consonance with the definition of ‘works contract’ in most of the State
VAT laws. However, each State has defined ‘works contracts’ differently while dealing with works contract as a category of deemed sales. There could, therefore, be variations from State to State. For service tax purposes the definition in clause (54) of section 65B would alone be applicable.

9. SERVICE PORTION IN AN ACTIVITY WHEREIN GOODS, BEING FOOD OR ANY OTHER ARTICLE OF HUMAN CONSUMPTION OR ANY DRINK (WHETHER OR NOT INTOXICATING) IS SUPPLIED IN ANY MANNER AS PART OF THE ACTIVITY Sec 66E(i)

A. What are the activities covered in this declared list entry?
   The following activities are illustration of activities covered in this entry-
   - Supply of food or drinks in a restaurant;
   - Supply of foods and drinks by an outdoor caterer.
   In terms of article 366(29A) of the Constitution of India supply of any goods, being food or any other article of human consumption or any drink (whether or not intoxicating) in any manner as part of a service for cash, deferred payment or other valuable consideration is deemed to be a sale of such goods. Such a service therefore cannot be treated as service to the extent of the value of goods so supplied. The remaining portion however constitutes a service. It is a well settled position of law, declared by the Supreme Court in BSNL’s case [2006(2)STR161(SC)], that such a contract involving service along with supply of such goods can be dissected into a contract of sale of goods and contract of provision of service. This declared list entry is has been incorporated to capture this position of law in simple terms.

B. Are services provided by any kind of restaurant, big or small, covered in this entry?
   Yes. Although services provided by any kind of restaurant are covered in this entry, the emphasis is to levy tax on services provided by only such restaurants where the service portion in the total supply is substantial and discernible.
   Thus the following category of restaurants are exempted –
   - Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central airheating in any part of the establishment, at
any time during the year, and which has a license to serve alcoholic beverage.

➢ Below the threshold exemption

C. How is the value of service portion to be determined?
For detailed discussion on this topic please refer to Chapter 7 of this book.

*** *** ***
CASE CAPSULE
DECLARED SERVICES

1. **TATA CONSULTANCY SERVICES v. STATE OF ANDHRA PRADESH**
   *(2002) 178 ELT 22 (SUPREME COURT)*

   In was held that onsite development of software is covered under development of information technology software. Sale of pre-packed or canned software is in nature of sale of goods and is not covered under this category. It is a settled position of law that pre-packed or canned software is, therefore, in the nature of sale of goods and is not be covered. However, such activities when carried out by person for another for consideration would fall within the definition of service and hence chargeable to service tax if other requirements of taxability are satisfied.


   In was held that the valuation provisions only provide for measure of tax and it does not create a charge. Question of going to measure of tax would arise only if it is found that charge of tax is attracted.


   In relation to transfer of property and with reference to Consumer Protection Act, 1986 [section 2(1)(o)], where plots were offered for sale with assurance of layout approvals, development of infrastructure/ amenities etc to be carried out by seller as a part of package of fully developed plots, Apex Court observed that it involved much more than a simple transfer of a piece of immovable property. It was not a case of mere sale of property on ‘as is where is’ basis but a service and any deficiency therein was liable to be tried under the said Act.
4. **OFFICIAL LIQUIDATOR v. SRIKRISHINA DEV (1959) 29 COMP CASES 476 (ALLAHABAD)**

It was held that any machinery attached or fastened to or embedded to earth becomes part of immovable property. However, if a machine is fixed by bolts, it does not become an immovable property but remain ‘goods’. Similarly, furniture fixed on ground by bolts, screw etc. are goods i.e not an immovable property.

5. **BHARAT SANCHAR NIGAM Ltd. (Mobile) v. CCE (2011) 22 STR 385 (PUNJAB & HARYANA)**

It was held that assessee who was providing taxable service under “commercial or industrial construction service” was entitled to take CENVAT Credit on input purchased for construction of towers for providing telecommunication service, by referring the case having similar matter in Idea cellular Ltd. V. CCE, Ahemdabad-III (2009) 16 STR 80 (CESTAT, Ahemdabad).


Where a public limited company leased a factory, plant and machinery for a consideration amount for a period of three years on a monthly rent, it was held that the assessee was not engaged in leasing business to be called a corporate body providing financial service u/s 65(12) and 65(105)(zm). There being no law to tax the transfer of right to use movable property before 16.05.2008, the assessee company was excluded from the purview of service tax.
CHAPTER 6

THE EXEMPTIONS

Under the present system there are number of exemption notifications. The need for exemptions is not obviated with the introduction of negative list. While some existing exemptions have been built into the negative list, others, wherever necessary, have been retained as exemptions. In addition some new exemptions are also proposed to be introduced. For ease of reference and simplicity most of the exemptions are now a part of one single mega exemption notification 25/2012-ST dated 20/6/12. The exemptions requiring some clarification are explained below:

1. SERVICES PROVIDED TO SPECIFIED INTERNATIONAL ORGANIZATIONS

A. Are services provided to all international organizations exempt from service tax?

No. Services to only specified international organisations are exempt. ‘Specified international organization’ has been defined in the notification and means an international organization declared by the Central Government in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 to which the provisions of the Schedule to the said Act apply.

Illustrative list of specified international organisations are as follows:

1. International Civil Aviation Organisation
2. World Health Organisation
3. International Labor Organisation
4. Food and Agriculture Organisation of the United Nations
5. UN Educational, Scientific and Cultural Organisation (UNESCO)
6. International Monetary Fund (IMF)
7. International Bank for Reconstruction and Development
8. Universal Postal Union
9. International Telecommunication Union
10. World Meteorological Organisation
11. Permanent Central Opium Board
12. International Hydrographic Bureau
13. Commissioner for Indus Waters, Government of Pakistan and his advisers and assistants
14. Asian African Legal Consultative Committee
15. Commonwealth Asia Pacific Youth Development Centre, Chandigarh
16. Delegation of Commission of European Community
17. Customs Co-operation Council
18. Asia Pacific Telecommunity
19. International Centre of Public Enterprises in Developing Countries, Ljubljana (Yugoslavia)
20. International Centre for Genetic Engineering and Biotechnology
22. South Asian Association for Regional Co-operation
23. International Jute Organisation, Dhaka, Bangladesh

2. Health Care Services (Details at Sr. No 2 of Exhibit A3)
   A. Are all health care services exempt?
      No. only services in recognized systems of medicines in India are exempt. In terms of the Clause (h) of section 2 of the Clinical Establishments Act, 2010, the following systems of medicines are recognized systems of medicines:
      - Allopathy
      - Yoga
      - Naturopathy
      - Ayurveda
      - Homeopathy
      - Siddha
      - Unani
      - Any other system of medicine that may be recognized by central government

   B. Who all are covered as paramedic?
      Paramedics are trained health care professionals, for example nursing staff, physiotherapists, technicians, lab assistants etc. Services by them in a clinical establishment would be in the capacity of employee and not provided in independent capacity and will thus be considered as services by such clinical establishment. Similar services in independent capacity are also exempted.
3. SERVICES PROVIDED TO OR BY A GOVERNMENTAL AUTHORITY

A. Are various corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act, 1956 or autonomous institutions set up by special acts covered under the definition of ‘governmental authority’?
No. In terms of its definition in mega notification 25/2012-ST, following conditions should be satisfied for a board, body or an authority to be eligible for exemptions as a governmental authority:
- set up by an act of the Parliament or a State Legislature;
- established with 90% or more participation by way of equity or control by Government; and
- carries out any of the functions entrusted to a municipality under article 243W of the Constitution.

B. What are the functions entrusted to a municipality under article 243W of the Constitution?

Article 243W of the Constitution is as under:
‘Subject to the provisions of this Constitution, the Legislature of a State may, by law, endow—
(a) the Municipalities with such powers and authority as may be necessary to enable them to function as institutions of self-government and such law may contain provisions for the devolution of powers and responsibilities upon Municipalities, subject to such conditions as may be specified therein, with respect to—
1. the preparation of plans for economic development and social justice;
2. the performance of functions and the implementation of schemes as may be entrusted to them including those in relation to the matters listed in the Twelfth Schedule;
(b) the Committees with such powers and authority as may be necessary to enable them to carry out the responsibilities conferred upon them including those in relation to the matters listed in the Twelfth Schedule.’ Matters listed in twelfth schedule are:
1. Urban planning including town planning.
2. Regulation of land-use and construction of buildings.
3. Planning for economic and social development.
4. Roads and bridges.
5. Water supply for domestic, industrial and commercial purposes.
7. Public health, sanitation conservancy and solid waste management.
8. Fire services.
9. Urban forestry, protection of the environment and promotion of ecological aspects.
10. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
11. Slum improvement and upgradation.
13. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
14. Promotion of cultural, educational and aesthetic aspects.
15. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.
16. Cattle pounds; prevention of cruelty to animals.
17. Vital statistics including registration of births and deaths.
18. Public amenities including street lighting, parking lots, bus stops and public conveniences.
19. Regulation of slaughter houses and tanneries.

C. Are all services provided by a governmental authority exempt from service tax?
No. All services are not exempt. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution are exempt. All other services are subjected to service tax if they are not otherwise exempt.

D. Are all services provided to a governmental authority exempt from service tax?
No. A governmental authority enjoys same benefits as the Government or a local authority in respect of receipt of services. The following services when provided to a governmental authority are exempt:
 a) Specified services as listed in Sr. no. 12 of Mega Exemption relating to construction.
 b) Services in relation to any function ordinarily entrusted to a municipality in relation to water supply, public health, sanitation conservancy, solid waste management or slum improvement and upgradation.
 c) Services received from a service provider located in a non-taxable territory by such
authorities in relation to any purpose other than commerce, industry or any other business or profession.

4. CHARITIES

A. I am a registered charity. How do I know that activities provided by me are charitable activities?

You are doing charitable activities if you are registered with income tax authorities for this purpose under section 12AA the Income Tax Act, 1961 and carry out one or more of the specified charitable activities. Following are the specified charitable activities:

a) public health by way of –
   - care or counseling of:
     (i) terminally ill persons or persons with severe physical or mental disability
     (ii) persons afflicted with HIV or AIDS, or
     (iii) persons addicted to a dependence-forming substance such as narcotics drugs or alcohol; or
   - public awareness of preventive health, family planning or prevention of HIV infection;

b) advancement of religion or spirituality;

c) advancement of educational programmes or skill development relating to,-
   - (I) abandoned, orphaned or homeless children;
   - (II) physically or mentally abused and traumatized persons;
   - (III) prisoners; or
   - (IV) persons over the age of 65 years residing in a rural area;

d) preservation of environment including watershed, forests and wildlife; or

e) advancement of any other object of general public utility up to a value of twenty five lakh rupees in a financial year subject to the condition that total value of such activities had not exceeded twenty five lakh rupees during the preceding financial year.

B. What is the tax liability of a registered charity on their activities?

If a registered charity is doing any activity falling in negative list of services or is otherwise exempt, it is not required to pay service tax on that activity. In case, where its activity is covered explicitly in any of the specified charitable activities at ‘a’ to ‘d’ of the answer to A. above, it is exempt from service tax without any value limit. For charitable
activities mentioned at ‘e’, it is exempt up to a value of twenty five lakh rupees in a financial year if the total value of such services had not exceeded twenty five lakh rupees during the preceding financial year. However, this later exemption is available only if the activities are meant for general public. General public is defined in the notification as ‘body of people at large sufficiently defined by some common quality of public or impersonal nature’.

5. RELIGIOUS PLACES/CEREMONIES

A. 7.5.1 Is renting of precincts of a religious place taxable?
Yes. However, exemption is available only if the place is meant for general public. General public is also defined in the mega notification 25/2012-ST as ‘body of people at large sufficiently defined by some common quality of public or impersonal nature’.

B. 7.5.2 Am I liable to pay service tax for conducting religious ceremonies for my client?
No. Conduct of religious ceremonies is exempt under Sr. no. 4 of Mega Exemption. Religious ceremonies are life-cycle rituals including special religious poojas conducted in terms of religious texts by a person so authorized by such religious texts. Occasions like Birth, marriage, and death involve elaborate religious ceremonies.

6. ADVOCATES OR ARBITRAL TRIBUNALS

A. What is the tax liability of advocates, or arbitral tribunal in respect of services provided by them?
Advocates can provide services either as individuals or as firms. Legal services provided by advocates or partnership firms of advocates are exempt from service tax when provided to the following:

- an advocate or partnership firm of advocates providing legal services (same class of persons)
- any person other than a business entity or
- a business entity with a turnover up to rupees ten lakh in the preceding financial year

However, in respect of services provided to business entities, with a turnover exceeding rupees ten lakh in the preceding financial year, tax
is required to be paid on reverse charge by the business entities. Business entity is defined in section 65B of the Finance Act, 1994 as ‘any person ordinarily carrying out any activity relating to industry, commerce or any other business or profession’. Thus it includes sole proprietors as well. The business entity can, however, take input tax credit of such tax paid in terms of Cenvat Credit Rules, 2004, if otherwise eligible. The provisions relating to arbitral tribunal are also on similar lines.

B. I am serving as a member of an arbitral tribunal comprising many arbitrators and receiving an amount from the arbitral tribunal. Am I providing a service and required to pay service tax on such amount received?
Arbitral tribunal comprising more than one arbitrator will constitute an entity by itself. Thus services of individual arbitrator when represented on such an arbitral tribunal will also constitute service by one person to another. However such service is exempt under sr. no. 6(c) of the Mega Notification.

7. RECREATIONAL COACHING OR TRAINING

A. What is the scope of exemption to coaching or training in recreational activities?
There is exemption from service tax to training or coaching in recreational activities relating to arts, culture or sports. The benefit is available to coaching or training relating to all forms of dance, music, painting, sculpture making, theatre and sports etc.

8. SPORTS

A. What is the tax liability on services provided to a recognized sports body?
Services provided to a recognized sports body by an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body are exempt from service tax. Similarly services by a recognized sports body to another are also exempt. Services by individuals such as selectors, commentators, curators, technical experts are taxable. Recognized sports body has been defined in the Mega Notification itself.
B. Are the services of an individual as a player, umpire in a premier league taxable?
The service of a player to a franchisee which is not a recognized sports body is taxable. However, services of an individual as umpire, referee when provided directly to a recognized sports body shall be exempt.

9. CONSTRUCTION
A. Which are the construction services exempted when provided to the Government, a local authority or a governmental authority?
Exemption is available to the services by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of:
A. a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession
B. a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under Ancient Monuments and Archaeological Sites and Remains Act, 1958
C. a structure meant predominantly for use as
   (i) an educational,
   (ii) a clinical, or
   (iii) an art or cultural establishment
D. canal, dam or other irrigation works
E. pipeline, conduit or plant for
   (i) water supply
   (ii) water treatment, or
   (iii) Sewerage treatment or disposal
F. a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the of a religious building

B. What is the significance of words predominantly for use other than for commerce, industry, or any other business or profession?
The exemption is available for a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession. The significance of the word predominantly is that benefit of exemption will not be denied if the building is also incidentally used for some other purposes if it is
used primarily for commerce, industry, or any other business or profession.

C. **I am a contractor in number of projects for constructing roads. What is my tax liability on construction of roads under different types of projects?**
   Construction of roads for use by general public is exempt from service tax. Construction of roads which are not for general public use e.g., construction of roads in a factory, residential complex would be taxable.

D. **I am engaged in construction of hospitals and educational institutes. Am I required to pay service tax?**
   If you are constructing such structures for the government, a local authority or a governmental authority, you are not required to pay service tax. If you are constructing for others, you are required to pay tax.

E. **What is the service tax liability on construction of a religious building?**
   Service tax is exempt on construction of a building owned by an entity registered under section 12 AA of the Income tax Act, 1961 and meant predominantly for religious use by general public.

F. **I am constructing a residential complex for my client. The houses are predominantly meant for self-use or the use of the employees. Am I required to pay service tax?**
   If your client is other than the Government, a local authority or a governmental authority, you are required to pay service tax. However, exemption is available for services provided to the Government, a local authority or a governmental authority by way of construction of a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act.

G. **What is the service tax liability on construction of two-floor house constructed through a contractor? My contractor is demanding service tax. Is he right in doing so?**
   Service tax is payable on construction of a residential complex having more than one single residential unit. Single residential unit is defined
in the notification and means a self-contained residential unit which is
designed for use, wholly or principally, for residential purposes for
one family. If each of the floors of your house is a single residential
unit in terms of the definition, the contractor is rightly demanding
service tax. If the title of each of floors is capable of being transferred to
another person by mutation in land/ municipal records, both the
floors may be considered as separate single residential units.

H. Are repair, maintenance of airports, ports and railways liable to tax?
Yes. They are liable to service tax and the same will be available as
input tax credit to railways, port or airport authority, if other
conditions are met.

I. I am setting up a wheat flour mill. The supplier of machines is
demanding service tax on erection and installation of machineries
and equipments in the flour mill. Is he right in demanding service
tax?
There is no service tax liability on erection or installation of
machineries or equipments for units processing agricultural produce
as food stuff excluding alcoholic beverages. You are processing wheat
which is made from processing an agricultural produce. Similarly
erection or installation of machineries or equipment for dal mills, rice
mills, milk dairies or cotton ginning mills would be exempt.

10. COPYRIGHT

A. Will a music company having the copyright for any sound recording
be taxable for its activity of distributing music?
Temporary transfer of a copyright relating to original literary,
dramatic, musical, artistic work or cinematographic film falling under
clause (a) and (b) of sub-section (1) of section 13 of the Indian
Copyright Act, 1957 is exempt. A music company would be required to
pay service tax as the copyright relating to sound recording falls under
clause (c) of sub-section (1) of section 13 of the Indian Copyright Act,
1957.

B. I am a composer of a song having the copyright for my song. When I
allow the recording of the song on payment of some royalty by a
music company for further distribution, am I required to pay service
tax on the royalty amount received from a music company?
No, as the copyright relating to original work of composing song falls under clause (a) of subsection (1) of section 13 of the Indian Copyright Act, 1957 which is exempt from service tax. Similarly an author having copy right of a book written by him would not be required to pay service tax on royalty amount received from the publisher for publishing the book. A person having the copyright of a cinematographic film would also not be required to pay service tax on the amount received from the film exhibitors for exhibiting the cinematographic film in cinema theatres.

C. What would be the liability of service tax on various arrangements entered into for screening of cinematographic films by producers/distributors/exhibitors?
A detailed circular has been issued by the Board dealing with various arrangements in the context of existing present system of taxation based on positive list of services vide Circular No.148 / 17 / 2011 – ST, dated 13.12.2011. The said circular may be referred for the guidance. However, no service tax is payable on temporary transfer of copyright in relation to cinematographic films as the same is exempt under the mega-notification 25/2012.

11. MISCELLANEOUS
A. I am an artist. How do I know that my activity is subjected to service tax?
The activities by a performing artist in folk or classical art forms of music, dance, or theatre are not subjected to service tax. All other activities by an artist in other art forms e.g. western music or dance, modern theatres, performance of actors in films or television serials would be taxable. Similarly activities of artists in still art forms e.g. painting, sculpture making etc. are taxable.

B. Are the services of an artist as brand ambassador taxable? Who are brand ambassadors?
Yes, services provided by an artist as brand ambassador is taxable. Brand ambassador is defined in the mega notification and means a person engaged for promotion or marketing of a brand of goods, service, property or actionable claim, event or endorsement of name, including a trade name, logo or house mark of any person.

C. What is the significance of declared tariff?
Declared tariff is defined in the mega notification. It includes charges for all amenities provided in the unit of accommodation (given on rent for stay) like furniture, air-conditioner, refrigerators or any other amenities, but without excluding any discount offered on the published charges for such unit.

Its relevance is in determining the liability to pay service tax on renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes as exemption is available where declared tariff of a unit of accommodation is below rupees one thousand per day or equivalent. However, the tax will be liable to be paid on the amount actually charged i.e. declared tariff minus any discount offered. Thus if the declared tariff is Rs 1100/-, but actual room rent charged is Rs 800/-, tax will be required to be paid on Rs 800/-. When the declared tariff is revised as per the tourist season, the liability to pay tax shall be only on the declared tariff for the accommodation where the published/printed tariff is above Rupees 1000/-. However, the revision in tariff should be made uniformly applicable to all customers and declared when such change takes place.

D. I am running a hotel having the facility of central air-conditioning. There are number of restaurants in the hotel. Am I liable to pay service tax on serving of food or beverages in these restaurants?

Notification No. 3/2013 has amended Notification No. 25/2012(Mega exemption) according to which serving of food or beverages in a centrally air-conditioned premise will be taxed whether or not restaurant has a license to serve alcoholic beverages. Serving of food or beverages outside the restaurant, say near the swimming pool, will be taxed if service is from a restaurant.

E. Is giving of a bus on hire to any person liable to tax?

Giving on hire a bus to a state transport undertaking is exempt from service tax. If the bus is given on hire to a person other than a state transport undertaking, it will be taxed.

F. I have a bus with a contract permit and operating the bus on a route. The passengers embark or disembark from the bus at any place falling on the route and pay separate fares either for the whole or for the stages of journey. Am I required to pay tax?
No. However, transport of passengers in a contract carriage for the transportation of passengers, for tourism, conducted tour, charter or hire is taxable.

G. I have taken on rent a piece of vacant land from its owner. The land will be used for providing the facility of vehicles parking on payment. What is my service tax liability? You are not required to pay tax on providing the facility of vehicle parking to general public. However, if you are providing the facility of parking of vehicles to a car dealer, you are be required to pay tax as parking facility is not for general public. Moreover, land owner is liable to pay service tax on renting of his land to you.

H. What is the tax liability of a RWA on the charges collected from own members by way of reimbursement of charges or share of contribution for the common use of its members in a housing society or a residential complex. Service of an unincorporated body or a non-profit entity registered under any law for the time being in force to its own members up to an amount of Rs 5,000 per member per month by way of reimbursement of charges or share of contribution is exempt from service tax. Where RWA is working as a pure agent of its members for sourcing of goods or services from a third person, amount collected by RWA from its members may be excluded from the value of taxable service in terms of Rule 5(2) of Service Tax (Determination of Value) Rules, 2006 subject to compliance with the specified conditions.

I. I am a Resident Welfare Association (RWA). The members contribute an amount to RWA for holding camps to provide health care services to poor men and women. Am I required to pay tax on contribution received from members? No. You are not required to pay service tax on the contribution received as you are carrying out any activity (holding camps to provide health care services) which is exempt from the levy of service tax. If contribution is for carrying out an activity which is taxable, you are required to pay service tax.

J. What is the tax liability on services by the intermediaries to entities those are liable to pay tax on their final output services?
Services by following intermediaries are exempt from service tax:

a. sub-broker or an authorized person to a stock broker;
b. authorized person to a member of a commodity exchange;
c. mutual fund agent to a mutual fund or asset management company;
d. distributor to a mutual fund or asset management company;
e. selling or marketing agent of lottery tickets to a distributor or a selling agent;
f. selling agent or a distributor of SIM cards or recharge coupon vouchers;
g. business facilitator or a business correspondent to a banking company or an insurance company in a rural area; or
h. sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;

K. Whether the exemption provided in the mega-exemption to services by way of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., is also available to the sub-contractors who provide input service to these main contractors in relation to such construction?

As per clause (1) of section 66F reference to a service by nature or description in the Act will not include reference to a service used for providing such service. Therefore, if any person is providing services, in respect of projects involving construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., such as architect service, consulting engineer service, which are used by the contractor in relation to such construction, the benefit of the specified entries in the mega-exemption would not be available to such persons unless the activities carried out by the sub-contractor independently and by itself falls in the ambit of the exemption.

It has to be appreciated that the wordings used in the exemption are ‘services by way of construction of roads etc’ and not ‘services in relation to construction of roads etc’. It is thus apparent that just because the main contractor is providing the service by way of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as an exempt service.
However, a sub-contractor providing services by way of works contract to the main contractor, providing exempt works contract services, has been exempted from service tax under the mega exemption if the main contractor is engaged in providing exempt services of works contracts. It may be noted that the exemption is available to sub-contractors engaged in works contracts and not to other outsourced services such as architect or consultants. *(point no. J (h) above, refers)*

L. **What is the tax liability of a person carrying out intermediate production process as job work for his clients?**
   Any process amounting to manufacture or production of goods is in the negative list. If process does not amount to manufacture or production of goods, and is further not covered in clause of the mega notification, the same is liable to service tax.

M. **Whether service tax is leviable on telephone services rendered by M/s. BSNL through Village Panchayat Telephone (VPT) with local call facility, as M/s. BSNL is a public sector unit and telephones run by it cannot be treated as ‘departmentally run telephones’?**
   As per Sl. No. 32 of the mega-exemption Notification in addition to exemption to ‘departmentally run telephones’ there is exemption for ‘Guaranteed Public Telephone operating only for local calls’ also. Village Public Telephones (VPTs) with facility of local calls (without 9 dialing facility or STD facility) run by BSNL would fall under the category of ‘Guaranteed Public Telephone operating only for local calls’.

N. **I am in the business of running a chain of restaurants. I intend to sell my business. Am I required to pay service tax?**
   Services by way of transfer of a going concern, as a whole or an independent part thereof, are exempt from service tax. Therefore, you are not required to pay service tax on such sale of your business. Sale of assets of a business that has closed will be outside the definition of service”

O. **What does the term ‘transfer of a going concern’ mean?**
   Transfer of a going concern means transfer of a running business which is capable of being carried on by the purchaser as an independent business, but shall not cover mere or predominant transfer of an activity comprising a service. Such sale of business as a
whole will comprise comprehensive sale of immovable property, goods and transfer of unexecuted orders, employees, goodwill etc. Since the transfer in title is not merely a transfer in title of either the immovable property or goods or even both it may amount to service and has thus been exempted.

P. Footwear Association of India is organizing a business exhibition in Germany for footwear manufacturers of India. Is Footwear association of India required to pay service tax on services to footwear manufacturers? No. The activity is exempt from service tax.

Q. I am resident in Jammu and Kashmir and planning to construct a property in Delhi. I have got the architectural drawings made from an architect who is also resident in Jammu and Kashmir. Am I liable to pay service tax on architect services? No. Even though the property is located in Delhi- in a taxable territory- your architect is exempt from service tax as both the service provider and the service receiver is in a non-taxable territory.

R. I am an individual receiving services from a service provider located in nontaxable territory. Am I required to pay service tax? If you are using these services in relation to any purpose other than commerce, industry or any other business or profession, you are required to pay tax under reverse charge, unless you are otherwise exempt. If use is for any other purpose, you are exempt from service tax.
1. **HICO PRODUCTS v. CCE (1994) 71 ELT 339 (SUPREME COURT)**

   It was held that exemption by notification does not take away the levy or has the effect of erasing the levy of duty. The object of exemption notification is to forgo the duty and confer certain benefits upon the manufacture or buyer or consumer through manufacturer, as the case may be.


   It was held that exemption can only operate when there has been a valid levy; or if there is no levy at all, there would be nothing to exempt. Exemption does not negate a levy of tax altogether despite an exemption, the liability to tax remains unaffected, only the subsequent requirement of payment of tax to fulfill the liability is done-away with.


   It was held that Constitution of India does not restrict the rights of parliament to legislate retrospectively creating a tax liability. The amendment to sub-clause (zzzz) of clause (95) of Section 65 of Finance Act, 1994 is not merely clarifactory but creates a substantive liability or right. The parliament’s right to legislate and create liabilities or rights with retrospective effect can be curtailed only by a restriction placed upon the legislature power of parliament by one or the other provision of Constitution of India.


   On special provision for exemption in certain cases relating to management, etc, for roads, it was held that as per section 97 of Finance
Act, 1994 there’s non-levy of service tax on impugned services during the period. Hence, department’s demand didn’t survive.

5. **POSCO INDOA DELHI STEEL PROCESSING Ltd. v. CC, KANDA (2012) 285 ELT 410 (CESTAT, AHEMBADABAD)**

It was held that intention behind the notification need not be examined while extending the benefit since the notification has to be interpreted on the basis of the words used therein not taking into account the intention.


Where assessee provided internal audit and indirect support services to SEZ units which was ultimately consumed by SEZ, it was held that Section 51 of Special Economic Zone Act, 2005 had overriding effect aver Notification No. 4/2004-ST and so is assessee was held ineligible for availing the impugned Notification considering wordings i.e consumption of services within SEZ, it could be treated as inconsistent notification. Hence, assessee was eligible for exemption.

7. **UNION OF INDIA v. BHARAT ALUMINUMS COMPANY (2011) 263 ELT 48 (CHHATTISGHR) **

It was held that while interpreting an exemption notification, non-compliance of conditions attached to the said notification, non compliance of conditions attached to the said notification would render the availment of exemption nugatory (Also see: CCE, Ghaziabad v. Radha Products Pvt. Ltd. (2012) 260 ELT 98 (CESTAT, New Delhi)).
CHAPTER 7
VALUATION

With the introduction of system of taxation of services based on the negative list there has been no fundamental change in the manner of valuation of service for the purpose of payment of service tax. The broad scheme remains the same barring some marginal changes carried out to align the scheme of valuation of taxable services and the Service Tax (Determination of Value) Rules, 2006 with the new system of taxation.

Broadly these changes in the Valuation Rules are as follows:-

As compared to the existing two schemes for valuation of works contract services – one under the rule 2A of the Valuation Rules and second under the Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007 has been replaced with a unified scheme under the new rule 2A of Service Tax (Determination of Value) Rules, 2006.

A new Rule 2C has been inserted for determining the value of service involved in supply of food or any other article of human consumption or any drinks in a restaurant or as outdoor catering. The existing scheme of determination of value of such services through prescribed abatements in various exemption notifications has been done away with.

There are certain changes in rule 6 of the Service Tax (Determination of Value) Rules, 2006.

All notifications that prescribed the abatements for working out the taxable value from the gross amount charged have been merged into one single exemption notification i.e., notification no. 26/2012-ST dated 20/6/12.

The broad scheme of valuation and provisions of Valuation Rules have been explained through a set of examples, questions and answers below.

1. BROAD SCHEME OF VALUATION.

A. How is value of service relevant for the purpose of payment of service tax?

In terms of the charging provisions contained in Section 66B, service tax is levied @ 12% on the value of taxable services. Therefore, value of service provided is relevant for determining the amount of service tax payable when a taxable service is provided by a person to another.
B. What is the value on which service tax is to be paid?

The manner of value of service is provided in Section 67. As per sub-section (1) of Section 67 wherever Service Tax is chargeable on any taxable service with regard to its value then its value shall

(i) in a case where the provision of service is for a consideration in money, be the gross amount charged by the service provider for such service provided or to be provided by him;
(ii) in a case where the provision of service is for a consideration not wholly or partly consisting of money, be such amount in money as, with the addition of service tax charged, is equivalent to the consideration;
(iii) in a case where the provision of service is for a consideration which is not ascertainable, be the amount as may be determined in the prescribed manner.

C. If the gross amount charged is inclusive of service tax payable then would service tax be chargeable on the gross amount?

No. As per sub-section (2) of section 67 where the gross amount chargeable by the service provider is inclusive of service tax payable then the value of such taxable service shall be such amount as, with the addition of such tax payable, is equal to the gross amount charged.

For example if the gross amount charged for provision of service is Rs.1500 then the value of taxable service would be Rs.1339.29 (1500 x 100/112) as after including the tax payable at Rs.1339.29 @ 12% (which works out to Rs.160.71) the total amount (1339.29 + 160.71) comes to Rs.1500.

D. Is it necessary that gross amount charged should have been received by the service provider prior to provision of service?

No. As per sub-section (3) of Section 67 the gross amount charged includes any amount received towards the taxable service before during or after the provision of such service.

E. What is the meaning of ‘consideration’ referred to in sub clause (1) Section 67?

The concept of consideration comes from the very root of the definition of service contained in clause (44) of section 65B as per which service
has been defined as an activity carried out by a person for another ‘for consideration’. The consideration could be monetary or non-monetary.

F. If provision of service is for the consideration for money then what will be the manner of determining the value of taxable service?
In terms of clause (i) of sub-section (1) of Section 67 in case provision of service is for consideration in money, then the value of taxable service shall be the gross amount charged by the service provider for such service provided or agreed to be provided by him.

G. What is the meaning of ‘gross amount charged’?
‘Gross amount charged’ has been defined in Explanation (c) of Section 67 to include payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called “Suspense account” or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

H. What is the manner of determining the value of non-monetary consideration?
As per clause (ii) of sub-section (1) of section 67 of the Act where the consideration received is not wholly or partly consisting of money the value of taxable service shall be the equivalent money value of such consideration. If the same is not ascertainable then the value of such consideration is determined under clause (iii) of section 67 read with rule 3 of the Service Tax (Determination of the value) Rules 2006 as follows:-

- On the basis of gross amount charged for similar service provided to other person in the ordinary course of trade;
- Where value cannot be so determined, the equivalent money value of such consideration, not less than the cost of provision of service.

I. As per clause (iii) of sub-section (1) of Section 67 in cases where provision of service is for a consideration which is not ascertainable then the value of taxable service shall be the amount as it may be determined in the prescribed manner. What are the situations where consideration is not ascertainable and what is the manner for determining the value in such cases are prescribed?
There may be several situations wherein it may be difficult to determine the consideration received by service provider for provision of a service. Such situations can arise on account of several factors such as consideration of service being embedded in the total amount received as consideration for a composite activity involving elements of provisions of service and element of sale of goods or consideration for service being included in the gross amount charged for a particular transaction or consideration of service being wholly or partly in the nature of non-monetary consideration.

The manner has been prescribed under Service Tax (Determination of Value) Rules 2006. These rules inter-alia provide provisions in respect of the following situations:

- Determination of value of service portion involved in execution of works contract.
- Determination of value of service in relation to money changing.
- Determination of value of service portion involved in supply of food and any other article of human consumption or any drinks in a restaurant or as outdoor catering.
- Determination of value where such value is not ascertainable.
- The said rules also specify certain expenditures or costs that are incurred by the service provider which have to be included or excluded.
- The said rules also specify certain commissions or costs that are received by the service provider that have to be included or excluded while arriving at the taxable value.

In addition to the Service Tax (Determination of Value) Rules 2006, certain sub-rules in rule 6 of the Service Tax Rules, 1994 also provide simplified compounded mechanism for determination of value of taxable services in specified situations.

J. In addition to the two set of rules explained above, that have a bearing on the valuation of services, are there any exemption notifications that exempt certain portion of the gross amount charged from levy of service tax or in other words provide for abatements to arrive at the value of taxable services?

Yes. Earlier there were a number of exemption notifications that prescribed the abatements for various categories of services. As another measure of simplification now all such abatements for specified category of services have been merged into a single...
notification no 26/2102 – ST dated 20/6/12 which has been dealt with below.

2. **VALUATION OF SERVICE PORTION IN EXECUTION OF A WORKS CONTRACT**

Works contract has been defined in clause (54) of section 65B of the Act. Typically every works contract involves an element of sale of goods and provision of service. It is a well settled position of law, declared by the Supreme Court in BSNL’s case [2006(2) STR 161 (SC)], that a works contract can be segregated into a contract of sale of goods and contract of provision of service. With a view to bring certainty and simplicity the manner of determining the value of service portion in works contracts has been provided in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. In order to align this rule with the new system of taxation of services based on the negative list the old Rule 2A has been replaced by a new rule by the Service Tax (Determination of Value) Second Amendment Rules, 2012 which have been explained in this book.

A. What is the manner of determination of value of service portion in execution of a works contract from the total contract?

The manner for determining the value of service portion of a works contract from the total works contract is given in Rule 2A of the Service Tax (Determination of Value) Rules, 2006. As per sub-rule (i) of the said Rule 2A the value of the service portion in the execution of a works contract is the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

<table>
<thead>
<tr>
<th>Gross amount includes</th>
<th>Gross amount does not include</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour charges for execution of the works</td>
<td>Value of transfer of property in goods involved in the execution of the said works contract.</td>
</tr>
<tr>
<td>Amount paid to a sub-contractor for labour and services</td>
<td>Note:</td>
</tr>
<tr>
<td>Charges for planning, designing and architect’s fees</td>
<td></td>
</tr>
</tbody>
</table>

93
Charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract | As per Explanation (c) to the said sub-rule (i), where value added tax or sales tax has been paid or payable on the actual value of property in goods transferred in the execution of the works contract,

Cost of consumables such as water, electricity, fuel, used in the execution of the works contract

Cost of establishment of the contractor relatable to supply of labour and services | then such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract.

Profit earned by the service provider relatable to supply of labour and services | Value Added Tax (VAT) or sales tax, as the case may be, paid, if any, on transfer of property in goods involved in the execution of the said works contract.

### B. Is there any simplified scheme for determining the value of service portion in a works contract?
Yes. The scheme is contained in the clause (ii) of rule 2A of the Service Tax (Determination of Value) Rules, 2006. As per this scheme the value of the service portion, where value has not been determined in the manner as provided in clause (i) of rule 2A (explained in point 8.2.1 above), shall be determined in the manner explained in the table below.

<table>
<thead>
<tr>
<th>Where works contract is for...</th>
<th>Value of the service portion shall be...</th>
</tr>
</thead>
<tbody>
<tr>
<td>(A) execution of original works</td>
<td><strong>forty percent</strong> of the <strong>total amount charged</strong> for the works contract</td>
</tr>
<tr>
<td>(B) maintenance or repair or reconditioning or restoration or</td>
<td><strong>seventy per cent</strong> of the <strong>total amount charged</strong> including</td>
</tr>
</tbody>
</table>
servicing of any goods | such gross amount
---|---
(C) in case of other works contracts, not included in serial nos. (A) and (B) above, including contracts for maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings | sixty percent of the **total amount charged** for the works contract

**Important** – As per the Explanation (II) to clause (ii) of rule 2A of the said Rules ‘**total amount**’ referred to in the second column of the table above would be the sum total of gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of works contract, under the same contract or any other contract, less (i) the amount charged for such goods or services provided by the service receiver; and (ii) the value added tax or sales tax, if any, levied to the extent they form part of the gross amount or the total amount, as the case may be.

**C. How is the fair market value of goods or services, so supplied, be determined to arrive at the total amount charged for a works contract?**

As per the proviso to Explanation (II) to clause (ii) of rule 2A of the Valuation Rules the fair market value of the goods or services so supplied shall be determined in accordance with the generally accepted accounting principles.

**D. What are ‘original works’?**

As per Explanation (I) to clause (ii) of rule 2A of the Valuation Rules ‘Original works’ means:

- all new constructions;
- all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;
- erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise.
E. Can the manner of determination of ‘total amount charged’ be explained by way of a suitable example?
The manner of arriving at the ‘total amount charged’ is explained with the help of the following example pertaining to works contract for execution of ‘original works’.

<table>
<thead>
<tr>
<th>S. No.</th>
<th>Notation</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Gross amount received excluding taxes</td>
<td>95,00,000</td>
</tr>
<tr>
<td>2</td>
<td>Fair market value of goods supplied by the service receiver excluding taxes</td>
<td>10,00,000</td>
</tr>
<tr>
<td>3</td>
<td>Amount charged by service receiver for 2</td>
<td>5,00,000</td>
</tr>
<tr>
<td>4</td>
<td>Total amount charged (1+2-3)</td>
<td>1,00,00,000</td>
</tr>
<tr>
<td>5</td>
<td>Value of service portion(40% of 4 in case of original works)</td>
<td>40,00,000</td>
</tr>
</tbody>
</table>

Note: When the service provider pays partially or fully for the materials supplied by the service receiver, gross amount charged would inevitably go higher by that much amount.

3. DETERMINATION OF VALUE OF SERVICE IN RELATION TO MONEY CHANGING
In services of money changing including sale and purchase of foreign currency the problem of valuation arises on account of the fact that as per normal trade practice in such services the consideration is inbuilt in the difference between the selling/buying rates and the Reserve Bank of India (RBI) reference rate for that currency at that time. Accordingly a separate Rule 2B provides for the manner of determination of value of service in relation to money changing.

A. Would sale and purchase of foreign currency or money changing not be excluded from the definition of service as being transaction only in money?
No. As per Explanation 2 to clause (44) of Section 65B, which defines ‘service’, activity of conversion of one currency into another for which a separate consideration is charged would not get tantamount to a
transaction only in money. In transactions of sale and purchase of foreign currency or money changing since a separate consideration is charged these would not be excluded from the definition of ‘service’.

B. What is the manner of determination of value of service in relation to money changing including sale and purchase of foreign currency?
If a currency is exchanged from or to Indian Rupees then, as per Rule 2B of the Valuation Rules, the value of taxable service shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the RBI reference rate for that currency. For example if US$ 1000 are sold by a customer @ Rs55 per US$ and RBI reference rate for US$ is Rs.55.73 then the taxable value shall be Rs.730 (1000 x 0.73).

C. How would the value be determined if the RBI reference rate for a currency is not available?
As per the first proviso to Rule 2B in case RBI reference rate for a currency is not available the value shall be 1% of the gross amount of Indian Rupees provided or received by the person changing the money.

D. How would the value of taxable service be determined if foreign currency is exchanged for another foreign currency?
These situations are dealt with in second proviso to Rule 2B as per which in such situations the value of taxable service shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting one of the currencies into Indian Rupees on that day at the reference rate provided by RBI.

4. VALUATION OF SERVICE PORTION INVOLVED IN SUPPLY OF FOOD OR ANY OTHER ARTICLE OF HUMAN CONSUMPTION OR ANY DRINK IN A RESTAURANT OR AS OUTDOOR CATERING.

In terms of article 366(29A) of the Constitution of India supply of any goods, being food or any other article of human consumption or any drink (whether or not intoxicating) in any manner as part of a service for cash, deferred payment or other valuable consideration is deemed to be a sale of such goods. Such a service therefore cannot be treated as service to the extent of the value of goods so supplied. The remaining portion however constitutes a service. It is a well settled position of law, declared by the Supreme Court in BSNL’s case [2006(2) STR 161 (SC)], that such a contract
involving service along with supply of such goods can be dissected into a contract of sale of goods and contract of provision of service. Since normally such an activity is in the nature of composite activity, difficulty arises in determining the value of the service portion. In order to ensure transparency and standardization in the manner of determination of the value of such service provided in a restaurant or as outdoor catering a new rule 2C has been inserted in the Service Tax (Determination of Value) Rules, 2006 by the amendment rules of 2012. This manner of valuation is explained in the points below.

A. Are services provided by any kind of restaurant, big or small, covered by the manner of valuation provided in Rule 2C of the Valuation Rules?
Yes. Although services provided by any kind of restaurant would be valued in the manner provided in Rule 2C, it may be borne in mind that the following category of restaurants are exempted –
- Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air heating in any part of the establishment, at any time during the year.
- Below the threshold exemption

B. How is the value of service portion to be determined in supply of food or any other article of human consumption or any drink in a restaurant or as outdoor catering?
The manner of determination of service portion in such an activity is very simple and is given in Rule 2C of the the Service Tax (Determination of Value) Rules, 2006. In terms of the said rule value of the service portion shall be determined in the following manner:

<table>
<thead>
<tr>
<th>Value of service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner.....</th>
<th>Shall be .....percent of the total amount charged:</th>
</tr>
</thead>
<tbody>
<tr>
<td>In a restaurant</td>
<td>40</td>
</tr>
<tr>
<td>As part of outdoor catering</td>
<td>60</td>
</tr>
</tbody>
</table>
Important - As per Explanation 1 to the said Rule 2C ‘Total amount’ (referred to in the second column of the table above) means the sum total of gross amount charged and the fair market value of all goods and services supplied by the service receiver in or in relation to the supply of food or any other article of human consumption or any drink (whether or not intoxicating), under the same contract or any other contract, less (i) the amount charged for such goods or services provided by the service receiver; and (ii) the value added tax or sales tax, if any, levied to the extent they form part of the gross amount or the total amount, as the case may be.

The clarification given in point no 2(E) above would, mutatis mutandis, apply to valuation in this case also.

C. What are the restrictions, if any, on availing of Cenvat credit by such service providers?

In terms of the Explanation2 to Rule 2C of the Valuation Rules any goods meant for human consumption classifiable under chapters 1 – 22 of Central Excise Tariff are not ‘inputs’ for provision of such service. Cenvat Credit is, therefore, not available on these items. Availability of Cenvat credit on other inputs, input services and capital goods would be subject to the provisions of the Cenvat Credit Rules, 2004 including the provisions relating to reversal of credits contained in rule 6 of the said rules. It may be noted the sale of food in the restaurant would amount to clearance of exempt goods and thus the provisions of Rule 6 of Cenvat Credit Rules will be applicable.

D. Would Rule 2C of the Valuation Rules also apply to determination of value of service portion in cases of supply of food or any other article of human consumption or any drink, in a premises, including hotel, convention center, club, pandal, shamiana or any place specially arranged for organizing a function?

No. Rule 2C applies only in cases of restaurants and outdoor catering. For valuation of service portion where such supplies are made in any other premises like hotel, convention center, club, pandal, shamiana or any place specially arranged for organizing a function an abatement of 30% has been provided for in exemption notification no 26/2012-ST dated 20/6/12.

For details please refer to serial no. 4 of the table in point no. 8 below.
5. INCLUSION OR EXCLUSION FROM VALUE OF CERTAIN EXPENDITURE OR COSTS BORNE BY THE SERVICE PROVIDER.

Rule 5 of Service Tax (Determination of Value) Rules, 2006 lays down the details of expenditure and cost borne by the service provider which have to be included or excluded while determining the value of taxable service.

A. What is the expenditure or costs that are to be included in the value of taxable services as per rule 5 of the Valuation Rules?

As per Rule 5 any expenditure or cost that are incurred by the service provider in the course of providing taxable services are treated as consideration for taxable service provided or agreed to be provided and shall be included in the value for the purpose of charging Service Tax on the said service.

However, Explanation to sub-rule (1) of Rule 5 clarifies that for the value of telecommunication services shall be the gross amount paid by the person to whom the service is actually provided (i.e. the subscriber).

B. Which costs or expenditure is to be excluded from the value of taxable service as per Rule 5?

As per sub rule (2) of Rule 5 the expenditure or cost incurred by the service provider as a pure agent of the recipient of the service shall be excluded from the value of taxable service if all the following conditions are satisfied:

(i) the service provider acts as a pure agent of the recipient of service when he makes payment to third party for the goods or services procured;

(ii) the recipient of service receives and uses the goods or services so procured by the service provider in his capacity as pure agent of the recipient of service;

(iii) the recipient of service is liable to make payment to the third party;

(iv) the recipient of service authorises the service provider to make payment on his behalf;

(v) the recipient of service knows that the goods and services for which payment has been made by the service provider shall be provided by the third party;
(vi) the payment made by the service provider on behalf of the recipient of service has been separately indicated in the invoice issued by the service provider to the recipient of service;

(vii) the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and

(viii) the goods or services procured by the service provider from the third party as a pure agent of the recipient of service are in addition to the services he provides on his own account.

C. What is the meaning of pure agent?

Pure agent has been defined in Explanation to sub-rule 2 of Rule (5) of the Valuation Rules as a person who-

- enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service;
- neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service;
- does not use such goods or services so procured; and
- receives only the actual amount incurred to procure such goods or services.

6. CASES IN WHICH COMMISSION, COSTS ETC. RECEIVED BY THE SERVICE PROVIDER WILL BE INCLUDED OR EXCLUDED.

Rule 6 of the Valuation Rules deals with specific situation where certain commission or costs received by the service provider would be included as part of the taxable service.

INCLUSIONS

- the commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;
- the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;
- the amount of premium charged by the insurer from the policy holder;
- the commission received by the air travel agent from the airline;
the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;
the reimbursement received by the authorised service station, from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer;
the commission or any amount received by the rail travel agent from the Railways or the customer;
the remuneration or commission, by whatever name called, paid to such agent by the client engaging such agent for the services provided by a clearing and forwarding agent to a client rendering services of clearing and forwarding operations in any manner;
the commission, fee or any other sum, by whatever name called, paid to such agent by the insurer appointing such agent in relation to insurance auxiliary services provided by an insurance agent; and
the amount realized as demurrage or by any other name whatever called for the provision of service beyond the period originally contracted or in any other manner relatable to the provision of service.

EXCLUSIONS

• initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;
• the airfare collected by air travel agent in respect of service provided by him;
• the rail fare collected by [rail travel agent] in respect of service provided by him;
• interest on delayed payment of any consideration for the provision of services or sale of property, whether moveable or immoveable;
• the taxes levied by any Government on any passenger travelling by air, if shown separately on the ticket, or the invoice for such ticket, issued to the passenger;
• accidental damages due to unforeseen action not relatable to the provision of service and
• subsidies or grants disbursed by the Government, not in the nature of directly influencing the value of service. (italics indicate the additions made in the Service Tax (Determination of Value) Second Amendment, Rules, 2012)
A. Does the interest for delayed payment for provision of a service includable in the taxable value?
No. In terms of clause (iv) of Sub-rule 2 of Rule 6 delayed payments of any consideration for provision of service is excluded from the value of taxable service.

B. What is the scope of the exclusion entry related to accidental damages due to unforeseen actions not relatable to the provisions of service?
This inclusion has been inserted vide the Serviced Tax (Determination of Value) Second Amendment Rules, 2012. In terms of this exclusion accidental damages are not to be included in the value of service provided the following two conditions are specified:
- The damages are due to unforeseen actions.
- The damages are not related to provisions of service.

Examples-
✓ Insurance Companies provide insurance services to the clients for which the premium is charged. The premium charged is a consideration for the insurance service provided. However, in case due to an unforeseen action, like an accident etc., a compensation is paid by the insurance company to the client then the money would not be included as part of value of taxable service as it is not relatable to the provisions of service but is only in the nature of consequence of provisions of insurance service.
✓ In case a landlord who has rented out his office building to a tenant receives compensation from the tenant for the damage caused to the building by an unforeseen action then such compensation would not form part of the value of taxable service related to tenant of his building as an unforeseen damage caused by the tenant is not relatable to provision of service of renting of the office building.

C. What is the scope of the exclusion entry relating to subsidies and grants disbursed by the Government, not in the nature or directly influencing the value of service?
This exclusion entry has also been inserted by the Service Tax (Determination of Value) Second Amendment Rules, 2012. A subsidy influences the price directly when the price goes down proportionately to the amount of subsidy. In terms of this exclusion any subsidy or
grant disbursed by the Government cannot form part of the value of taxable service unless such subsidy or grant directly influences the value of such service.

**7. ABATEMENTS.**

All abatements available to services of specified categories have now been merged in one exemption notification no 26/2012-ST dated 20/6/12. In terms of the said notification, exemption is granted from so much of the service tax leviable, as is in excess of the service tax calculated on a value which is equivalent to a percentage specified in the corresponding entry in column (3) of the following Table, of the amount charged (or in some cases of specified amount) by such service provider for providing the said taxable service, unless specified otherwise, subject to the relevant conditions specified in the corresponding entry in column (4) of the said Table:

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Description of taxable service</th>
<th>Taxable Portion (%)</th>
<th>Conditions</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Financial leasing services including equipment leasing and hire purchase</td>
<td>10</td>
<td>Nil.</td>
</tr>
<tr>
<td>2</td>
<td>Transport of goods by rail</td>
<td>30</td>
<td>Nil.</td>
</tr>
<tr>
<td>3</td>
<td>Transport of passengers, with or without accompanied belongings by rail</td>
<td>30</td>
<td>Nil.</td>
</tr>
<tr>
<td>4</td>
<td>Bundled services by way of supply of food or any other article of human consumption or any drink, in a premises, including hotel, convention center,</td>
<td>70</td>
<td>CENVAT credit on any goods classifiable under chapter 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986) used for providing the taxable service has not been taken under the provisions of</td>
</tr>
<tr>
<td></td>
<td>Description</td>
<td>Percentage</td>
<td>Note</td>
</tr>
<tr>
<td>---</td>
<td>-----------------------------------------------------------------------------</td>
<td>------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
<tr>
<td>1</td>
<td>Club, pandal, shamiana or any place specially arranged for organizing a function</td>
<td></td>
<td>the CENVAT Credit Rules, 2004.</td>
</tr>
<tr>
<td>5</td>
<td>Transport of passengers by air, with or without accompanied belongings</td>
<td>40</td>
<td>CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.</td>
</tr>
<tr>
<td>6</td>
<td>Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes.</td>
<td>60</td>
<td>Same as above.</td>
</tr>
<tr>
<td>7</td>
<td>Transport of goods by road by Goods Transport Agency</td>
<td>25</td>
<td>CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.</td>
</tr>
<tr>
<td>8</td>
<td>Services provided in relation to chit</td>
<td>70</td>
<td>Same as above.</td>
</tr>
<tr>
<td>9</td>
<td>Renting of any motor vehicle designed to carry passengers</td>
<td>40</td>
<td>Same as above.</td>
</tr>
<tr>
<td>10</td>
<td>Transport of goods in a vessel from one port in India to another</td>
<td>50</td>
<td>Same as above.</td>
</tr>
<tr>
<td>11</td>
<td>(i) Services provided or to be provided to any person, by a tour operator in relation to a package tour</td>
<td>25</td>
<td>(i) CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The bill issued for this purpose indicates that it is inclusive of charges for such a tour.</td>
</tr>
<tr>
<td>(ii) Services provided or to be provided to any person, by a tour operator in relation to a tour, if the tour operator is providing services solely of arranging or booking accommodation for any person in relation to a tour</td>
<td>10</td>
<td>(i) CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. (ii) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation. (iii) This exemption shall not apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, only includes the service charges for arranging or booking accommodation for any person and does not include the cost of such accommodation.</td>
<td></td>
</tr>
<tr>
<td>(iii) Services, other</td>
<td>40</td>
<td>(i) CENVAT credit on</td>
<td></td>
</tr>
</tbody>
</table>
than services specified in (i) and (ii) above, provided or to be provided to any person, by a tour operator in relation to a tour.

<table>
<thead>
<tr>
<th>12</th>
<th>Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority.</th>
</tr>
</thead>
</table>
| 25 | (i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.  
(ii) The value of land is included in the amount charged from the service receiver. |

w.e.f. 1.3.2013 upto 7.5.2013

(i) for residential unit having carpet area upto 2000 square feet or where the amount charged is less than rupees one crore;  
(ii) for other than the (i) above.

W.e.f. 8.5.2013

| 25 |  
| 30 |  

107
(i) for a residential unit satisfying both the following conditions, namely:-
• the carpet area of the unit is less than 2000 square feet; and
• the amount charged for the unit is less than rupees one crore;

(ii) for other than the (i) above.

A. Once the specified description of services has been done away with in the negative list regime how would the scope of services specified by way of description in the said notification be determined?
The services specified in the said notification, which have been tabulated in the table above, have been so specified in self-explanatory terms. In addition certain terms that have been used in the said notification are already defined in section 65B of the Act (like goods transport agency, vessel, port etc) and others have been defined in the said notification itself (like chit, package tour, tour operator and financial leasing).

B. Would the gross amount charged for financial leasing services, including equipment leasing and hire purchase, also include the interest amount charged for such financial services?
The gross amount charged for this service will be sum total of the following-
✓ 10% of the amount forming or representing interest; and
✓ Other charges such as lease management fees, processing fees, documentation charges and administrative fees.
9. PERSON RESPONSIBLE FOR DETERMINING THE VALUE OF TAXABLE SERVICE

A. Who is the person responsible for determining the value of taxable service?
   Since Service Tax has to be paid by the persons responsible to pay Service Tax on the basis of self-assessment for value of taxable service has to be determined by the person responsible for payment of Service Tax in accordance with the provisions of Section 67 of the Act and rules made there under.

B. Can the value determined by the person responsible to pay service tax be rejected by the Department?
   Yes. In terms of the provisions of Section 73 of the Finance Act 1994 and Rule 4 of Service Tax (Determination of value) Rules 2006 the value works out by the service provider or any other person responsible for payment of service tax can be rejected by Central Excise Officer if he has specified that the value so determined is not in accordance with the provisions of the act or the Valuation Rules. In such a situation the Central Excise Officer shall issue a Show Cause Notice to the serviced provider or any other person responsible for payment of Service Tax to Show Cause as to why the value of such taxable service for the purpose of charging service tax should not be fixed on the amount specified in the notice. After giving reasonable options and heard, the Central Excise Officer shall determining the value of such taxable service for the purpose of charging service tax in accordance with the provisions of the Finance Act 1994 and the Valuation Goods.
1. **BOARD OF TRUSTEES OF THE PORT OF BOMBAY v. JAI HIND OIL MILLS Co.** (1987) AIR 622 (SUPREME COURT)

   It was held that “Demurrage Charges” are levied in order to ensure quick clearance of the cargo from the harbour and make it unprofitable for importers to use the port premises as a warehouse.


   It was held that in the context of the goods remaining in the wharfage, ‘demurrage’ implies the charges which the port trust can levy at a particular rate if the goods remain on the docks beyond a specified time.

3. **ALL INDIA FEDERATION OF TAX PRACTITIONERS v. UNION OF INDIA**
   (2007) 7 STR 625; [2007] 10 STT 166 (SUPREME COURT)

   It was held that service tax in destination based consumption tax and that may be either performance based or property based. Economic services are provided for valuable consideration without being rendered charitable. No service which is uneconomical or commercially unviable is provided in the commercial world. Various elements of cost contribute to the provision of economic services. Expenses which are indispensable and inevitably incurred to make the economic service performable that contribute to the gross value of service. The provider of economic service recovers his entire cost involved in providing such service in the best possible manner that may be viable to him and the service recipient.

4. **RELIANCE INDUSTRIES Ltd. v. CCE.** (2011) 23 STR J226 (SUPREME COURT)

   It was held that expenses incurred on account of reimbursable expenses shall not be includible in the taxable value. The Department had earlier
sought for inclusion of such expenses incurred towards travelling allowance to consulting engineers.

5. **IDEA MOBILE COMMUNICATION Ltd. v. CCE 2011 (23) STR 433 (SUPREME COURT)**

It was held that the value of SIM cards forms part of the activation charges as no activation is possible without a valid functioning of SIM card and the value of the taxable service is calculated on the gross total amount received by the operator from the subscribers. Amount received towards sim cards will form part of taxable value for service tax.

6. **BHARAT SANCHAR NIGAM Ltd. v. UNION OF INDIA (2005) 4 STJ (SUPREME COURT)**

It was held that the aspect theory would not apply to enable the value of the services to be included in the sale of goods or the price of goods in the value of the services. The value of services cannot be included in the meaning of goods. In a telecom service, what could comprise as a sale is the sale of handset only and not the service component.


It was held that reimbursement of expenses incurred on behalf of client is not includible in gross amount on which service tax was payable by the assessee. [Also refer: *Rolex Logistics (P) Ltd. v. CST (2009) 20 STT 431 (CESTAT, Bangalore)*]

8. **SAHARA INDIA v. CCE 2011 (24) STR 593 (CESTAT, DELHI)**

Where assessee was willing to submit certificate from Chartered Accountant that those amounts were actual reimbursement and offered the vouchers for verification by any officer deputed by adjudicating authority, it was held that levy of service tax on reimbursable expenses was unconvincing and demand thereof unsustainable.
8. BOMBAY CHEMICALS (P) Ltd. v. CCE (1995) SUPP (2) SCC 64; (1995) 17 E.L.T. 3 (SUPREME COURT)

A three Judge Bench of the Court held that an exemption notification should be construed strictly, but once an article is found to satisfy the test by which it falls in the notification, then it cannot be excluded from it by construing such notification narrowly.

9. COMMISSIONER OF CUSTOMS (PREVENTIVE), GUJRAT v. RELIANCE PETROLEUM Ltd. (2008) 227 ELT 3 (SUPREME COURT)

It was held that interpretation of an exemption notification depends upon its nature and extent. Terminology used in the notification has an important role to play. Where exemption notification ex facie applies, there is no reason as to why the purport thereof would be limited by giving a strict construction thereto. A contextual meaning to the entries, keeping in view the nature of exemption sought to be granted by reason of the notification, must be assigned. The purpose of exemption was granted must be considered in its entirety – the purpose of exemption cannot be lost sight of.

10. SARASWATI SUGAR MILLS v. CCE, DELHI-III (2011) 270 ELT 465 (SUPREME COURT)

It was held that Exemption notification is to be strictly construed and conditions thereof strictly interpreted. Since exemption notifications are issued under delegated legislative power, they have full statutory force. A party claiming exemption has to prove that he/it is eligible for exemption contained in the notification. An exemption notification has to be strictly construed. The conditions for taking benefit under the notification are also to be strictly interpreted. When the wordings of notification are clear, then the plain language of the notification must be given effect to. By way of an interpretation or construction, the Court cannot add or substitute any word.
while construing the notification either to grant or deny exemption. The Courts are also not expected to stretch the words of notification or add or subtract words in order to grant or deny the benefit of exemption notification.

11. **STATE OF GUJARAT v. ESSAR OIL Ltd. (2012) 34 STT 629 (SUPREME COURT)**

   It is held that the principle that in case of ambiguity, a taxing statute should be construed in favor of the assessee, does not apply to the construction of an exception or an exempting provision, as the same has to be construed strictly. Further, a person invoking an exemption provision to relieve him of tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the state.

12. **CCE, JAMMU v. JINDAL DRUGS Ltd. (2011) 267 ELT 653 (CESTAT, DELHI)**

   It was held that it is also a settled law that the meaning of any term in a taxing statute cannot be understood with reference to even similar term used in the different taxing statute. It is essentially to be understood in the context it is used in the very section where the term is found to have been used. Being so, even while understanding the term in the notifications which are issued under a taxing statute, the meaning if the term there under cannot be understood with reference to the similar term used in a different statute, unrelated to the notification.


   When value of material supplied by principal was included in gross value construction service, it was held that benefit of abatement under Notification No. 15/2004-ST dated 10-09-2004 could not be restricted.
CHAPTER 8

JOINT CHARGE & REVERSE CHARGE MECHANISM

With effect from 1.7.2012 a new scheme of taxation is being brought into effect whereby the liability of payment of service tax shall be both on the service provider and the service recipient.

Usually such liability is affixed either on the service provider or the service recipient, but in specified services and in specified conditions, such liability shall be on both the service provider and the service recipient.

The enabling provision has been provided by insertion of proviso to section 68 in the Finance Act, 2012 as per which Central Government may notify the service and the extent of service tax which shall be payable by such person and the provisions of Chapter V shall apply to such person to the extent so specified and the remaining part of the service tax shall be paid by the service provider. Under this clause the Central government has issued notification no. 30/2012 dated 20.6.2012 notifying the description of specified services when provided in the manner so specified where part of the service tax has to be paid by the service receiver. The extent to which tax liability has to be discharged by the service receiver has also been specified in the said notification.

I. The taxable services,—

(A)

(i) provided or agreed to be provided by an insurance agent to any person carrying on the insurance business;
(ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is,—

(a) any factory registered under or governed by the Factories Act, 1948 (63 of 1948);
(b) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any other law for the time being in force in any part of India;
(c) any co-operative society established by or under any law;
(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made thereunder;
(e) any body corporate established, by or under any law; or
(f) any partnership firm whether registered or not under any law including association of persons;

(iii) provided or agreed to be provided by way of sponsorship to anybody corporate or partnership firm located in the taxable territory;

(iv) provided or agreed to be provided by,-
   (A) an arbitral tribunal, or
   (B) an individual advocate or a firm of advocates by way of support services, or
   (C) Government or local authority by way of support services excluding,-
      (1) renting of immovable property, and
      (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994,

to any business entity located in the taxable territory;

(v) provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers to any person who is not in the similar line of business or supply of manpower for any purpose or service portion in execution of works contract by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory;

(B) provided or agreed to be provided by any person which is located in a non-taxable territory and received by any person located in the taxable territory;

II. The extent of service tax payable thereon by the person who provides the service and the person who receives the service for the taxable services specified in (I) shall be as specified in the following Table, namely:-

<table>
<thead>
<tr>
<th>Sl. No.</th>
<th>Description of a service</th>
<th>Percentage of service tax</th>
<th>Percentage of service tax</th>
</tr>
</thead>
</table>

Table

115
<table>
<thead>
<tr>
<th></th>
<th>Description</th>
<th>Payable by the Person Providing Service</th>
<th>Payable by the Person Receiving the Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>in respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>2</td>
<td>in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>3</td>
<td>in respect of services provided or agreed to be provided by way of sponsorship</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>4</td>
<td>in respect of services provided or agreed to be provided by an arbitral tribunal</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>5</td>
<td>in respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>6</td>
<td>in respect of services provided or agreed to be provided by Government or local authority by way of support services excluding,- (1) renting of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act,1994</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td>7</td>
<td>(a) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed</td>
<td>Nil</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>to carry passengers on abated value to any person who is not engaged in the similar line of business</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---</td>
<td>---------------------------------------------------------------------------------------------------------------------------------</td>
<td>---</td>
<td></td>
</tr>
<tr>
<td>(b)</td>
<td>in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non abated value to any person who is not engaged in the similar line of business</td>
<td>60%</td>
<td>40%</td>
</tr>
<tr>
<td>8.</td>
<td>in respect of services provided or agreed to be provided by way of supply of manpower for any purpose</td>
<td>25%</td>
<td>75%</td>
</tr>
<tr>
<td>9.</td>
<td>in respect of services provided or agreed to be provided in service portion in execution of works contract</td>
<td>50%</td>
<td>50%</td>
</tr>
<tr>
<td>10</td>
<td>in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory</td>
<td>Nil</td>
<td>100%</td>
</tr>
</tbody>
</table>

Explanation-I. - The person who pays or is liable to pay freight for the transportation of goods by road in goods carriage, located in the taxable territory shall be treated as the person who receives the service for the purpose of this notification.

Explanation-II. - In works contract services, where both service provider and service recipient is the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per choice, independent of valuation method adopted by the provider of service.
A. What does a service provider need to indicate on the invoice when he is liable to pay only a part of the liability under the partial reverse charge mechanism?

The service provider shall issue an invoice complying with Rule 4A of the Service Tax Rules 1994. Thus the invoice shall indicate the name, address and the registration number of the service provider; the name and address of the person receiving taxable service; the description and value of taxable service provided or agreed to be provided; and the service tax payable thereon. As per clause (iv) of sub-rule (1) of the said rule 4A “the service tax payable thereon” has to be indicated. The service tax payable would include service tax payable by the service provider.

B. If the service provider is exempted being a SSI (turnover less than Rs 10 lakhs), how will the reverse charge mechanism work?

The liability of the service provider and service recipient are different and independent of each other. Thus in case the service provider is availing exemption owing to turnover being less than Rs 10 lakhs, he shall not be obliged to pay any tax. However, the service recipient shall have to pay service tax which he is obliged to pay under the partial reverse charge mechanism.

C. Will the credit of such tax paid be available to the service recipient?

Normally, the credit of the entire tax paid on the service received by the service receiver would be available to the service recipient subject to the provisions of the CENVAT Credit Rules 2004. The credit of tax paid by the service provider would be available on the basis of the invoice subject to the conditions specified in the CENVAT Credit Rules 2004. The credit of tax paid by the service recipient under partial reverse charge would be available on the basis on the tax payment challan, again subject to conditions specified in the said Rules.

D. What shall be the point of taxation for the service recipient? When will he need to pay the service tax in respect of his liability?

Both the service provider and service recipient are governed by the Point of Taxation Rules 2011 in respect of the service provided or received by him. Usually it is the invoice or date of receipt of payment which is the point of taxation for the service provider. However for the service recipient, in terms of rule 7 of the said rules, point of taxation is when he pays for the service. Thus in the case where the invoice is
issued in say July 2012 and the service recipient pays for the same in August 2012 the point of taxation for the service provider will be the date of issue of invoice in July 2012. The point of taxation for the service recipient shall be the date of payment in August 2012. The service provider would be required to pay tax (to the extent liability is affixed on him) by 5th/6th August, 2012 or 5th/6th October 2012 depending upon the admissibility of benefit under the proviso to rule 6 of the Service Tax Rules 1994. The service recipient would need to pay tax (to the extent liability is affixed on him) by 5th/6th September 2012.

E. How is the service recipient required to calculate his tax liability under partial reverse charge mechanism? How will the service recipient know which abatement or valuation option has been exercised by the service provider?

The service recipient would need to discharge liability only on the payments made by him. Thus the assessable value would be calculated on such payments done (Free of Cost material supplied and out of pocket expenses reimbursed or incurred on behalf of the service provider need to be included in the assessable value in terms of Valuation Rules). The invoice raised by the service provider would normally indicate the abatement taken or method of valuation used for arriving at the taxable value. However since the liability of the service provider and service recipient are different and independent of each other, the service recipient can independently avail or forgo an abatement or choose a valuation option depending upon the ease, data available and economics.

F. Is the reverse charge applicable on services provided and complete before 1.7.2012 though payments were made after 1.7.2012?

For any service whose point of taxation has been determined and whole liability affixed before 1.7.2012 the new provisions will not apply. Merely because payments are being made after 1.7.2012 will not add any additional liability on the service receiver in respect of such services.
CASE CAPSULE
REVERSE & JOINT CHARGE MECHANISM

1. RASHTRIYA ISPAT NIGAM Ltd. v. DEWAN CHAND RAM SHARAN (2012) 26 STR 289 (SUPREME COURT)

It was held that there was nothing in the law to prevent the parties from agreeing that burden of tax arising under contract would be borne by service provider, such a clause cannot be read to mean that service provider was liable only to honor their own tax liabilities, and not that arising out of the contract. It was accepted commercial practice to shift such liability to service provider. This case was also referred to in SAIL v. Gupta Brother Steel Tubes Ltd. (2009) 10 SCC 63 (SC) and Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (2012) 11 SCC 296.

2. ADITYA CEMENT v. CCE JAIPUR II (2007) 79 RLT 581 (CESTAT, NEW DELHI)

It has been that rule 2(1)(d)(iv) only defines the person to pay tax and cannot shift the liability on the person other than service provider unless proper notification is issued under section 68(2) of the Finance Act, 1994. In the instant case, 2(1)(d)(iv) was examined with reference to Notification No. 26/2004-ST.

3. BHARAT HEAVY ELECTRICAL Ltd. v. CCE (2009) 44 TAXCOM 862 (CESTAT, NEW DELHI)

It was held that where service is provided by foreign companies who have no office in India, demand of service tax from service recipient is not sustainable for the period prior to 01.01.2005

4. GUJARAT AMBUJA EXPORTS Ltd. v. CCE, AHMEDABAD (2013) 30 STR 667 (CESTAT, AHMEDABAD)

Where certain amount was deducted by foreign bank while remitting payment to the beneficiary (assessee), and Letter of Credit (LC) was produced to Indian Bank and payment made against LC, it was held that assessee was not receiving any service from foreign bank for collection
against LC and prima facie, amount charged should not be considered as service by the assessee and not liable to service tax under Reverse Charge Mechanism.
CHAPTER 9
PLACE OF PROVISION RULES

9. INTRODUCTION

A. What is the relevance of the ‘Place of Provision of Services Rules, 2012’?
The ‘Place of Provision of Services Rules, 2012’ specify the manner to
determine the taxing jurisdiction for a service. Hitherto, the task of
identifying the taxing jurisdiction was largely limited in the context of
import or export of services. For this purpose rules were formulated
which handled the subject of place of provision of services somewhat
indirectly, confining to define the circumstances in which a provision
of service would constitute import or export.
The new rules will, on the other hand, determine the place where a
service shall be deemed to be provided, in terms of section 66C of the
Finance Act, 2012, read with section 94 (hhh) of Chapter V of the
Finance Act, 1994. Under Section 66B, a service is taxable only when,
inter alia, it is “provided (or agreed to be provided) in the taxable
territory”. Thus, the taxability of a service will be determined based on
the “place of its provision”. The ‘Place of Provision of Services Rules,
2012’ will replace the ‘Export of Services, Rules, 2005’ and ‘Taxation of
Services (Provided from outside India and received in India) Rules,
2006.

B. For whom are these rules meant?
These rules are primarily meant for persons who deal in cross-border
services. They will also be equally applicable for those who have
operations with suppliers or customers in the state of Jammu and
Kashmir.
Additionally service providers operating within India from multiple
locations, without having centralized registration will find them useful
in determining the precise taxable jurisdiction applicable to their
operations. The rules will be equally relevant for determining services
that are wholly consumed within a SEZ, to avail the outright
exemption.
C. What is the basic philosophy of these rules?

The essence of indirect taxation is that a service should be taxed in the jurisdiction of its consumption. This principle is more or less universally applied. In terms of this principle, exports are not charged to tax, as the consumption is elsewhere, and services are taxed on their importation into the taxable territory. However, this determination is not easy. Services could be provided by a person located at one location, actually performed at another while being delivered to a person located at a third location, and occasionally actually consumed at a third location or over a larger geographical territory, falling in more than one taxable jurisdiction. For example a person located in Mumbai may buy a ticket on internet from a service provider located outside India for a journey from Delhi to London. On other occasions the exact location of service recipient itself may not be available e.g. services supplied electronically. As a result it is necessary to lay down rules determining the exact place of provision, while ensuring a certain level of harmonization with international practices in order to avoid both the double taxation as well as double non-taxation of services. It is also a common practice to largely tax services provided by business to other business entities, based on the location of the customers and other services from business to consumers based on the location of the service provider. Since the determination in terms of above principle is not easy, or sometimes not practicable, nearest proxies are adopted to provide specificity in the interpretation as well as application of the law.

5. BASIC FRAMEWORK

A. How will a person determine the taxability of a service in terms of these rules?

As stated earlier, in terms of section 66B, a service is taxable only when, inter alia, it is “provided (or agreed to be provided) in the taxable territory”. Thus, the taxability of a service will be determined based on the place of its provision. For determining the taxability of a service, therefore, one needs to ask the following questions sequentially:-

1. Which rule applies to the service provided specifically? In case more than one rules apply equally, which of these come later in the order given in the rules?
2. What is the place of provision of the service in terms of the above rule?
3. Is the place of provision in taxable territory? If yes, tax will be payable. If not, tax will not be payable.
4. Is the provider ‘located’ in the taxable territory? If yes, he will pay the tax.
5. If not, is the service receiver located in taxable territory? If yes, he may be liable to pay tax on reverse charge basis.
6. Is the service receiver an individual or government receiving services for a non-business purpose, or a charity receiving services for a charitable activity? If yes, the same is exempted.
7. If not, he is liable to pay tax.

B. What is “taxable territory”? What is its significance?
Taxable territory has been defined in sub-section 52 of section 65B. It means the territory to which the provisions of Chapter V of the Finance Act, 1994 apply i.e. whole of India excluding the state of Jammu and Kashmir. “Non-taxable territory” is defined in sub-section 35 ibid accordingly as the territory which is outside the taxable territory.
“India” is defined in sub-section 27 of section 65 B, as follows:
“India” means—
(a) the territory of the Union of India as referred to in clauses (2) and (3) of article 1 of the Constitution;
(b) its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976;
(c) the sea-bed and the subsoil underlying the territorial waters;
(d) the air space above its territory and territorial waters; and
(e) the installations structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof;
The new charging section, section 66B, enables taxation of only such services as are provided in taxable territory. Thus services that are provided in a non-taxable territory are not chargeable to service tax.

C. What is the significance of “Location” of a Service Provider or Receiver for determining taxing jurisdiction?
In terms of explanation (2) to sub-section 44 of section 65B, an establishment of a person outside the taxable territory is a person distinct from an establishment in a taxable territory. Thus, services provided from overseas are to be carefully judged whether they are being rendered by the establishment outside the taxable territory or within. Similarly, from the taxpayer’s perspective the jurisdiction of the field formation, which is relevant for compliance with registration formalities, filing of returns, refund claims etc. by the person liable to pay tax (provider or receiver as the case may be), will be the “location” as determined in terms of these rules.

D. How will such “location” be determined?
The location of a service provider or receiver (as the case may be) is to be determined by applying the following steps sequentially:

A. where the service provider or receiver has obtained only one registration, whether centralized or otherwise, the premises for which such registration has been obtained;

B. where the service provider or receiver is not covered by A above:
   i. the location of his business establishment; or
   ii. where services are provided or received at a place other than the business establishment i.e. a fixed establishment elsewhere, the location of such establishment;
   iii. where services are provided or received at more than one establishment, whether business or fixed, the establishment most directly concerned with the provision or use of the service; and
   iv. in the absence of such places, the usual place of residence of the service provider or receiver.

It is important to note that in the case of a service receiver, the place relevant for determining location is the place where the service is “used” or “consumed”.

E. What is the meaning of “business establishment”?
‘Business establishment’ is the place where the essential decisions concerning the general management of the business are adopted, and where the functions of its central administration are carried out. This could be the head office, or a factory, or a workshop, or shop/retail outlet. Most significantly, there is only one business establishment that a service provider or receiver can have.
F. **What is the meaning of a “fixed establishment”?**

A “fixed establishment” is a place (other than the business establishment) which is characterized by a sufficient degree of permanence and suitable structure in terms of human and technical resources to provide the services that are to be supplied by it, or to enable it to receive and use the services supplied to it for its own needs. Temporary presence of staff by way of a short visit at a place cannot be called a fixed establishment. Also, the number of staff at a location is not important. What is relevant is the adequacy of the arrangement (of human and technical resources), to carry out an activity for a consideration, or to receive and use a service supplied. Similarly, it will be important to evaluate the permanence of the arrangement i.e. whether it is capable of executing the task.

For further guidance on when a fixed establishment of a service receiver would be treated as “location”, please see para 3(D) below.

G. **How will the establishment “most directly concerned with the supply” be determined?**

This will depend on the facts and supporting documentation, specific to each case. The documentation will include the following:-

- the contract(s) between the service provider and receiver;
- where there are no written contracts, any written account (documents, correspondence/ e-mail etc) between parties which sets out in detail their understanding of the oral contract;
- in particular, for suppliers, from which establishment the services are actually provided;
- in particular, for receivers, at which establishment the services are actually consumed, effectively used or enjoyed;
- details of how the business fits into any larger corporate structure;
- the establishment whose staff is actually involved in the execution of the job;
- performance agreements (which may be indicative both of the substance and actual nature of work performed at a particular establishment);

Thus, normally in the case of multiple establishments of a person, it will be the establishment that actually provides, or receives (i.e. uses or consumes), a service that would be treated as ‘directly concerned’
with the provision of service, notwithstanding the contractual position, or invoicing or payment.

Illustration 1
A business has its headquarters in India, and branches in London, Dubai, Singapore and New York. Its business establishment is in India.

Illustration 2
An overseas business house sets up offices with staff in India to provide services to Indian customers. Its fixed establishment is in India.

Illustration 3
A company with a business establishment abroad buys a property in India which it leases to a tenant. The property by itself does not create a fixed establishment. If the company sets up an office in India to carry on its business by managing the property, this will create a fixed establishment in India.

Illustration 4
A company is incorporated in India, but provides its services entirely from Singapore. The location of this service provider is Singapore, being the place where the establishment most directly concerned with the supply is located.

H. What does “usual place of residence” mean?
The usual place of residence, in case of a body corporate, has been specified as the place where it is incorporated or otherwise legally constituted.
The usual place of residence of an individual is the place (country, state etc) where the individual spends most of his time for the period in question. It is likely to be the place where the individual has set up his home, or where he lives with his family or is in full time employment. Individuals are not treated as belonging in a country if they are short term, transitory visitors (for example if they are visiting as tourists, or to receive medical treatment or for a short term educational course). An individual cannot have more than one usual place of residence.
In addition, in the case of telecommunication services, it has been prescribed that the usual place of residence of the receiver shall be the billing address. This in effect means the address that is available in the records of the service provider for billing the receiver of the telecommunication service. This provision will be applicable to individual customers (generally referred to as subscribers) of a
telecommunication service, who are provided a subscriber identification module (commonly referred to as SIM card, which may be post-paid or prepaid) and a unique identification number (10-digit or 8-digit, as the case may be) by the service provider.

6. MAIN RULE- RULE 3- LOCATION OF THE RECEIVER

A. What is the implication of this Rule?

The main rule or the default rule provides that a service shall be deemed to be provided where the receiver is located. The main rule is applied when none of the other later rules apply (by virtue of rule 14 governing the order of application of rules). In other words, if a service is not covered by an exception under one of the later rules, and is consequently covered under this default rule, then the receiver’s location will determine whether the service is leviable to tax in the taxable territory.

The principal effect of the Main Rule is that:-

A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.

B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service.

B. 5.3.2 If the place of provision of a taxable service is the location of service receiver, who is the person liable to pay tax on the transaction?

Service tax is normally required to be paid by the provider of a service, except where he is located outside the taxable territory and the place of provision of service is in the taxable territory.

Where the provider of a service is located outside the taxable territory, the person liable to pay service tax is the receiver of the service in the taxable territory, unless of course, the service is otherwise exempted.

A company ABC provides a service to a receiver PQR, both located in the taxable territory. Since the location of the receiver is in the taxable territory, the service is taxable. Service tax liability will be discharged by ABC, being the service provider and being located in taxable territory.

However, if ABC were to supply the same service to a recipient DEF located in non-taxable territory, the provision of such service is not taxable, since the receiver is located outside the taxable territory. If the
same service were to be provided to PQR (located in taxable territory) by an overseas provider XYZ (located in non-taxable territory), the service would be taxable, since the recipient is located in the taxable territory. However, since the service provider is located in a nontaxable territory, the tax liability would be discharged by the receiver, under the reverse charge principle (also referred to as “tax shift”).

C. Who is the service receiver?
   Normally, the person who is legally entitled to receive a service and, therefore, obliged to make payment, is the receiver of a service, whether or not he actually makes the payment or someone else makes the payment on his behalf.

Illustration
   A lady leaves her car at a service station for the purpose of servicing. She asks her chauffer to collect the car from the service station later in the day, after the servicing is over. The chauffer makes the payment on behalf of the lady owner and collects the car. Here the lady is the ‘person obliged to make the payment’ towards servicing charges, and therefore, she is the receiver of the service.

D. 5.3.4 What would be the situation where the payment for a service is made at one location (say by the headquarters of a business) but the actual rendering of the service is elsewhere (i.e. a fixed establishment)?
   Occasionally, a person may be the person liable to make payment for the service provided on his behalf to another person. For instance, the provision of a service may be negotiated at the headquarters of an entity by way of centralized sourcing of services whereas the actual provision is made at various locations in different taxing jurisdictions (in the case of what is commonly referred to as a multi-locational entity or MLE). Here, the central office may act only as a facilitator to negotiate the contract on behalf of various geographical establishments. Each of the geographical establishments receives the service and is obligated to make the payment either through headquarters or sometimes directly. When the payment is made directly, there is no confusion. In other situations, where the payment is settled either by cash or through debit and credit note between the business and fixed establishments, it is clear that the payment is being made by a geographical location. Wherever a fixed establishment bears
the cost of acquiring, or using or consuming a service through any internal arrangement (normally referred to as a “recharge”, “reallocation”, or a “settlement”), these are generally made in accordance with corporate tax or other statutory requirements. These accounting arrangements also invariably aid the MLE’s management in budgeting and financial performance measurement. Various accounting and business management systems are generally employed to manage, monitor and document the entire purchasing cycle of goods and services such as the ERP (Enterprise Resource Planning System). These systems support and document the company processes, including the financial and accounting process, and purchasing process. Normally, these systems will provide the required information and audit trail to identify the establishment that uses or consumes a service.

It should be noted that in terms of proviso to section 66B, the establishments in a taxable and non-taxable territory are to be treated as distinct persons. Moreover, the definition of “location of the receiver” clearly states that “where the services are “used” at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service” will be the location. Thus, the taxing jurisdiction of service, which is provided under a ‘global framework agreement’ between two multinational companies with the business establishment located outside the taxable territory, but which is used or consumed by a fixed establishment located in the taxable territory, will be the taxable territory.

E. What is the place of provision where the location of receiver is not ascertainable in the ordinary course of business?

Generally, in case of a service provided to a person who is in business, the provider of the service will have the location of the recipient’s registered location, or his business establishment, or his fixed establishment etc, as the case may be. However, in case of certain services (which are not covered by the exceptions to the main rule), the service provider may not have the location of the service receiver, in the ordinary course of his business. This will also be the case where a service is provided to an individual customer who comes to the premises of the service provider for availing the service and the provider has to, more often than not, rely on the declared location of the customer. In such cases the place of provision will be the location of the service provider. It may be noted that the service provider is not
required to make any extraordinary efforts to trace the address of the service receiver. The address should be available in the ordinary course of business.

In case of certain specified categories of services, the place of provision shall be the place where the services are actually performed. These are discussed in the following paragraphs.

7. **RULE 4- PERFORMANCE BASED SERVICES**

A. **What are the services that are provided “in respect of goods that are made physically available, by the receiver to the service provider, in order to provide the service”?- sub-rule (1):**

Services that are related to goods, and which require such goods to be made available to the service provider or a person acting on behalf of the service provider so that the service can be rendered, are covered here. The essential characteristic of a service to be covered under this rule is that the goods temporarily come into the physical possession or control of the service provider, and without this happening, the service cannot be rendered. Thus, the service involves movable objects or things that can be touched, felt or possessed. Examples of such services are repair, reconditioning, or any other work on goods (not amounting to manufacture), storage and warehousing, courier service, cargo handling service (loading, unloading, packing or unpacking of cargo), technical testing/inspection/certification/analysis of goods, dry cleaning etc. It will not cover services where the supply of goods by the receiver is not material to the rendering of the service e.g. where a consultancy report commissioned by a person is given on a pen drive belonging to the customer. Similarly, provision of a market research service to a manufacturing firm for a consumer product (say, a new detergent) will not fall in this category, even if the market research firm is given say, 1000 nos. of 1 kilogram packets of the product by the manufacturer, to carry for door-to-door surveys.

B. **What is the implication of the proviso to sub-rule (1)?**

The proviso to this rule states as follows:-

“Provided further that where such services are provided from a remote location by way of electronic means, the place of provision shall be the location where goods are situated at the time of provision of service.”
In the field of information technology, it is not uncommon to provide services in relation to tangible goods located distantly from a remote location. Thus the actual place of performance of the service could be quite different from the actual location of the tangible goods. This proviso requires that the place of provision shall be the actual location of the goods and not the place of performance, which in normal situations is one and the same.

C. What are the services that are provided “to an individual … which require the physical presence of the receiver … with the provider for provision of the service.”? sub-rule (2)

Certain services like cosmetic or plastic surgery, beauty treatment services, personal security service, health and fitness services, photography service (to individuals), internet café service, classroom teaching, are examples of services that require the presence of the individual receiver for their provision. As would be evident from these examples, the nature of services covered here is such as are rendered in person and in the receiver’s physical presence. Though these are generally rendered at the service provider’s premises (at a cosmetic or plastic surgery clinic, or beauty parlor, or health and fitness centre, or internet café), they could also be provided at the customer’s premises, or occasionally while the receiver is on the move (say, a personal security service; or a beauty treatment on board an aircraft).

D. What is the significance of “..in the physical presence of an individual, whether represented either as the service receiver or a person acting on behalf of the receiver” in this rule?

This implies that while a service in this category is capable of being rendered only in the presence of an individual, it will not matter if, in terms of the contractual arrangement between the provider and the receiver (formal or informal, written or oral), the service is actually rendered by the provider to a person other than the receiver, who is acting on behalf of the receiver.

Illustration

A modelling agency contracts with a beauty parlour for beauty treatment of say, 20 models. Here again is a situation where the modelling agency is the receiver of the service, but the service is rendered to the models, who are receiving the beauty treatment service on behalf of the modelling agency. Hence, notwithstanding that the modelling agency does not qualify as the individual receiver in whose
presence the service is rendered, the nature of the service is such as can be rendered only to an individual, thereby qualifying to be covered under this rule.

8. **RULE 5- LOCATION OF IMMOVABLE PROPERTY**

In the case of a service that is ‘directly in relation to immovable property’, the place of provision is where the immovable property (land or building) is located, irrespective of where the provider or receiver is located.

A. **What is “immovable property”?**

“Immovable Property” has not been defined in the Finance Act, 1994. However, in terms of section 4 of the General Clauses Act, 1897, the definition of immovable property provided in sub-section 3 (26) of the General Clauses Act will apply, which states as under:

“Immovable Property” shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.” It may be noted that the definition is inclusive and thus properties such as buildings and fixed structures on land would be covered by the definition of immovable property. The property must be attached to some part of earth even if underwater.

B. **What are the criteria to determine if a service is ‘directly in relation to’ immovable property located in taxable territory?**

Generally, the following criteria will be used to determine if a service is in respect of immovable property located in the taxable territory:

i) The service consists of lease, or a right of use, occupation, enjoyment or exploitation of an immovable property;

ii) the service is physically performed or agreed to be performed on an immovable property (e.g. maintenance) or property to come into existence (e.g. construction);

iii) the direct object of the service is the immovable property in the sense that the service enhances the value of the property, affects the nature of the property, relates to preparing the property for development or redevelopment or the environment within the limits of the property (e.g. engineering, architectural services, surveying and sub-dividing, management services, security services etc);

iv) the purpose of the service is:
a) the transfer or conveyance of the property or the proposed transfer or conveyance of the property (e.g., real estate services in relation to the actual or proposed acquisition, lease or rental of property, legal services rendered to the owner or beneficiary or potential owner or beneficiary of property as a result of a will or testament);
b) the determination of the title to the property. There must be more than a mere indirect or incidental connection between a service provided in relation to an immovable property, and the underlying immovable property. For example, a legal firm’s general opinion with respect to the capital gains tax liability arising from the sale of a commercial property in India is basically advice on taxation legislation in general even though it relates to the subject of an immovable property. This will not be treated as a service in respect of the immovable property.

C. Examples of land-related services
   i) Services supplied in the course of construction, reconstruction, alteration, demolition, repair or maintenance (including painting and decorating) of any building or civil engineering work;
   ii) Renting of immovable property;
   iii) Services of real estate agents, auctioneers, architects, engineers and similar experts or professional people, relating to land, buildings or civil engineering works. This includes the management, survey or valuation of property by a solicitor, surveyor or loss adjuster.
   iv) Services connected with oil/gas/mineral exploration or exploitation relating to specific sites of land or the seabed.
   v) The surveying (such as seismic, geological or geomagnetic) of land or seabed.
   vi) Legal services such as dealing with applications for planning permission.
   vii) Packages of property management services which may include rent collection, arranging repairs and the maintenance of financial accounts.
   viii) The supply of hotel accommodation or warehouse space.
D. What if a service is not directly related to immovable property?

The place of provision of services rule 5 applies only to services which relate directly to specific sites of land or property. In other words, the immovable property must be clearly identifiable to be the one from where, or in respect of which, a service is being provided. Thus, there needs to be a very close link or association between the service and the immovable property.

Needless to say, this rule does not apply if a provision of service has only an indirect connection with the immovable property, or if the service is only an incidental component of a more comprehensive supply of services.

For example, the services of an architect contracted to design the landscaping of a particular resort hotel in Goa would be land-related. However, if an interior decorator is engaged by retail chain to design a common décor for all its stores in India, this service would not be land related and the default rule i.e. Rule 3 will apply in this case.

E. Examples of services which are not land-related

i) Repair and maintenance of machinery which is not permanently installed. This is a service related to goods.

ii) Advice or information relating to land prices or property markets because they do not relate to specific sites.

iii) Land or Real Estate Feasibility studies, say in respect of the investment potential of a developing suburb, since this service does not relate to a specific property or site.

iv) Services of a Tax Return Preparer in simply calculating a tax return from figures provided by a business in respect of rental income from commercial property.

v) Services of an agent who arranges finance for the purchase of a property.

9. RULE 6- SERVICES RELATING TO EVENTS

A. What is the place of provision of services relating to events?

Place of provision of services provided by way of admission to, or organization of a cultural, artistic, sporting, scientific, educational, entertainment event, or a celebration, conference, fair, exhibition, or any other similar event and of services ancillary to such admission, shall be the place where the event is held.
B. What are the services that will be covered in this category?
Services in relation to admission as well as organization of events such as conventions, conferences, exhibitions, fairs, seminars, workshops, weddings, sports and cultural events are covered under this Rule.

Illustration 1
A management school located in USA intends to organize a road show in Mumbai and New Delhi for prospective students. Any service provided by an event manager, or the right to entry (participation fee for prospective students, say) will be taxable in India.

Illustration 2
An Indian fashion design firm hosts a show at Toronto, Canada. The firm receives the services of a Canadian event organizer. The place of provision of this service is the location of the event, which is outside the taxable territory. Any service provided in relation to this event, including the right to entry, will be non-taxable.

C. What is a service ancillary to organization or admission to an event?
Provision of sound engineering for an artistic event is a prerequisite for staging of that event and should be regarded as a service ancillary to its organization. A service of hiring a specific equipment to enjoy the event at the venue (against a charge that is not included in the price of entry ticket) is an example of a service that is ancillary to admission.

D. What are event-related services that would be treated as not ancillary to admission to an event?
A service of courier agency used for distribution of entry tickets for an event is a service that is not ancillary to admission to the event.

10. RULE 7- PART PERFORMANCE OF A SERVICE AT DIFFERENT LOCATIONS

A. What does this Rule imply?
This Rule covers situations where the actual performance of a service is at more than one location, and occasionally one (or more) such locations may be outside the taxable territory.

This Rule states as follows:-
“Where any service stated in rules 4, 5, or 6 is provided at more than one location, including a location in the taxable territory, its place of provision shall be the location in the taxable territory where the greatest proportion of the service is provided”.

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The following example illustrates the application of this Rule:--

**Illustration 1**

An Indian firm provides a ‘technical inspection and certification service’ for a newly developed product of an overseas firm (say, for a newly launched motorbike which has to meet emission standards in different states or countries). Say, the testing is carried out in Maharashtra (20%), Kerala (25%), and an international location (say, Colombo 55%).

Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, in this case Kerala.

This rule is, however, not intended to capture insignificant portion of a service rendered in any part of the taxable territory like mere issue of invoice, processing of purchase order or recovery, which are not by way of service actually performed on goods. It is clarified that this rule is applicable in performance-based services or location-specific services (immovable property related or event-linked). Normally, such services when provided in a non-taxable territory would require the presence of separate establishments in such territories. By virtue of an explanation of sub-clause (44) of section 65B, they would constitute distinct persons and thus it would be legitimate to invoice the services rendered individually in the two territories.

11. **RULE 8- SERVICES WHERE THE PROVIDER AS WELL AS RECEIVER IS LOCATED IN TAXABLE TERRITORY**

A. **What is the place of provision of a service where the location of the service provider and that of the service receiver is in the taxable territory?**

The place of provision of a service, which is provided by a provider located in the taxable territory to a receiver who is also in the taxable territory, will be the location of the receiver.

B. **What is the implication of this Rule?**

This Rule covers situations where the place of provision of a service provided in the taxable territory may be determinable to be outside the taxable territory, in terms of the application of one of the earlier Rules i.e. Rule 4 to 6, but the service provider, as well as the service receiver, are located in the taxable territory.
The implication of this Rule is that in all such cases, the place of provision will be deemed to be in the taxable territory, notwithstanding the earlier rules. The presence of both the service provider and the service receiver in the taxable territory indicates that the place of consumption of the service is in the taxable territory. Services rendered, where both the provider and receiver of the service are located outside the taxable territory, are now covered by the mega exemption.

Illustration
A helicopter of Pawan Hans Ltd (India based) develops a technical snag in Nepal. Say, engineers are deputed by Hindustan Aeronautics Ltd, Bangalore, to undertake repairs at the site in Nepal. But for this rule, Rule 4, sub-rule (1) would apply in this case, and the place of provision would be Nepal i.e. outside the taxable territory. However, by application of Rule 7, since the service provider, as well as the receiver, are located in the taxable territory, the place of provision of this service will be within the taxable territory.

12. RULE 9- SPECIFIED SERVICES- PLACE OF PROVISION IS LOCATION OF THE SERVICE PROVIDER

A. What are the specified services where the place of provision is the location of the service provider?
Following are the specified services where the place of provision is the location of the service provider:-
   i) Services provided by a banking company, or a financial company, or a non-banking financial company to account holders;
   ii) Online information and database access or retrieval services;
   iii) Intermediary services;
   iv) Service consisting of hiring of means of transport, up to a period of one month.

B. What is the meaning of “account holder”? Which accounts are not covered by this rule?
   “Account” has been defined in the rules to mean an account which bears an interest to the depositor. Services provided to holders of demand deposits, term deposits, NRE (non-resident external) accounts and NRO (non-resident ordinary) accounts will be covered under this
rule. Banking services provided to persons other than account holders will be covered under the main rule (Rule 3- location of receiver).

C. **What are the services that are provided by a banking company to an account holder (holder of an account bearing interest to the depositor)?**

Following are examples of services that are provided by a banking company or financial institution to an “account holder”, in the ordinary course of business:

i) services linked to or requiring opening and operation of bank accounts such as lending, deposits, safe deposit locker etc;

ii) transfer of money including telegraphic transfer, mail transfer, electronic transfer etc.

D. **What are the services that are not provided by a banking company or financial institution to an account holder, in the ordinary course of business, and will consequently be covered under another Rule?**

Following are examples of services that are generally NOT provided by a banking company or financial institution to an account holder (holder of a deposit account bearing interest), in the ordinary course of business:

i) financial leasing services including equipment leasing and hire-purchase;

ii) merchant banking services;

iii) Securities and foreign exchange (forex) broking, and purchase or sale of foreign currency, including money changing;

iv) asset management including portfolio management, all forms of fund management, pension fund management, custodial, depository and trust services;

v) advisory and other auxiliary financial services including investment and portfolio research and advice, advice on mergers and acquisitions and advice on corporate restructuring and strategy;

vi) banker to an issue service.

In the case of any service which does not qualify as a service provided to an account holder, the place of provision will be determined under the default rule i.e. the Main Rule 3. Thus, it will be the location of the service receiver where it is known (ascertainable in the ordinary course of business), and the location of the service provider otherwise.
E. What are “Online information and database access or retrieval services”?

“Online information and database access or retrieval services” are services in relation to online information and database access or retrieval or both, in electronic form through computer network, in any manner. Thus, these services are essentially delivered over the internet or an electronic network which relies on the internet or similar network for their provision. The other important feature of these services is that they are completely automated, and require minimal human intervention.

Examples of such services are:

i) online information generated automatically by software from specific data input by the customer, such as web-based services providing trade statistics, legal and financial data, matrimonial services, social networking sites;

ii) digitized content of books and other electronic publications, subscription of online newspapers and journals, online news, flight information and weather reports;

iii) Web-based services providing access or download of digital content.

The following services will not be treated as “online information and database access or retrieval services”:

i) Sale or purchase of goods, articles etc over the internet;

ii) Telecommunication services provided over the internet, including fax, telephony, audio conferencing, and videoconferencing;

iii) A service which is rendered over the internet, such as an architectural drawing, or management consultancy through e-mail;

iv) Repair of software, or of hardware, through the internet, from a remote location;

v) Internet backbone services and internet access services.

F. What are “Intermediary Services”?

Generally, an “intermediary” is a person who arranges or facilitates a supply of goods, or a provision of service, or both, between two persons, without material alteration or further processing. Thus, an intermediary is involved with two supplies at any one time:

i) the supply between the principal and the third party; and
ii) the supply of his own service (agency service) to his principal, for which a fee or commission is usually charged.

For the purpose of this rule, an intermediary in respect of goods (such as a commission agent i.e. a buying or selling agent, or a stockbroker) is excluded by definition. Also excluded from this sub-rule is a person who arranges or facilitates a provision of a service (referred to in the rules as “the main service”), but provides the main service on his own account.

In order to determine whether a person is acting as an intermediary or not, the following factors need to be considered:

**Nature and value:** An intermediary cannot alter the nature or value of the service, the supply of which he facilitates on behalf of his principal, although the principal may authorize the intermediary to negotiate a different price. Also, the principal must know the exact value at which the service is supplied (or obtained) on his behalf, and any discounts that the intermediary obtains must be passed back to the principal.

**Separation of value:** The value of an intermediary’s service is invariably identifiable from the main supply of service that he is arranging. It can be based on an agreed percentage of the sale or purchase price. Generally, the amount charged by an agent from his principal is referred to as “commission”.

**Identity and title:** The service provided by the intermediary on behalf of the principal is clearly identifiable.

In accordance with the above guiding principles, services provided by the following persons will qualify as ‘intermediary services’ (illustrative list only):

i) Travel Agent (any mode of travel)

ii) Tour Operator

iii) Commission agent for a service [an agent for buying or selling of goods is excluded]

iv) Recovery Agent

Even in other cases, wherever a provider of any service acts as an intermediary for another person, as identified by the guiding principles outlined above, this rule will apply. Normally, it is expected that the intermediary or agent would have documentary evidence authorizing him to act on behalf of the provider of the ‘main service’.

**Illustration**
A freight forwarder arranges for export and import shipments. There could be two possible situations here— one when he acts on his own account, and the other, when he acts as an intermediary.

**When the freight forwarder acts on his own account (say, for an export shipment)**

A freight forwarder provides domestic transportation within taxable territory (say, from the exporter’s factory located in Pune to Mumbai port) as well as international freight service (say, from Mumbai port to the international destination), under a single contract, on his own account (i.e. he buys-in and sells fright transport as a principal), and charges a consolidated amount to the exporter. This is a service of transportation of goods for which the place of supply is the destination of goods. Since the destination of goods is outside taxable territory, this service will not attract service tax. Here, it is presumed that ancillary freight services (i.e. services ancillary to transportation— loading, unloading, handling etc) are “bundled” with the principal service owing to a single contract or a single price (consideration). On an import shipment with similar conditions, the place of supply will be in the taxable territory, and so the service tax will be attracted.

**When the freight forwarder acts as an intermediary**

Where the freight forwarder acts as an intermediary, the place of provision will be his location. Service tax will be payable on the services provided by him. However, when he provides a service to an exporter of goods, the exporter can claim refund of service tax paid under notification for this purpose. Similarly, persons such as call centres, who provide services to their clients by dealing with the customers of the client on the client’s behalf, but actually provided these services on their own account, will not be categorized as intermediaries.

**G. What is the service of “hiring of means of transport”?**

The services of providing a hire or lease, without the transfer of right to use, is covered by this rule. Normally the following will constitute means of transport:-

i) Land vehicles such as motorcars, buses, trucks;

ii) Vessels;

iii) Aircraft;
iv) Vehicles designed specifically for the transport of sick or injured persons;
v) Mechanically or electronically propelled invalid carriages;
vii) Trailers, semi-trailers and railway wagons.

The following are not ‘means of transport’:-
i) Racing cars;
ii) Containers used to store or carry goods while being transported;
iii) Dredgers, or the like.

H. What if I provide a service of hiring of a fleet of cars to a company on an annual contract? What will be place of provision of my service if my business establishment is located in New Delhi, and the company is located in Faridabad (Haryana)?

This Rule covers situations where the hiring is for a period of up to one month. Since hiring period is more than one month, this sub-rule cannot be applied to the situation. The place of provision of your service will be determined in terms of Rule 3 i.e. receiver location, which in this case is Faridabad (Haryana).

13.

RULE 10 - PLACE OF PROVISION OF A SERVICE OF TRANSPORTATION OF GOODS

A. What are the services covered under this Rule?

Any service of transportation of goods, by any mode of transport (air, vessel, rail or by a goods transportation agency), is covered here. However, transportation of goods by courier or mail is not covered here.

B. What is the place of provision of a service of transportation of goods?

Place of provision of a service of transportation of goods is the place of destination of goods, except in the case of services provided by a Goods Transportation Agency in respect of transportation of goods by road, in which case the place of provision is the location of the person liable to pay tax (as determined in terms of rule 2(1)(d) of Service Tax Rules, 1994 (since amended).

Illustration
A consignment of cut flowers is consigned from Chennai to Amsterdam. The place of provision of goods transportation service will be Amsterdam (outside India, hence not liable to service tax). Conversely, if a consignment of crystal ware is consigned from Paris to New Delhi, the place of provision will be New Delhi.

C. What does the proviso to this Rule imply?

The proviso to this Rule states as under:

“Provided that the place of provision of services of transportation of goods by goods transportation agency shall be the location of the person liable to pay tax.”

Sub-rule 2(1)(d) of Service Tax Rules, 1994 provides that where a service of transportation of goods is provided by a ‘goods transportation agency’, and the consignor or consignee is covered under any of the specified categories prescribed therein, the person liable to tax is the person who pays, or is liable to pay freight (either himself or through his agent) for the transportation of goods by road in a goods carriage. If such person is located in non-taxable territory, then the person liable to pay tax shall be the service provider.

Illustration 1

A goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Bhopal, Madhya Pradesh. Say, XYZ is a registered assessee and is also the person liable to pay freight and hence person liable to pay tax, in this case. Here, the place of provision of the service of transportation of goods will be the location of XYZ i.e. Haryana.

Illustration 2

A goods transportation agency ABC located in Delhi transports a consignment of new motorcycles from the factory of XYZ in Gurgaon (Haryana), to the premises of a dealer in Jammu (non-taxable territory). Say, as per mutually agreed terms between ABC and XYZ, the dealer in Jammu is the person liable to pay freight. Here, in terms of amended provisions of rule 2(1)(d), since the person liable to pay freight is located in non-taxable territory, the person liable to pay tax will be ABC. Accordingly, the place of provision of the service of transportation of goods will be the location of ABC i.e. Delhi.
11. RULE 11- PASSENGER TRANSPORTATION SERVICES

A. What is the place of provision of passenger transportation services?
   The place of provision of a passenger transportation service is the place where the passenger embarks on the conveyance for a continuous journey.

B. What does a “continuous journey” mean?
   A “continuous journey” means a journey for which:
   (i) a single ticket has been issued for the entire journey; or
   (ii) more than one ticket or invoice has been issued for the journey, by one service provider, or by an agent on behalf of more than one service providers, at the same time, and there is no scheduled stopover in the journey.

C. What is the meaning of a stopover? Do all stopovers break a continuous journey?
   “Stopover” means a place where a passenger can disembark either to transfer to another conveyance or break his journey for a certain period in order to resume it at a later point of time. All stopovers do not cause a break in continuous journey. Only such stopovers will be relevant for which one or more separate tickets are issued. Thus a travel on Delhi-London- New York-London-Delhi on a single ticket with a halt at London on either side, or even both, will be covered by the definition of continuous journey. However if a separate ticket is issued, say New York-Boston-New York, the same will be outside the scope of a continuous journey.

12. RULE 12- SERVICES PROVIDED ON BOARD CONVEYANCES

A. What are services provided on board conveyances?
   Any service provided on board a conveyance (aircraft, vessel, rail, or roadways bus) will be covered here. Some examples are on-board service of movies/music/video/ software games on demand, beauty treatment etc, albeit only when provided against a specific charge, and not supplied as part of the fare.

B. What is the place of provision of services provided on board conveyances?
The place of provision of services provided on board a conveyance during the course of a passenger transport operation is the first scheduled point of departure of that conveyance for the journey.

Illustration
A video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of this service will be Bangkok (outside taxable territory, hence not liable to tax).
If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).

13. RULE 13- POWER TO NOTIFY SERVICES OR CIRCUMSTANCES

A. What is the implication of this Rule?
This Rule states as follows:-
“In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service.”
The rule is an enabling power to correct any injustice being met due to the applicability of rules in a foreign territory in a manner which is inconsistent with these rules leading to double taxation. Due to the cross border nature of many services it is also possible in certain situations to set up businesses in a non-taxable territory while the effective enjoyment, or in other words consumption, may be in taxable territory. This rule is also meant as an anti-avoidance measure where the intent of the law is sought to be defeated through ingenious practices unknown to the ordinary ways of conducting business.

14. RULE 14- ORDER OF APPLICATION OF RULES

A. What is the implication of this Rule?
Rule 14 provides that where the provision of a service is, prima facie, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. This Rule covers situations where the nature of a
service, or the business activities of the service provider, may be such that two or more rules may appear equally applicable. Following illustrations will make the implications of this Rule clear:

**Illustration 1**
An architect based in Mumbai provides his service to an Indian Hotel Chain (which has business establishment in New Delhi) for its newly acquired property in Dubai. If Rule 5 (Property rule) were to be applied, the place of provision would be the location of the property i.e. Dubai (outside the taxable territory). With this result, the service would not be taxable in India. Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India.

By application of Rule 14, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.

**Illustration 2**
For the Ms Universe Contest planned to be held in South Africa, the Indian pageant (say, located in Mumbai) avails the services of Indian beauticians, fashion designers, videographers, and photographers. The service providers travel as part of the Indian pageant’s entourage to South Africa. Some of these services are in the nature of personalized services, for which the place of provision would normally be the location where performed (Performance rule-Rule 4), while for others, under the main rule (Receiver location) the place of provision would be the location of receiver. Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India. By application of Rule 15, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.
CASE CAPSULE

PLACE OF PROVISION RULES

1. BERND VON HOFFMANN v. FINANZAMT TRIER (2012) 37 STT 155 (ECJ)

Where assessee of Germany acted as a arbitrator on International Arbitral tribunal bases in Paris and received fees thereof, it was held that arbitrators’ services were different from that of lawyer, consultant or other similar professionals and due to absence of any specific rule covering it, place of provision of services would be place of location of customer.

2. JURGEN DUDDA v. FINANZGERICHT BERGISCH GLADBACH (2012) 37 STT 16 (ECJ)

Where assessee was engaged in supply of technical acoustic services, in particular sound-engineering for concerts and similar events which was held outside country and provision of sound-engineering for; artistic or entertainment event was a pre-requisite for staging of that event, it was an ancillary service under rule 6, it was held that place of provision thereof was place where event was actually held i.e. outside country and therefore, assessee was not liable to pay service tax.

3. COMMISSIONER OF THE EUROPEAN COMMUNITIES v. FEDERAL REPUBLIC OF GERMANY (2012) 37 STT 207 (ECJ)

While services of executor by way of executing a Will, which may involve management activities, legal acts and a whole range of factual or legal transactions are different from services normally undertaken by the lawyers, it was that place of provision of such services was to be determined as per general Rule 3, so services of executor by way of executing a Will were deemed to be provided at place of provision of recipient.

4. BANQUE BRUXELLES LAMBERT SA (BBL) v. BELGIAN STATE (2013) 38 STT 277 (ECJ)
It was held that in case of consultancy/advisory services provided to a mutual fund/collective investment scheme located outside taxable territory, place of provision of such service shall be location of such mutual fund or collective investment scheme. Such services are not liable to Service Tax in territory from where provided. In Indian context, mutual funds are also taxed accordingly.

5. **DESIGN CONCEPT SA v. FLANDERS EXPO (2013) 38 STT 141 (ECJ)**

It was held that in case of services provided to another customer, transaction between provider of service and intermediate customer is relevant to determine the place of provision. In case of advertising services provided to an intermediate customer located abroad, place of provision would be the place of location of service recipient i.e. such intermediate customer to whom such service was provided. This applies in Indian context too.


It was held that transfer of fishing rights in relation to a river is not supply of goods but a supply of service. Stretches of river to which fishing rights relate, is an immovable property and as such fishing rights are services connected with immovable property. Accordingly, the place of supply of such services was the place where the immovable property viz, river was situated.


It case of passenger transport services by sea or air, it was held that the same shall be regarded being carried out within taxable territory and there is no stopover in any foreign country. Services shall be taxable even if such transport involves journey in or above international waters.

In Indian context, as per Rule 11, entire consideration would be taxable it for such continuous journey, embarkation is in India irrespective of the fact that journey is undertaken outside Indian territory.
Despite doing away with the service-specific descriptions, there will be some descriptions where some differential treatment will be available to a service or a class of services. Section 66F lays down the principles of interpretation of specified descriptions of services and bundled services. These are explained in paras below –

2. **PRINCIPLES FOR INTERPRETATION OF SPECIFIED DESCRIPTIONS OF SERVICES**

   Although the negative list approach largely obviates the need for descriptions of services, such descriptions continue to exist in the following areas –
   - In the negative list of services.
   - In the declared list of services.
   - In exemption notifications.
   - In the Place of Provision of Service Rules, 2012
   - In a few other rules and notifications e.g. Cenvat Credit Rules, 2004.

   There are two principles laid down which are contained in clauses (1) and (2) of section 66F of the Act.

   **A. What is the scope of the clause (1) of section 66F: ‘Unless otherwise specified, reference to a service (hereinafter referred to as the “main service”) shall not include reference to a service which is used for providing the main service’**

   This rule can be best understood with a few illustrations which are given below –
   - Provision of access to any road or bridge on payment of toll’ is a specified entry in the negative list in section 66D of the Act. Any service provided in relation to collection of tolls or for security of a toll road would be in the nature of service used for providing such specified service and will not be entitled to the benefit of the negative list entry.
   - Transportation of goods on an inland waterway is a specified entry in the negative list in section 66D of the Act. Services provided by an agent to book such transportation of goods on inland waterways
or to facilitate such transportation would not be entitled to the negative list entry.

B. What is the scope of clause (1) of section 66F: ‘where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description’.

This rule can also be best understood with some illustrations which are given below:

- The services provided by a real estate agent are in the nature of intermediary services relating to immovable property. As per the Place of Provision of Service Rule, 2012, the place of provision of services provided in relation to immovable property is the location of the immovable property. However in terms of the rule 5 pertaining to services provided by an intermediary the place of provision of service is where the intermediary is located. Since Rule 5 provides a specific description of ‘estate agent’, the same shall prevail.

- Pandal and Shamiana is an existing service and will remain a subject of taxation. Likewise service provided by way of catering is a taxable service and entitled to abatement. There is abatement when the two are provided in combination. Since the combination is more a specific entry than the two provided individually, there is no need to apply the later rule of bundled services, where the character could be judged by the service which provides it the essential character.

3. **TAXABILITY OF ‘BUNDLED SERVICES’**

‘Bundled service’ means a bundle of provision of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services. An example of ‘bundled service’ would be air transport services provided by airlines wherein an element of transportation of passenger by air is combined with an element of provision of catering service on board. Each service involves differential treatment as a manner of determination of value of two services for the purpose of charging service tax is different.

Two rules have been prescribed for determining the taxability of such services in clause (3) of section 66F of the Act. These rules, which are explained below, are subject to the provisions of the rule contained in sub
section (2) of section 66F, viz a specific description will be preferred over a general description as explained in para 9.1.2 above.

A. Services which are naturally bundled in the ordinary course of business

The rule is – ‘If various elements of a bundled service are naturally bundled in the ordinary course of business, it shall be treated as provision of a single service which gives such bundle its essential character’

Illustrations -
- A hotel provides a 4-D/3-N package with the facility of breakfast. This is a natural bundling of services in the ordinary course of business. The service of hotel accommodation gives the bundle the essential character and would, therefore, be treated as service of providing hotel accommodation.
- A 5 star hotel is booked for a conference of 100 delegates on a lump sum package with the following facilities:
  - Accommodation for the delegates
  - Breakfast for the delegates,
  - Tea and coffee during conference
  - Access to fitness room for the delegates
  - Availability of conference room
  - Business centre

As is evident a bouquet of services is being provided, many of them chargeable to different effective rates of tax. None of the individual constituents are able to provide the essential character of the service. However, if the service is described as convention service it is able to capture the entire essence of the package. Thus the service may be judged as convention service and chargeable to full rate. However it will be fully justifiable for the hotel to charge individually for the services as long as there is no attempt to offload the value of one service on to another service that is chargeable at a concessional rate.

B. Services which are not naturally bundled in the ordinary course of business

The rule is – ‘If various elements of a bundled service are not naturally bundled in the ordinary course of business, it shall be treated as provision of a service which attracts the highest amount of service tax.’

Illustration -
A house is given on rent one floor of which is to be used as residence and the other for housing a printing press. Such renting for two different purposes is not naturally bundled in the ordinary course of business. Therefore, if a single rent deed is executed it will be treated as a service comprising entirely of such service which attracts highest liability of service tax. In this case renting for use as residence is a negative list service while renting for non-residence use is chargeable to tax. Since the latter category attracts highest liability of service tax amongst the two services bundled together, the entire bundle would be treated as renting of commercial property.

C. Significance of the condition that the rule relating to ‘bundled service’ is subject to the provisions of sub-section (2) of section 66F.
Sub-section (2) of section 66 lays down: ‘where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description’. This rule predominates over the rule laid down in sub-section (3) relating to ‘bundled services’. In other words, if a bundled service falls under a service specified by way of a description then such service would be covered by the description so specified. The illustration, relating to a bundled service wherein a pandal and shamiana is provided in combination with catering service, given above explains the operation of this rule.

D. Manner of determining if the services are bundled in the ordinary course of business
Whether services are bundled in the ordinary course of business would depend upon the normal or frequent practices followed in the area of business to which services relate. Such normal and frequent practices adopted in a business can be ascertained from several indicators some of which are listed below –

✓ The perception of the consumer or the service receiver. If large number of service receivers of such bundle of services reasonably expect such services to be provided as a package then such a package could be treated as naturally bundled in the ordinary course of business.

✓ Majority of service providers in a particular area of business provide similar bundle of services. For example, bundle of catering on board and transport by air is a bundle offered by a majority of airlines.
The nature of the various services in a bundle of services will also help in determining whether the services are bundled in the ordinary course of business. If the nature of services is such that one of the services is the main service and the other services combined with such service are in the nature of incidental or ancillary services which help in better enjoyment of a main service. For example, service of stay in a hotel is often combined with a service or laundering of 3-4 items of clothing free of cost per day. Such service is an ancillary service to the provision of hotel accommodation and the resultant package would be treated as services naturally bundled in the ordinary course of business.

Other illustrative indicators, not determinative but indicative of bundling of services in ordinary course of business are -
  - There is a single price or the customer pays the same amount, no matter how much of the package they actually receive or use.
  - The elements are normally advertised as a package.
  - The different elements are not available separately.
  - The different elements are integral to one overall supply – if one or more is removed, the nature of the supply would be affected.

No straight jacket formula can be laid down to determine whether a service is naturally bundled in the ordinary course of business. Each case has to be individually examined in the backdrop of several factors some of which are outlined above.