



# Taxation of Services: An Education Guide

June 20, 2012



**Central Board of Excise & Customs**  
**Department of Revenue, Ministry of Finance**  
**Government of India**

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**TAX RESEARCH UNIT  
Central Board of Excise & Customs,  
Department of Revenue, Ministry of Finance  
Government of India  
New Delhi**



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### **Message**

Our country is about to embrace the new system of taxation of services by way of the introduction of Negative List. These changes ushered as a part of Budget 2012 mark a paradigm shift in the taxation of services.

Besides providing for the comprehensive taxation of the entire service sector, the new changes will help to mitigate litigation and prepare both the Department as well as the taxpayers for the eventual transition towards the Goods and Services Tax (GST).

We, in the Central Board of Excise and Customs (CBEC) are highly conscious of our responsibility to explain the changes as lucidly and as comprehensively as possible. This educational Guide material has been prepared by a team of officers of our Tax Research Unit and goes far beyond the standard Q&A guides, budget circulars or similar tools that are commonly used for such purposes.

We are conscious that the concept is new and it may not have been possible to capture all the intricacies of the new provisions. But we do hope that our sincere effort will help to narrow the areas of differences while providing the taxpayers a ready guide for reference.

Any suggestions for further improvement of this guide booklet are most welcome.

  
(S.K.Goel)

June 19, 2012.

## Preface

I write this on behalf of a number of persons collectively addressed as “We”: the Team TRU, other officials of the Department as well as elsewhere, academicians, innumerable tax-payers, tax advisors, business entities and representatives from the chambers of trade and industry and professional institutes.

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.

It was evident that we were measuring up to the challenge of remote budget-making entrusted to us. But we knew we had to do some more work. Despite the Negative List being operational in most parts of the world, we had to address our own uniqueness and in our way.

With the level of confidence and trust that we had won, it was natural that we were kept in the picture and informed which of our suggestions were accepted and which were not. The revised concept paper followed in November. We realized that the government was serious with this piece of progressive reform. We had to be likewise. Once again we tried our best to critique and comment on various proposals.

When the Budget announcements came in March, it was no shock or surprise. It was largely an affirmation of what we had known all along. We could see our collective efforts bear fruit.

The Department was also becoming far more reliant in entrusting us the responsibility of reading two rather lengthy draft guidance papers, trying to explain the whole concept and seeking our inputs so that very little was left for experimentation through litigation on either side.

Innumerable seminars organized by various chambers and professional institutes were very illuminating with the CBEC also breaking tradition by holding its own seminar for business in Delhi immediately after the budget followed by a well-attended seminar at its academy for the officers. Not to rest on that laurel alone, CBEC further reinforced learning and doubt-clearing with seminars in Delhi, Ahmedabad, Kolkata, and Chennai in June (Mumbai to follow soon), collaborating with industry associations and professional bodies and making it grossly interactive.

And now the final packaged version is before us on June 20, 2012 ready to be operationalised from July 1, 2012.

The head of the family: the Hon'ble Finance Minister of India, who has personally supported this entire initiative, guiding it intellectually and in all other possible ways, has very readily and graciously agreed to find time, out of his most busy schedule, to release the final version of this Educational Guide, indigenously produced and directed by We: The Team Negative List.

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Dated: 20<sup>th</sup> June, 2012

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TRU, Central Board of Excise & Customs,  
Department of Revenue, Ministry of Finance  
June 20, 2012

## 1. Introduction

### 1.1 Background

The journey of taxation of services began by selective taxation of just three services on July 1, 1994. The first year collections now appear a very modest at Rs 407 crore.

After appearing largely as just-another-tax for the first 8 years, with collections touching Rs 3,302 crore in 2001-02, service tax took some giant leaps in the next 7 years, both on the back of wider coverage as well as increase in tax rate, reaching Rs 60,941 crore in 2008-09. Next two years saw the growth somewhat moderating with collections reaching Rs 70,896 crore in 2010-11.

The buoyancy began once again on the back of some policy initiatives and Service Tax contributed Rs 97, 444 crore during 2011-12, an increase of nearly 37% over the previous year.

While the revenue expectations were often exceeded in all these years the administrative challenge began to assume unmanageable proportions. The newer additions to the list of services often raised issues of overlaps with the previously existing services, confounding both sides as to whether some activities were taxed for the first time or were already covered under an earlier, even if a little less specific head.

There was also a near unanimity across a wide section of thinkers that potential of service tax remained huge and largely untapped. Part of the problem identified was the lack of comprehensive taxation of services, not so much in the lack of coverage but more on account of lack of clarity and significant gaps in existing definitions, exposing the tax collection process to avoidable leakages and litigation.

Budget 2012 has ushered a new system of taxation of services; popularly known as Negative List. The new changes are a paradigm shift from the existing system where only services of specified descriptions are subjected to tax. In the new system all services, except those specified in the negative list, will be subject to taxation. For those who like to use modern-day terminology one could call it taxation of service version 2.0.

### 1.2 What is the aim of this Guide?

This guide is aimed at educating the tax payers and the tax administrators on various aspects of the new concept in order to assist them in gaining better understanding about the new system of taxation.

It is clarified at the outset that this guide is merely an educational aid based on a broad understanding of a team of officers of the issues. It is neither a “Departmental Circular” nor a manual of instructions issued by the Central Board of Excise and Customs. To that extent it does not command the required legal backing to be binding on either side in any manner. The guide is being released purely as a measure of facilitation so that all stakeholders obtain some preliminary understanding of the new issues for smooth transition to the new regime.

### **1.3 What is the key to using this Guide?**

The guide consists of a number of Guidance Notes. Each of the notes deals with a specific topic relating to the negative list. The list of these educational notes is as follows-

Guidance Note 1	Introduction
Guidance Note 2	What is ‘service’?
Guidance Note 3	Taxability of a ‘service’
Guidance Note 4	Negative List
Guidance Note 5	Place of Provision of Service
Guidance Note 6	Declared Services
Guidance Note 7	Exemptions
Guidance Note 8	Valuation
Guidance Note 9	Rules of Interpretation
Guidance Note 10	Miscellaneous

In addition, the Guide has the following three Exhibits:

- Exhibit A1 - List of services specified in the negative list
- Exhibit A2 – Place of Provision of Service Rules, 2012.
- Exhibit A3- List of exemptions in mega notification

### **1.4 What is the broad scheme of new taxation?**

The key features of the new system of taxation are as follows:

- At the outset ‘service’ has been defined in clause (44) of section 65B of the Act.
- Section 66B specifies the charge of service tax which is essentially that service tax



shall be levied on all services provided or agreed to be provided in a taxable territory, other than services specified in the negative list.

- The negative list of services is contained in section 66D of the Act.
- Since provision of service in the taxable territory is an important ingredient of taxability, section 66C empowers the Central Government to make rules for determination of place of provision of service. Under these provisions the Place of Provision of Services Rules, 2012 have been made.
- To remove some ambiguities certain activities have been specifically defined by description as services and are referred as Declared Services (listed in section 66E).
- In addition to the services specified in the negative list, certain exemptions have been given. Most of the exemptions have been consolidated in a single mega exemption for ease of reference.
- Principles have been laid down in section 66F of the Act for interpretation wherever services have to be treated differentially for any reason and also for determining the taxability of bundled services.
- The system of valuation of services for levy of service tax and of availment and utilization of Cenvat credits essentially remains the same with only incidental changes required for the new system of taxation

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## Guidance Note 2 –What is Service?

‘Service’ has been defined in clause (44) of the new section 65B and means –

- any activity
- for consideration
- carried out by a person for another
- and includes a declared service.

The said definition further provides that ‘Service’ does not include –

- any activity that constitutes only a transfer in title of (i) goods or (ii) immovable property by way of sale, gift or in any other manner
- (iii) a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution
- a transaction only in (iv) money or (v) actionable claim
- a service provided by an employee to an employer in the course of the employment.
- fees payable to a court or a tribunal set up under a law for the time being in force

There are four explanations appended to the definition of ‘service’ which are dealt with in later part of this Guidance Note. Each of the ingredients bulleted above have been explained in the points below.

### 2.1 Activity

#### 2.1.1 What does the word ‘activity’ signify?

‘Activity’ has not been defined in the Act. In terms of the common understanding of the word activity would include an act done, a work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. It is a term with very wide connotation.

Activity could be active or passive and would also include forbearance to act. Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.

### 2.2 Consideration

#### 2.2.1 The phrase ‘consideration’ has not been defined in the Act. What is, therefore, the meaning of ‘consideration’?

As per Explanation (a) to section 67 of the Act “consideration” includes any amount that is payable for the taxable services provided or to be provided.

Since this definition is inclusive it will not be out of place to refer to the definition of 'consideration' as given in section 2 (d) of the Indian Contract Act, 1872 as follows-

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

In simple terms, 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of non-monetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory on the other hand.

### **2.2.2 What are the implications of the condition that activity should be carried out for a 'consideration'?**

- To be taxable an activity should be carried out by a person for a 'consideration'
- Activity carried out without any consideration like donations, gifts or free charities are therefore outside the ambit of service. For example grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research.
- An act by a charity for consideration would be a service and taxable unless otherwise exempted. ( **for exemptions to charities please see Guidance Note 7**)
- Conditions in a grant stipulating merely proper usage of funds and furnishing of account also will not result in making it a provision of service.
- Donations to a charitable organization are not consideration unless charity is obligated to provide something in return e.g. display or advertise the name of the donor in a specified manner or such that it gives a desired advantage to the donor.

### **2.2.3 What is the meaning of monetary consideration?**

Monetary consideration means any consideration received in the form of money. 'Money' has been defined in section 65B and includes not only cash but also cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler's cheque, money order, postal or electronic remittance or any such similar instrument.

### **2.2.4 What is non-monetary consideration?**

Non-monetary consideration essentially means compensation in kind such as the following:

- Supply of goods and services in return for provision of service
- Refraining or forbearing to do an act in return for provision of service
- Tolerating an act or a situation in return for provision of a service
- Doing or agreeing to do an act in return for provision of service

**Illustrations**

If.....	And in return...
A agrees to dry clean B's clothes	B agrees to click A's photograph
A agrees not to open dry clean shop in B's neighborhood	B agrees not to open photography shop in A's neighborhood
A agrees to design B's house	B agrees not to object to construction of A's house in his neighborhood
A agrees to construct 3 flats for B on land owned by B	B agrees to provide one flat to A without any monetary consideration

**Then**

For the services provided by A to B, the acts of B specified in 2<sup>nd</sup> column are non- monetary consideration provided by B to A. Conversely, for services provided by B to A, similar reasoning will be adopted.

**2.2.5 Is the value of non-monetary consideration important?**

Yes. The non-monetary consideration also needs to be valued for determining the tax payable on the taxable service since service tax is levied on the value of consideration received which includes both monetary consideration and money value of non-monetary consideration.

**2.2.6 How is the money value of non-monetary consideration determined?**

The value of non-monetary consideration is determined as per section 67 of the Act and the Service Tax (Determination of Value) Rules 2006, which is equivalent money value of such consideration and if not ascertainable, then 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.

For details please refer to point no 8.1.8 and 8.1.9 of this Guide.

**2.2.7 Are research grant with counter obligation on researcher to provide IPR rights on outcome of a research a consideration?**

In case research grant is given with counter obligation on the researcher to provide IPR rights on the outcome of research or activity undertaken with the help of such grants then the grant is a consideration for the provision of service of research. General grants for researches will not amount to a consideration.

## 2.3 Activity for a consideration

The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration. An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.

Thus an award received in consideration for contribution over a life time or even a singular achievement carried out independently or without reciprocity to the amount to be received will not comprise an activity for consideration.

There can be many activities without consideration. An artist performing on a street does an activity without consideration even though passersby may drop some coins in his bowl kept after feeling either rejoiced or merely out of compassion. They are, however, under no obligation to pay any amount for listening to him nor have they engaged him for his services. On the other hand if the same person is called to perform on payment of an amount of money then the performance becomes an activity for a consideration.

Provisions of free tourism information, access to free channels on TV and a large number of governmental activities for citizens are some of the examples of activities without consideration.

Similarly there could be cases of payments without an activity though they cannot be put in words as being "consideration without an activity". Consideration itself pre-supposes a certain level of reciprocity. Thus grant of pocket money, a gift or reward (which has not been given in terms of reciprocity), amount paid as alimony for divorce would be examples in this category. However a reward given for an activity performed explicitly on the understanding that the winner will receive the specified amount in reciprocity for a service to be rendered by the winner would be a consideration for such service. Thus amount paid in cases where people at large are invited to contribute to open software development (e.g. Linux) and getting an amount if their contribution is finally accepted will be examples of activities for consideration.

### **2.3.1 Would imposition of a fine or a penalty for violation of a provision of law be a consideration for the activity of breaking the law making such activity a 'service'?**

No. To be a service an activity has to be carried out for a consideration. Therefore fines and penalties which are legal consequences of a person's actions are not in the nature of consideration for an activity.

**2.3.2 Would the payments in the nature as explained in column A of the table below constitute a consideration for provision of service?**

S. No.	A	B
	Nature of payment	Whether consideration for service?
1.	Amount received in settlement of dispute.	Would depend on the nature of dispute. Per se such amounts are not consideration unless it represents a portion of the consideration for an activity that has been carried out. If the dispute itself pertains to consideration relating to service then it would be a part of consideration.
2.	Amount received as advances for performance of service.	Such advances are consideration for the agreement to perform a service.
3.	Deposits returned on cancellation of an agreement to provide a service.	Returned deposits are in the nature of a returned consideration. If tax has already been paid the tax payer would be entitled to refund to the extent specified and subject to provisions of law in this regard.
4.	Advances forfeited for cancellation of an agreement to provide a service.	Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provision of service.
5.	Security deposit that is returnable on completion of provision of service.	Returnable deposit is in the nature of security and hence do not represent consideration for service. However if the deposit is in the nature of a colorable device wherein the interest on the deposit substitutes for the consideration for service provided or the interest earned has a perceptible impact on the consideration charged for service then such interest would form part of gross amount received for the service. Also security deposit should not be in lieu of advance payment for the service.
6.	Security deposits forfeited for damages done by service receiver in the course of receiving a service	If the forfeited deposits relate to accidental damages due to unforeseen actions not relatable to provision of service then such forfeited deposits would not be a consideration in terms of clause (vi) of sub-rule (2) of rule 6 of the Valuation Rules.



7.	Excess payment made as a result of a mistake	If returned it is not consideration . If not returned and retained by the service provider it becomes a part of the taxable value.
8.	Demurrages payable for use of services beyond the period initially agreed upon e.g. retention of containers beyond the normal period.	This will be consideration and is covered by clause (x) of sub -rule (1) to Rule 6 of the Valuation Rules.

**2.3.3 Can a consideration for service be paid by a person other than the person receiving the benefit of the service?**

Yes. The consideration for a service may be provided by a person other than the person receiving the benefit of service as long as there is a link between the provision of service and the consideration. For example, holding company may pay for services that are provided to its associated companies.

**2.4 By a person for another**

**2.4.1 What is the significance of the phrase ‘carried out by a person for another’?**

The phrase ‘provided by one person to another’ signifies that services provided by a person to self are outside the ambit of taxable service. Example of such service would include a service provided by one branch of a company to another or to its head office or vice-versa.

**2.4.2 Are there any exceptions wherein services provided by a person to oneself are taxable?**

Yes. Two exceptions have been carved out to the general rule that only services provided by a person to another are taxable. These exceptions, contained in Explanation 2 of clause (44) of section 65B, are:

- an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons. [Similar provision exists presently in section 66A (2)].
- an unincorporated association or body of persons and members thereof are also treated as distinct persons. [Also exists presently in part as explanation to section 65].

Implications of these deeming provisions are that inter-se provision of services between such persons, deemed to be separate persons, would be taxable. For example, services provided by a club to its members and services provided by the branch office of a multi-national company to the headquarters of the multi-national company located outside India would be taxable provided other conditions relating to taxability of service are satisfied.

### **2.4.3 Are services provided by persons who have formed unincorporated joint ventures or profit-sharing arrangements liable to be taxed?**

The services provided, both by the so constituted JV or profit sharing association of persons (AOP), as well as by each of the individual persons constituting the JV/AOP will be liable to be taxed separately, subject of course to the availability of the credit of the tax paid by independent persons to the JV/AOP and as otherwise admissible under Cenvat Rules..

### **2.4.4 Who is a ‘person’? Is it only a natural person or includes an artificial or a juridical person?**

‘Person’ is not restricted to natural person. ‘Person’ has been defined Section 65 B of the Act. The following shall be considered as persons for the purposes of the Act:

- an individual
- a Hindu undivided family
- a company
- a society
- a limited liability partnership
- a firm
- an association or body of individuals, whether incorporated or not
- Government
- a local authority, or
- every artificial juridical person, not falling within any of the preceding sub-clauses.

### **2.4.5 Are Government and local authorities also liable to pay tax?**

Yes. However, most of the services provided by the Government or local authorities are in the negative list.

### **2.4.6 What is the rationale behind taxing certain activities of the Government or local authorities?**

Only those activities of Government or local authorities are taxed where similar or substitutable services are provided by private entities. The rationale is as follows-

- to provide a level playing field to private entities in these areas as exemption to Government in such activities would lead to competitive inequities; and
- to avoid break in Cenvat chain as the support services provided by Government are normally in the nature of intermediary services.

### **2.4.7 What is the meaning of ‘Government’?**

The phrase ‘Government’ has not been defined in the Act. As per clause (23) of section 3 of the General Clauses Act, 1897 ‘Government’ includes both Central Government and any State

Government. As per clause (8) of section 3 of the said Act 'Central Government', in relation to anything done or to be done after the commencement of the Constitution, mean the President. As per article 53 of the Constitution the executive power of the Union shall be vested in the President and shall be exercised by him either directly or indirectly through officers subordinate to him in accordance with the Constitution. Further, in terms of article 77 of the Constitution all executive actions of the Government of India shall be expressed to be taken in the name of the President. Therefore, the Central Government means the President and the officers subordinate to him while exercising the executive powers of the Union vested in the President and in the name of the President.

Similarly as per clause (60) of section 3 of the General Clauses Act, 1897 'State Government', as respects anything done after the commencement of the Constitution, shall be in a State the Governor, and in Union Territory the Central Government. Further as per article 154 of the Constitution the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or indirectly through officers subordinate to him in accordance with the Constitution. Further, as per article 166 of the Constitution all executive actions of the Government of State shall be expressed to be taken in the name of Governor. Therefore, State Government means the Governor or the officers subordinate to him who exercise the executive power of the State vested in the Governor and in the name of the Governor.

#### **2.4.8 What is a local authority?**

Local authority is defined in clause (31) of section 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.

#### **2.4.9 Are all local bodies constituted by a State or Central Law local authorities?**

No. The definition of 'local authority' is very specific as explained in point no 2.4.8 above and only those bodies which fall in the definition comprise 'local authorities'. It would not include other bodies which are merely described as a local body by virtue of a local law.

However it may be noted that services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243W of the Constitution are specifically exempt under the mega exemption. 'Governmental authority' has been defined in the said mega exemption as a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under

article 243W of the Constitution. Thus some of these local bodies may comprise governmental authorities.

**2.4.10 Would various entities like a statutory body, corporation or an authority constituted under an Act passed by the Parliament or any of the State Legislatures be ‘Government’ or “local authority”?**

A statutory body, corporation or an authority created by the Parliament or a State Legislature is neither ‘Government’ nor a ‘local authority’ as would be evident from the meaning of these terms explained in point nos. 2.4.7 and 2.4.8 above respectively. 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. It is a settled position of law Government (Agarwal Vs. Hindustan Steel AIR 1970 Supreme Court 1150) 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.

**2.4.11 Would services provided by one department of the Government to another Department of the Government be taxable?**

If services are provided by one department of the Central Government to another department of the Central Government or by a department of a State Government to another department of the same State Government then such service would not be taxable as it would amount to self-service. To be taxable a service has to be provided to another person.

On the other hand if a service is provided by a Central Government department to a State Government department or vice versa or a by a State to another State Government or by a Government to an autonomous body, the same would be taxable if such service does not fall in the negative list. It is another matter that most of the services provided by the Government are in the negative list. For details please refer to point no. 4.1 of this Guide.

**2.4.12 Would taxable services provided by Government or local authorities still be liable to tax if they are covered under any other head of the negative list or are otherwise exempted?**

No. For example, transport services provided by Government to passengers by way of a stage carriage would not be taxable as transport of passengers by stage carriage has separately been specified in the negative list of services. The specified services provided by the Government or local authorities are taxable only to the extent they are not covered elsewhere i.e. either in the negative list or in the exemptions.

**2.5 Activities specified in the declared list are services.**

Declared Services are activities that have been specified in Section 66 E of the Act. When such activities are carried out by one person for another in the taxable territory for a

consideration then such activities are taxable services. For guidance on the declared services please refer to **Guidance Note 6**.

## **2.6 Activity to be taxable should not constitute only a transfer in title of goods or immovable property by way of sale, gift or in any other manner**

- Mere transfer of title in goods or immovable property by way of sale, gift or in any other manner for a consideration does not constitute service.
- Goods has been defined in section 65B of the Act as ‘every kind of moveable property other than actionable claims and money; and includes securities, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale’.
- Immovable property has not been defined in the Act. Therefore the definition of immovable property in the General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

### **2.6.1 What is the significance of the phrase ‘transfer of title’?**

‘Transfer of title’ means change in ownership. Mere transfer of custody or possession over goods or immovable property where ownership is not transferred does not amount to transfer of title. For example giving the property on rent or goods for use on hire would not involve a transfer of title.

### **2.6.2 What is the significance of the word ‘only’ in the said exclusion clause in the definition of ‘service’?**

The word ‘only’ signifies that activities which constitute only:

- transfer of title in goods or immovable property; or
- transfer , supply or delivery which is deemed to be a deemed sale of goods or constitute; or
- a transaction in money or an actionable claim-are outside the definition of service.

A transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be outrightly excluded from the definition of service. Such transactions are liable to be treated as follows-

- If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words the discernible portion of the transaction which constitutes, let’s say, a transfer of title in goods, would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of

service. For example a builder carrying out an activity for a client wherein a flat is constructed by the builder for the client for which payments are received in instalments and on completion of the construction the title in the flat is transferred to the client involves two elements namely provision of construction service and transfer of title in immovable property. The two activities are discernibly separate. The activity of construction carried out by the builder would, therefore, be a service and the activity of transfer of title in the flat would be outside the ambit of service.

- In cases of composite transactions, i.e. transactions involving an element of provision of service and an element of transfer of title in goods in which various elements are so inextricably linked that they essentially form one composite transaction then the nature of such transaction would be determined by the application of the dominant nature test laid down by the Supreme Court in BSNL's case. The judgement has been explained in detail in point no 2.6.3. Although the judgement was given in the context of composite transactions involving an element of transfer in title of goods by way of sale and an element of provision of service, the ratio would equally apply to other kind of composite transactions involving a provision of service and transfer in title in immovable property or actionable claim.

### **2.6.3 What is the manner of dealing with composite transactions which in addition to a transfer of title in goods involve an element of provision of service?**

The manner of treatment of such composite transactions for the purpose of taxation, i.e. are they to be treated as sale of goods or provision of service, has been laid down by the Honorable Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India [2006(2)STR161(SC)]. The relevant paras 42 and 43 of the said judgment are reproduced below -

**“42.** Of all the different kinds of composite transactions the drafters of the 46th Amendment chose three specific situations, a works contract, a hire purchase contract and a catering contract to bring within the fiction of a deemed sale. Of these three, the first and third involve a kind of service and sale at the same time. Apart from these two cases where splitting of the service and supply has been Constitutionally permitted in Clauses (b) and (g) of Clause 29A of Art. 366, there is no other service which has been permitted to be so split. For example the clauses of Article 366(29A) do not cover hospital services. Therefore, if during the treatment of a patient in a hospital, he or she is given a pill, can the sales tax authorities tax the transaction as a sale? Doctors, lawyers and other professionals render service in the course of which can it be said that there is a sale of goods when a doctor writes out and hands over a prescription or a lawyer drafts a document and delivers it to his/her client? Strictly speaking with the payment of fees, consideration does pass from the patient or client to the doctor or lawyer for the documents in both cases.

**43.** The reason why these services do not involve a sale for the purposes of Entry 54 of List II is, as we see it, for reasons ultimately attributable to the principles enunciated in Gannon Dunkerley's case, namely, if there is an instrument of contract which may be composite in form in any case other than the exceptions in Article 366(29-A), unless the transaction in truth represents two distinct and separate contracts and is discernible as such, then the State would not have the power to separate the agreement to sell from the agreement to render service, and impose tax on the sale. The test therefore for composite contracts other than



those mentioned in Article 366 (29A) continues to be - 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 even if the contract could be disintegrated. The test for deciding whether a contract falls into one category or the other is to as what is the substance of the contract. We will, for the want of a better phrase, call this the **dominant nature test.**”

The following principles emerge from the said judgment for ascertaining the taxability of composite transactions-

- Except in cases of works contracts or catering contracts [exact words in article 366(29A) being – ‘service 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 service’] composite transactions cannot be split into contracts of sale and contracts of service.
- The test whether a transaction is a ‘composite transaction’ is that did the parties intend or have in mind that separate rights arise out of the constituent contract of sale and contract of service. If no then such transaction is a composite transaction even if the contracts could be disintegrated.
- The nature of a composite transaction, except in case of two exceptions carved out by the Constitution, would be determined by the element which determines the ‘dominant nature’ of the transaction.
  - If the dominant nature of such a transaction is sale of goods or immovable property then such transaction would be treated as such.
  - If the dominant nature of such a transaction is provision of a service then such transaction would be treated as a service and taxed as such even if the transaction involves an element of sale of goods.
- In case of works contracts and ‘service 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 service’ the ‘dominant nature test’ does not apply and service portion is taxable as a ‘service’ This has also been declared as a service under section 66E of the Act. For guidance on these two types of composite transactions and the manner of determining the value portion of service portion of such composite transactions please refer to point nos. 5.8 and 5.9 of this Guidance Paper.
- If the transaction represents two distinct and separate contracts and is discernible as such then contract of service in such transaction would be segregated and chargeable to service tax if other elements of taxability are present. This would apply even if a single invoice is issued.

The principles explained above would, mutatis mutandis, apply to composite transactions involving an element of transfer of title in immovable property or transaction in money or an actionable claim.



#### **2.6.4 Why has notification 12/2003-ST been deleted?**

Notification 12/2003 – ST exempted so much of the value of all taxable services as was equal to the value of goods and materials **sold** (emphasis supplied) by the service provider to the service recipient subject to condition that there is documentary proof of such value of goods and materials. This was necessary under the regime of taxation of services based on specified descriptions as some of the specified descriptions could include an element of transfer of title in goods.

On the other hand, under the negative list scheme, specified descriptions of taxable services have been done away with and transactions that involve transfer of title in goods or are ‘deemed to be sale of goods’ under the Constitution are excluded from the ambit of service by the very definition of service. Therefore if, in the course of providing a service, goods are also being sold by a service provider for which there is such documentary proof as to make the sale a distinct and a separate transaction then the activity of sale of such goods gets excluded from the definition of service itself. The essence and intent of notification no 12/2003 has, therefore, been fully captured in the definition of service itself.

#### **2.6.5 Will the goods portion in transactions like annual maintenance contracts or erection and commissioning or construction be includible in the value of services consequent to the deletion of Notification 12/2003-ST?**

All the examples given in the question now comprise “works contracts” and only the service portion of such contracts comprise service. By the express provisions contained in the definition of service (which is mandated by constitutional provisions) it is not possible to tax the goods portion of works contracts. However the principles of segregation of the value of goods are provided in Rule 2A of the Valuation Rules. Thus there is no basis for the taxation of goods in such contracts even after the deletion of the stated notification.

Even for the sale of any equipment for which a separate contract for warranty or after sales services or maintenance is entered the discernible sales portion is not to be included in the discernible portion of the value of service. For all practical purposes these will be two separate contracts. However for artificial segregation of value between goods and services, to save either of the taxes on goods or services, the benefit was neither available earlier under the stated notification and the position continues to be the same under the new regime.

#### **2.6.6 “Securities” have been included as goods. What are securities?**

Securities have been defined in section 65B of the Act as having the same meaning assigned to it in clause (h) of section 2 of the Securities Contract (Regulation) Act, 1956 (42 Of 1956) in terms of which ‘securities’ includes –

- Shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate.
- Derivative.
- Security receipt as defined in clause (zg) of section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

- Units or any other such instrument issued to the investors under any mutual fund scheme.
- Any certificate or instrument (by whichever name called), issued to any investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be;
- Government securities;
- Such other instruments as may be declared by the Central Government to be securities.
- Rights or interest in securities.

### **2.6.7 What are the implications of inclusion of ‘securities’ as ‘goods’?**

The definition of ‘goods’ has essentially been borrowed from the Sale of Goods Act, 1930 with the only variation that in the inclusion clause of the said definition the phrase ‘stocks and shares’ been replaced with ‘securities’. In effect, therefore, activities that are in the nature of only transfer of title by way of sale, redemption, purchase or acquisition of securities on principal-to-principal basis, excluding services of dealers, brokers or agents in relation to such transactions, are outside the ambit of ‘services. However activities which are not in the nature of transfer of title in securities (for example a person agreeing not to exercise his right in a security for a given period of time for a consideration) would not be included in this exclusion clause to the definition of ‘service.

### **2.6.8 What is a derivative?**

As per in clause (ac) of section 2 of the Securities Contract (Regulation) Act, 1956 (42 Of 1956) “derivative” includes—

(A) a security derived from a debt instrument, share, loan, whether secured or unsecured, risk instrument or contract for differences or any other form of security;

(B) a contract which derives its value from the prices, or index of prices, of underlying securities.

The definition of ‘derivatives’ in the said Act is an inclusive definition. Moreover, it may be noticed that as per the said definition ‘derivative’ includes security derived from a ‘contract of difference’ which is of a very wide ambit.

It would thus be prudent to keep in mind definition of derivatives as contained in Clause (a) of Section 45U of the RBI Act, 1935 as per which a ‘derivates’ means an instrument, to be settled at a future date, whose value is derived from change in interest rate, foreign exchange rate, credit rating from credit index, price of securities (also called “underlying”) , or a combination of a more than one of them and includes interest rates swaps, forward rate agreements, foreign currency swaps, foreign currency-rupee swaps, foreign currency options, foreign currency-rupee options or such other instruments as may be specified by the Bank

from time-to- time. Transactions, including over the counter transactions, in such securities would therefore be out of the ambit of definition of 'service'.

However if some service charges or service fees or documentation fees or broking charges or such like fees or charges are charged, the same would be considerations for provision of service and chargeable to service tax.

#### **2.6.9 Would buying or selling of mutual funds or debentures be a 'service'?**

No. buying or selling of mutual funds or debentures would not be a service as the same would be a transaction in securities.

#### **2.6.10 Whether the service tax would be chargeable on the 'entry and exit load' amount charged by a mutual fund to the investor?**

As per the definition of 'service' only activities which are in the nature of transfer of title in goods (which includes securities) are excluded. As a consideration for the transfer of title in mutual funds the investors pay amounts equal to NAV of the mutual fund. Entry or exit loads are in the nature of consideration for documentation, covering initial expenses, asset management etc. Hence service tax would be leviable on such entry and exit loads.

Service tax would also be leviable on fund management activity undertaken by an asset management company (AMC) for which an AMC charges the mutual fund an 'investment and advisory fee', in accordance with provisions contained in the SEBI regulation.

#### **2.6.11 What is the meaning of 'immoveable property'?**

'Immoveable property' has not been defined in the Act. Therefore, the definition of 'immoveable property' as given in clause (26) of the General Clauses Act, 1897 has to be taken as per which "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.

### **2.7 Activity to be taxable should not constitute merely a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution.**

#### **2.7.1 What are 'deemed sales' defined in article 366(29A)?**

The six categories of deemed sales as defined in article 366(29A) of the Constitution are –

- transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration
- transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract
- delivery of goods on hire-purchase or any system of payment by installments
- transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration

- supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration
- supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

### **2.7.2 Once transfer of title by way of sale of goods is specifically excluded, what is the need to exclude deemed sales specifically?**

Some categories of deemed sales do not involve transfer of title in goods like transfer of goods on hire-purchase or transfer of right to use goods. Accordingly, deemed sales have been specifically excluded.

### **2.7.3 Is there a possible conflict between exclusion of transactions covered under Article 366 (29A) and activities that have been declared as services under section 66E?**

No. Activities specified under section 66E, which are related to transactions that are deemed as sales under article 366 (29A), have been carefully specified to ensure that there is no conflict. This would be evident from the following illustrations-

- Transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract is a category of deemed sales. On the other hand the declared list entry is limited to the service portion in execution of a works contract.
- Delivery of goods on hire-purchase or any system of payment by installments is deemed to be a sale under article 366 (29A), while the related declared service list entry is limited to activities related to delivery of goods on hire-purchase or any system of payment by installments
- Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration is again a specified category of deemed sales. The declared list entry in clause (f) of section 66E specifies transfer of goods by way of hiring, leasing or licensing or in any such manner without involving transfer of right to use goods as a declared service.
- Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration is a deemed sale of goods. Such supply takes place in restaurants or in catering. On the other hand clause (i) of section 66E restricts the declared service to service portion in an activity where such supply of food or drinks takes place.

It is thus evident that the activities specified as declared services in section 66E do not encroach upon the area of deemed sales. In fact most of the declared services have been specified with the intent of clarifying the distinction between deemed sales and activities related thereto which are outside the realm of deemed sales but qualify as a service.

## **2.8 Transactions only in money or actionable claims do not constitute service**

### **2.8.1 What kind of activities would come under ‘transaction only in money’?**

- The principal amount of deposits in or withdrawals from a bank account.
- Advancing or repayment of principal sum on loan to someone.
- Conversion of Rs 1,000 currency note into one rupee coins to the extent amount is received in money form.

### **2.8.2 Would a business chit fund comes under ‘transaction only in money’?**

In business chit fund since certain commission received from members is retained by the promoters as consideration for providing services in relation to the chit fund it is not a transaction only in money. The consideration received for such services is therefore chargeable to service tax.

### **2.8.3 Would the making of a draft or a pay order by a bank be a transaction only in money?**

No. Since the bank charges a commission for preparation of a bank draft or a pay order it is not a transaction only in money. However, for a draft or a pay order made by bank the service provided would be only to the extent of commission charged for the bank draft or pay order. The money received for the face value of such instrument would not be consideration for a service since to the extent of face value of the instrument it is only a transaction in money.

### **2.8.4 Would an investment be transaction only in money?**

Investment of funds by a person with another for which the return on such investment is returned or repatriated to the investors without retaining any portion of the return on such investment of funds is a transaction only in money. Thus a partner being admitted in a partnership against his share will be a transaction in money. However, if a commission is charged or a portion of the return is retained as service charges, then such commission or portion of return is out of the purview of transaction only in money and hence taxable. Also, if a service is received in lieu of an investment it would cease to be a transaction only in money to the extent the investment represents the consideration for the service received.

### **2.8.5 What is the significance of Explanation 2 to the definition of service in clause (44) of section 65B of the Act?**

The said Explanation 2 clarifies that transaction in money does not include any activity in relation to money by way of its use or conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged. The implications of this explanation are that while mere transactions in money are outside the ambit of service, any activity related to a transaction in money by way of its use or conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination would not be treated as a transaction in money if a separate consideration is charged for such an activity. While the transaction in

money, per-se, would be outside the ambit of service the related activity, for which a separate consideration is charged, would not be treated as a transaction of money and would be chargeable to service tax if other elements of taxability are present. For example a foreign exchange dealer while exchanging one currency for another also charges a commission (often inbuilt in the difference between the purchase price and selling price of forex). The activity of exchange of currency, per-se, would be a transaction only in money, the related activity of providing the services of conversion of forex, documentation and other services for which a commission is charged separately or built in the margins would be very much a 'service'.

#### **2.8.6 Would debt collection services or credit control services be considered to be transaction only in money?**

No. Such services provided for consideration are taxable.

#### **2.8.7 What are actionable claims?**

As per section 3 of the Transfer of Property Act, 1893 actionable claims means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.

Illustrations of actionable claims are -

- Unsecured debts
- Right to participate in the draw to be held in a lottery.

#### **2.8.8 If an unsecured debt is transferred to a third person for a consideration would this activity be treated as service?**

No. Since unsecured debt is an actionable claim, a transaction only in such actionable claim is outside the ambit of service. However if a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax.

#### **2.8.9 Would sale, purchase, acquisition or assignment of a secured debt like a mortgage also constitute a transaction in money?**

Yes. However if a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax.

#### **2.8.10 What is the scope of 'beneficial interest in moveable property' in the definition of actionable claim?**

Black's Law Dictionary defines 'beneficial interest' as follows-

"A right or expectancy in something (such as a trust or an estate), as opposed to legal title to that thing. For example, a person with a beneficial interest in a trust receives income from the trust but does not hold legal title to the trust property"



Therefore 'beneficial interest in moveable property' is a right or expectancy in a moveable property like right to receive income accruing from a moveable property. It may be noted that accrual of income from a moveable property could be in the nature of a consideration for a taxable service, e.g. a hiring fees or a license fee accruing on hiring or licensing of a moveable property. In such a situation the service being provided in relation to such moveable property would not be covered in the exclusion clause. It is only if the beneficial interest in such property is transferred to another person for a consideration that the activity of transferring the beneficial interest would be covered.

**2.8.11 Would vouchers that entitle a person to enjoy a service, for example a health club, be an actionable claim?**

No. Such a voucher does not create a 'beneficial interest' in a moveable property but only entitles a person to enjoy a particular service for a single or specified number of times.

**2.8.12 Would recharge vouchers issued by service companies for enabling clients/consumers to avail services like mobile phone communication, satellite TV broadcasts, DTH broadcasts etc be 'actionable claims'?**

No. Such recharge vouchers do not create a 'beneficial interest' in a moveable property but only enable a person to enjoy a particular service.

**2.9 Provision of service by an employee to the employer is outside the ambit of service**

**2.9.1 Are all services provided by an employer to the employee outside the ambit of services?**

No. Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services. Services provided outside the ambit of employment for a consideration would be a service. For example, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service.

**2.9.2 Would services provided on contract basis by a person to another be treated as services in the course of employment?**

No. Services provided on contract basis i.e. principal-to-principal basis are not services provided in the course of employment.

**2.9.3 Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to service tax?**

No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.



2.9.4 What is the status of services provided by casual workers or contract labour?

If..... taxable	Then.....
Services provided by casual worker to employer who gives wages on daily basis to the worker	These are services provided by the worker in the course of employment
Casual workers are employed by a contractor, like a building contractor or a security services agency, who deploys them for execution of a contract or for provision of security services to a client	Services provided by the workers to the contractor are services in the course of employment and hence not taxable. However, services provided by the contractor to his client by deploying such workers would not be a service provided by the workers to the client in the course of employment. The consideration received by the contractor would therefore be taxable if other conditions of taxability are present.

2.10 Explanations to the definition of ‘service’

- **Explanation 1** clarifies that ‘service’ does not cover functions or duties performed by Members of Parliament, State Legislatures, Panchayat, Municipalities or any other local authority, any person who holds any post in pursuance of the provisions of the Constitution or any person as a Chairperson or a Member or a Director in a body established by the Central or State Governments or local authority and who is not deemed as an employee.
- **Explanation 2** clarifies that transaction in money does not include any activity in relation to money by way of its use or conversion by cash or by any other mode ,from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.’(please refer to point no 2.8.5 for further guidance on this)
- **Explanation 3** creates two exceptions, by way of a deeming provision, to the general rule that only services provided by a person to another are taxable. As per these deeming provisions establishment of a person located in taxable territory and establishment of such person located in non-taxable territory are deemed to be establishments of distinct persons. Further an unincorporated association or body of persons and members thereof are also deemed as separate persons. For implications please see point no 2.4.2 of this Guide.
- **Explanation 4** explains that a branch or an agency of a person through which the person carries out business is also an establishment of such person.

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## Guidance Note 3 – Taxability of Services

The taxability of services or the charge of service tax has been specified in section 66B of the Act. To be a taxable a service should be –

- provided or agreed to be provided by a person to another
- in the taxable territory
- and should not be specified in the negative list.

### 3.1 Provided or agreed to be provided

#### 3.1.1 What is the significance of the phrase ‘agreed to be provided’?

The phrase “agreed to be provided” has been retained from the definition of taxable service as contained in the erstwhile clause (105) of section 65 of the Act. The implications of this phrase are –

- Services which have only been agreed to be provided but are yet to be provided are taxable
- Receipt of advances for services agreed to be provided become taxable before the actual provision of service
- Advances that are retained by the service provider in the event of cancellation of contract of service by the service receiver become taxable as these represent consideration for a service that was agreed to be provided.

#### 3.1.2 Does the liability to pay the service tax on a taxable service arise the moment it is agreed to be provided without actual provision of service?

No. The point of taxation is determined in terms of the Point of Taxation Rules, 2011. As per these Rules point of taxation is –

- the time when the invoice for the service provided or agreed to be provided is issued;
- if invoice is not issued within prescribed time period( 30 days except for specified financial sector where it is 45 days) of completion of provision of service then the date of completion of service;
- the date of receipt of payment where payment is received before issuance of invoice or completion of service.

Therefore agreements to provide taxable services will become liable to pay tax only on issuance of invoice or date of completion of service if invoice is not issued within prescribed period of completion or on receipt of payment. For specific cases covered under the said Rules, including continuous supply of service, please refer to the Point of Taxation Rules, 2011.

## 3.2 Provided in the taxable territory

- Taxable territory has been defined in section 65B of the Act as the territory to which the Act applies i.e. the whole of territory of India other than the State of Jammu and Kashmir.
- “India” includes not only the land mass but 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(- of 1976); the sea-bed and the subsoil underlying the territorial waters; the air space above its territory and territorial waters; and 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.
- Detailed rules called the Place of Provision of Services Rules, 2012 have been made which determine the place of provision of service depending on the nature and description of service.
- Please refer to Guidance Note 5 relating to the Place of Provision of Services Rules, 2012

## 3.3 Service should not be specified in the negative list

As per section 66B, to be taxable a service should not be specified in the negative list. The negative list of services has been specified in section 66D of the Act. For the sake of simplicity the negative list of services has been reproduced in **Exhibit AI** to this Guidance Paper. For guidance on the negative list please refer to **Guidance Note 4**.

## 3.4 Relevant Questions relating to taxability of services

### 3.4.1 How do I know that I am performing a taxable service in the absence of a positive list?

The drill to identify whether you are providing taxable service is very simple. Pose the questions listed in Step 1 and Step 2 below-

#### Step 1

**To determine whether you are providing a ‘Service’**

Pose the following questions to yourself

S.NO.	QUESTION	ANSWER
	<b>1</b>	<b>2</b>
1	Am I doing an activity (including, but not limited to, an activity specified in section 66E of the Act) for another person*?	Yes
2	Am I doing such activity for a consideration?	Yes
3	Does this activity consist only of transfer of title in goods or immovable property by way of sale, gift or in any other manner?	No
4.	Does this activity constitute only a transfer, delivery or supply of goods which is deemed to be a sale of goods within the meaning of clause (29A) of article 366 of the Constitution	No
5	Does this activity consist only of a transaction in money or actionable claim?	No
6	Is the consideration for the activity in the nature of court fees for a court or a tribunal?	No
7	Is such an activity in the nature of a service provided by an employee of such person in the course of employment?	No
8	Is the activity covered in any of the categories specified in Explanation 1 or Explanation 2 to clause (44) of section 65B of the Act (para 2.10)	No

[\*if you are a person doing business through an establishment located in the taxable territory and another establishment located in non taxable territory OR an association or body of persons or a member thereof then please see Explanation 3 to clause (44) of section 65B of the Act (para 2.10) before answering this question]

If the answer to the above questions is as per the answers indicated in column 3 of the table above THEN you are providing a service.

**Step 2**

**To determine whether service provided by you is taxable**

If you are providing a ‘service’ (Step 1) and then pose the following questions to yourself-

S.NO.	QUESTION	ANSWER
	<b>1</b>	<b>2</b>
1	Have I provided or agreed to provide the service?	Yes
2	Have I provided or agreed to provide the service in the taxable territory?	Yes
3	Is this activity entirely covered in any of the services described in the negative list of services specified in section 66D of the Act?	No

If the answer to the above questions is also as per the answers given in column 3 of the table above THEN you are providing a ‘taxable service’

**3.4.2 Will I have to pay service tax for all taxable services provided in the taxable territory?**

No. You will not have to pay service tax on taxable services provided by you in the following cases:

- if in the previous financial year the aggregate value of taxable services provided by you was less than Rs.10 lakh and in the present financial year the aggregate value of taxable services provided by you is also less than Rs.10 lakh. (you start paying service tax after crossing the threshold of Rs 10 lakh)
- If the taxable service provided by you is covered under any one of the exemptions issued under section 93 of the Act.

**3.4.3 How do I know that the service provided by me is an exempt service?**

There are certain exemption notifications that have been issued under section 93 of the Act of which the main exemption no 25/2012-ST dated 20/6/12 has 39 heads (mega notification). If the service provided by you fits into the nature and description of services specified in these notifications then the service being provided by you is an exempted service. For the sake of convenience the proposed mega exemption has been reproduced at **Exhibits A3 of this Guide.**

**3.4.4 Are declared services also covered by exemptions?**

Yes.

**3.4.5 Are services other than declared services taxable?**

Yes. All services, whether declared or not, which are covered under Section 66B of the Act are taxable if elements of taxability are present. The only purpose behind declaring activities as service is to bring uniformity in assessment of such activities across the country.

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## Guidance Note 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. For ease of reference the negative list of services is given in **Exhibit A1**. 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.

### 4.1 Services provided by Government or local authority

#### 4.1.1 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:

- a) 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;
- b) services in relation to a vessel or an aircraft inside or outside the precincts of a port or an airport;
- c) transport of goods and/or passengers;
- d) support services, other than those covered by clauses (a) to (c) above, to business entities.

#### 4.1.2 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.

#### 4.1.3 ‘Government’ has not been defined in the Act. What is the meaning of Government?

Please refer to point no. 2.4.7.

#### 4.1.4 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. For detailed analysis please refer to point no. 2.4.10.

#### **4.1.5 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.

#### **4.1.6 Would a department of the Government need to get itself registered for each of the services listed in answer to Q. No.4.1.1 above?**

For the support services provided by the Government, other than where such support services are by way of renting of immovable property, 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 issued under the said section as well Service Tax Rules, 1994. For services mentioned at (a) to (c) of the list (point 4.1.1 above refers) and renting of immovable properties the tax will be payable by the concerned department.

#### **4.1.7 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, and which are not substitutable in any manner by any private entity, are not support services e.g. grant of mining or licensing rights or audit of government entities established by a special law, which are required to be audited by CAG under section 18 of the Comptroller and Auditor-General’s (Duties, Powers and Conditions of Service) Act, 1971 (such services are performed by CAG under the statute and cannot be performed by the business entity themselves and thus do not constitute support services.)

#### **4.1.8 Will the services provided by Police or security agencies to PSUs or corporate entities or sports events held by private entities be taxable?**

Yes. Services provided by government security agencies are covered by the main portion of the definition of support service as similar services can be provided by private entities. In any case it is also covered by the inclusive portion of the definition. However the tax will be actually payable on reverse charge by the recipient.

#### **4.1.9 What is the meaning of local authority?**

Please refer to point no 2.4.8 and 2.4.9.



#### **4.1.10 Department of Posts provides a number of services. What is the status of those services for the purpose of levy of service tax?**

As per sub-clause (i) of clause (a) of section 66D 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 are excluded from the negative list. Therefore, the following services provided by Department of Posts are not liable to service tax.

- Basic mail services known as postal services such as post card, inland letter, book post, registered post provided exclusively by the Department of Posts to meet the universal postal obligations.
- Transfer of money through money orders, operation of savings accounts, issue of postal orders, pension payments and other such services.

#### **4.1.11 Would agency or intermediary services on commission basis (distribution of mutual funds, bonds, passport applications, collection of telephone and electricity bills), which are provided by the Department of Posts to non-government entities be liable to service tax?**

Yes. Agency services carried out on payment of commission on non government business are excluded from the negative list entry relating to services provided by Government or a local authority.

### **4.2 Services provided by Reserve Bank of India**

#### **4.2.1 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.

#### **4.2.2 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.

#### **4.2.3 Would services provided by banks to RBI be also taxable?**

Yes. Services provided by banks to RBI would be taxable as these are neither in the negative list nor covered in any of the exemptions.

### **4.3 Services by a foreign diplomatic mission located in India**

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

### **4.4 Services relating to agriculture or agricultural produce.**

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



- agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing;
- supply of farm labour;
- processes carried out at the 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;
- renting of agro machinery or vacant land with or without a structure incidental to its use;
- loading, unloading, packing, storage and warehousing of agricultural produce;
- agricultural extension services;
- services provided by any Agricultural Produce Marketing Committee or Board or services provided by commission agent for sale or purchase of agricultural produce;

#### **4.4.1 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.

#### **4.4.2 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.

#### **4.4.3 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 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.

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

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

#### **4.4.5 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).

**4.4.6 Would operations like shelling of paddy or cleaning of wheat carried out outside the farm be covered in the negative list entry relating to agriculture as sub-clause (iii) of clause (d) of section 66D relating to services by way of processes carried out at an agricultural farm?**

The said sub-clause (iii) also includes 'such like operations which do not alter the essential characteristic of agricultural produce'. Therefore, activities like the processes carried out in agricultural farm would also be covered if the same are performed outside the agricultural farm provided such processes do not alter the essential characteristics of agricultural produce but only make it marketable in the primary market. Therefore, cleaning of wheat would be covered in the negative list entry even if the same is done outside the farm. Shelling of paddy would not be covered in the negative list entry relating to agriculture as this process is never done on a farm but in a rice sheller normally located away from the farm.

However, if shelling is done by way of a service i.e. on job work then the same would be covered under the exemption relating to 'carrying out of intermediate production process as job work in relation to agriculture'.

**4.4.7 Would agricultural products like cereals, pulses, copra and jaggery be covered in the ambit of 'agricultural produce' since on these products certain amount of processing may be done by a person other than a cultivator or producer?**

'Agricultural produce' has been defined in clause (5) of section 65B as 'any produce resulting from cultivation or rearing of plants, animals including all life- forms, on which either no further processing is done or such processing is done as is usually done by the cultivator or producer which does not alter essential characteristics of agricultural produce but make it marketable for primary market'. The processes contemplated in the said definition are those as are 'usually done by the cultivator or producer'

**4.4.8 Would the processes of grinding, sterilizing, extraction packaging in retail packs of agricultural products, which make the agricultural products marketable in retail market, be covered in the negative list?**

No. Only such processes are covered in the negative list which make agricultural produce marketable in the primary market.

**4.4.9 Would leasing of vacant land with a green house 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.

**4.4.10 What is the meaning of agricultural extension services?**

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

#### **4.4.11 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, 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. However any service provided by such bodies which is not directly related to agriculture or agricultural produce will be liable to tax e.g. renting of shops or other property.

### **4.5 Trading of goods**

#### **4.5.1 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 a service does not include reference to a service used for providing such service. (For guidance on clause (1) of section 66F please refer to Guidance Note 9) Moreover the title in the goods never passes on to such agents to come within the ambit of trading of goods.

#### **4.5.2 Would forward contracts in commodities be covered under trading of goods?**

Yes. Forward 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.

#### **4.5.3 Would commodity futures be covered under trading of goods?**

In commodity futures actual delivery of goods does not normally take place and the purchaser under a futures contract normally offset 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. These are in the nature of derivatives which have been dealt with in point no. 4.14.9.

#### **4.5.4 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.

### **4.6 Processes amounting to manufacture or production of goods**

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, which does not involve transfer of title in goods, provided duties of excise are leviable on such processes under the Central Excise Act, 1944 or any of the State Acts.

**4.6.1 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 A3.

**4.6.2 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. However if central excise duty is wrongly paid on a certain process which does not amount to manufacture, with or without an intended benefit, it will not save the process on this ground.

**4.7 Selling of space or time slots for advertisements other than advertisements broadcast by radio or television**

‘Advertisement’ has been defined in section 65 B of the Act as “any 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.”

**4.7.1 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?**

Taxable	Non-taxable
Sale of space or time for advertisement to be broadcast on radio or television	Sale of space for advertisement in print media
Sale of time slot by a broadcasting organization.	Sale of space for advertisement in bill boards, public places (including stadia), buildings, conveyances, cell phones, automated teller machines, internet
	Aerial advertising

**4.7.2 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 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.

**4.7.3 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.

For guidance on how to determine whether or not a combination of services is bundled in the ordinary course of business please refer to **Guidance Note 9 of this Guide**.

**4.7.4 Whether merely canvassing advertisement for publishing on a commission basis by persons/agencies is taxable?**

Yes. These services are not covered in the negative list entry.

**4.8 Access to a road or a bridge on payment of toll charges**

**4.8.1 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.

**4.8.2 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.

## **4.9 Betting, gambling or lottery**

“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’.

### **4.9.1 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.

## **4.10 Entry to Entertainment Events and Access to Amusement Facilities.**

‘Entertainment event’ 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, such as exhibition of cinematographic films, circus, concerts, sporting events, fairs, 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 places but does not include a place within such facility where other services are provided’.

### **4.10.1 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 performed in the open does not cease to be a theatrical performance provided it is performed in the manner it is performed in a theatre, i.e. before an audience.

### **4.10.2 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.

### **4.10.3 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.



#### **4.10.4 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.

#### **4.10.5 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. For guidance on the rules of interpretation please refer to **Guidance Note 9**.

### **4.11 Transmission or distribution of electricity**

#### **4.11.1 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 licensed under the said Act
- any other entity entrusted with such function by the Central or State Government

#### **4.11.2 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.

#### **4.11.3 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.

### **4.12 Specified services relating to education**

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 a prescribed curriculum for obtaining a qualification recognized by law for the time being in force;
- education as a part of an approved vocational education course

#### **4.12.1 What is the meaning of ‘education as a part of curriculum for obtaining a qualification recognized by law’?**

It means that only such educational services are in the negative list as are related to delivery of education as ‘a part’ of the curriculum that has been prescribed for obtaining a qualification prescribed by law. It is important to understand that to be in the negative list the service should be delivered as part of curriculum. Conduct of degree courses by colleges, universities or institutions which lead grant of qualifications recognized by law would be covered. Training given by private coaching institutes would not be covered as such training does not lead to grant of a recognized qualification.

#### **4.12.2 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, Ministry of Labour and Employment, Government of India;
- a course run by an institute affiliated to the National Skill Development Corporation set up by the Government of India.

#### **4.12.3 Are services provided by international schools giving 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.

#### **4.12.4 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.

#### **4.12.5 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 or by educational institutions are separately exempted under the mega-notification. These are services provided to or by an educational institution in respect of education exempted from service tax, by way of,-

- (a) auxiliary educational services; or
- (b) renting of immovable property

#### **4.12.6 What are auxiliary educational services?**

‘Auxiliary educational services’ are defined in the mega notification. In term of the definition, the following activities are auxiliary educational services:

- any services relating to imparting any skill, knowledge or education, or
- development of course content, or
- any other knowledge – enhancement activity, whether for the students or the faculty, or
- any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including following services relating to:
  - admission to such institution
  - conduct of examination
  - catering for the students under any mid-day meals scheme sponsored by Government
  - transportation of students, faculty or staff of such institution.

#### **4.12.7 Are the auxiliary educational services for all educational institutions exempt?**

No. Exemption is available for services to or by educational institutions in respect of education exempted from service tax. Therefore, service tax is chargeable on such auxiliary educational services which are in respect of education chargeable to service tax.

#### **4.12.8 Are private tuitions covered in the entry relating to education?**

No. However, private tutors can avail the benefit of threshold exemption.

#### **4.12.9 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.

**4.12.10 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 viz-a-viz the recognized course. (For guidance on 'bundled services' please refer to **Guidance Note 9**).

**4.12.11 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 (please refer to point no 4.12.5 above).

**4.12.12 Educational institutes such as IITs, IIMs charge a fee from prospective employers like corporate houses/ MNCs, who come to the institutes for recruiting candidates through campus interviews. Whether services provided by such institutions are taxable?**

Yes. Service tax is liable on services provided by such institutions in relation to campus recruitment as such services are not covered in the negative list.

**4.12.13 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 (please refer to point no 4.12.3 above).

**4.12.14 In addition to the services specified in the negative list, which educational services are exempt if provided by a charitable organization?**

Please refer to point no 7.4.1.

**4.13 Services by way of renting of residential dwelling for use as residence**

'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'.

**4.13.1 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.

**4.13.2 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. (Please refer to Guidance Note 9).

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

1	2
If.....	Then.....
(i) a residential house taken on rent is used only or predominantly for commercial or non-residential use.	the renting transaction is not covered in this negative list entry.
(ii) if a house is given on rent and the same is used as a hotel or a lodge	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.
(iii) rooms in a hotel or a lodge are let out whether or not for temporary stay	the renting transaction is not covered in this negative list entry because a hotel or a lodge is not a residential dwelling.
(iv) government department allots houses to its employees and charges a license fee	such service would be covered in the negative list entry relating to services provided by government and hence non- taxable.
(v) furnished flats given on rent for temporary stay (a few days)	such renting as residential dwelling for the bonafide use of a person or his family for a reasonable period shall be residential use; but if the same is given for a short stay for different persons over a period of time the same would be liable to tax.

## 4.14 Financial sector

### 4.14.1 What is the manner of dealing with various services provided by banks and other financial institutions?

Banks and financial institutions provide a bouquet of financial services relating to lending or borrowing of money or investments in money. For such services invariably a variety of instruments, often complex in nature, are used in the financial markets. Transactions in such instruments have to be examined on the touchstone of definition of 'service' given in clause (44) of section 65B and the list of services specified in the negative list to see whether such transactions would be chargeable to service tax. Broadly, the following legal provisions would have a bearing on determining the taxability of such transactions.

- The definition of 'service' excludes activities that constitute only transactions in money or actionable claims. 'Money' has been defined in clause (33) of section 65B to include instruments like cheques, drafts, pay orders, promissory notes, letters of credit etc. Therefore activities that are only transactions in such instruments would be outside the definition of service. This would include transactions in Commercial Paper ('CP') and Certificate of Deposit ('CD') (on the understanding of being in the nature of promissory notes), issuance of drafts or letters of credit etc.
- Explanation 2 to clause (44) of section 65B has to be kept in mind which clarifies that transaction in money does not include any activity in relation to money by way of its use or conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged. The implications of this explanation are that while mere transactions in money are outside the ambit of service, any activity related to a transaction in money by way of its use or conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination would not be treated as a transaction in money if a separate consideration is charged for such an activity. While the transaction in money, per-se, would be outside the ambit of service the related activity, for which a separate consideration is charged, would not be treated as a transaction of money and would be chargeable to service tax if other elements of taxability are present therefore service tax would be levied on service charges normally charged for various transactions in money including charges for making drafts, letter of credit issuance charges, service charges relating to issuance of CDs/CPs etc.
- Activities that constitute only transactions in 'goods' are also excluded from the definition of service. 'Goods' have been defined in clause (25) of section 65 B to include 'securities'. Definition of 'securities include 'derivatives'. These two instruments have been discussed in detail in point no. 2.6.6 to 2.6.8. Transactions in instruments like interest rate swaps and foreign exchange swaps would be excluded from the definition of 'service' as such instruments are derivatives, being securities, based on contracts of difference. Since only transfer of title in securities is excluded from the definition of 'service' any attendant service charges or fees would be chargeable to service tax.

- Further services by way of extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount. This has been explained in point nos. 14.2 to 14.4 below.

#### **4.14.2 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”?**

The negative list entry covers any such service wherein moneys due are allowed to be used or retained on payment of interest or on a discount. The words used are ‘deposits, loans or advances and have to be taken in the generic sense. They would cover any facility by which an amount of money is lent or allowed to be used or retained on payment of what is commonly called the time value of money which could be in the form of an interest or a discount. This entry would not cover investments by way of equity or any other manner where the investor is entitled to a share of profit.

Illustrations of such services are -

- Fixed deposits or saving deposits or any other such deposits in a bank or a financial institution for which return is received by way of interest.
- Providing a loan or overdraft facility or a credit limit facility 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.

#### **4.14.3 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.

#### **4.14.4 To what extent is invoice discounting or cheque discounting or any other similar form of discounting covered in the negative list entry?**

Such discounting is covered only to the extent consideration is represented by way of discount as such discounting is nothing else but a manner of extending a credit facility or a loan.

#### **4.14.5 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



#### **4.14.6 Would transactions entered into by banks in instruments like repos and reverse repos be covered in this negative list entry?**

Section 45U(c) of the RBI Act, 1934 defines 'repos' as an instrument for borrowing funds by selling securities with an agreement to repurchase the securities on a mutually agreed future date at an agreed price which includes interest for the funds borrowed'.

Section 45U (d) of the RBI Act, 1934 defines 'reverse repos' as an instrument for lending funds by buying securities with an agreement to resell the securities on a mutually agreed future date at an agreed price which includes interest for the funds lent'.

Repos and reverse repos are financial instruments of short term call money market that are normally used by banks to borrow from or lend money to RBI. The margins, called the repo rate or reverse repo rate in such transactions are nothing but interest charged for lending or borrowing of money. Thus they have the characteristics of loans and deposits for interest. However they are more appropriately excluded from the definition of service itself being the sale and purchase of securities, which are goods.

#### **4.14.7 Would subscription to or trading in Commercial Paper (CP) or Certificates of Deposit (CD) be taxable?**

Commercial Paper ('CP') and Certificate of Deposit ('CD') are understood as unsecured money market instruments which may be issued in the form of a promissory note or in a dematerialized form through any of the depositories approved by and registered with SEBI. CPs are normally issued by highly rated companies, primary dealers and financial institutions at a discount to the face value. CDs can be issued by Scheduled Commercial Banks (excluding RRBs and Local Area Banks) and All – India Financial Institutions (FIs) permitted by RBI.

Since these are instruments for lending or borrowing money where in consideration is represented by way of a discount issue or subscription to CPs or CDs would be covered in the negative list entry relating to 'services by way of extending deposits, loans or advances in so far as consideration is represented by way of interest or discount'. It may also be borne in mind that promissory note is included in the definition of money in the Act as given in clause (33) of section 65B.

However if some service charges or service fees or documentation fees or broking charges or such like fees or charges are charged, the same would be considerations for provision of service and chargeable to service tax.

#### **4.14.8 Would forward contracts in commodities or currencies be within the ambit of definition of 'service'?**

A forward contract is an agreement, executed, to purchase or sell a pre-determined amount of a commodity or currency at a pre-determined future date at a pre-determined price. The settlement could be by way of actual delivery of underlying commodity/currency or by way of net settlement of differential of the forward rate over the prevailing market rate on the settlement date.

In a forward contract effectively two contracts are entered into, one for purchase and other for sale at a future date at a pre-determined price. These contracts would be in the nature of



transfer in title in goods (in case the forward contract relates to a commodity) or transaction only money (in case the forward contract relates to transaction and money). Therefore, forward contracts in commodities or currencies would not fall in the ambit of definition of 'service'. For transactions in money Explanation 2 to clause (44) of section 65B should also be kept in mind.

However if some service charges or service fees or documentation fees or broking charges or such like fees or charges are charged, the same would be considerations for provision of service and chargeable to service tax.

#### **4.14.9 Would 'future contracts' be chargeable to Service tax?**

Future contracts are in the nature of financial derivatives price of which is depended on the value of underlying stocks or index of stocks or certain approved currencies and the settlement happens normally by way of net settlement with no actual delivery.

Since future contracts are in the nature of contracts of difference based on the prices of underlying stocks or index of stocks or approved currencies, they would be outside to the ambit of definition of 'service' as being transactions only in transfer of title in derivatives. For details please refer to point no. 2.6.8.

#### **4.14.10 Would charges for late payment of dues on credit card outstandings be chargeable to service tax?**

In case of a credit card, issuing entity allows the facility of payment of the purchases made by the card holder within a specified period failing which some charges are levied. The question that arises is whether the credit so extended for this payment is in the nature of a loan or advance for interest.

Interest for delayed payment of any consideration for the sale of goods or provision of service has been specifically excluded from value by rule 6 of valuation rules. Thus ordinarily any interest charged for delayed payment of consideration would have been outside the gambit of service tax. However in the case of credit cards the credit extended is not for the delayed payment of consideration for the provision of services. The services in the case of the credit card are by way of levy of issuing charges or the commission charged from merchants etc. The interest in this case is not for the consideration for the use of the card. Thus the benefit under the valuation rules will not be available to credit card companies.

The other question is whether such credit extended will amount to loans or advances. Loans and advances are meant to signify amounts contractually negotiated as such (loan or advance) and not merely failure to pay an amount at the due date. The exorbitant charges have also no relationship with the prevailing interest for the same class of creditworthiness and are in the nature of consideration for the services rendered for using the convenience of using the services by way of a credit card and hence taxable.

### **4.15 Services relating to transportation of passengers**

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, between places located in India; and
- metered cabs, radio taxis or auto rickshaws.

Following terms have also been defined in section 65B of the Act –

- stage carriage
- inland waterways
- metered cab

**4.15.1 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 a motor vehicle meant to carry more than 12 passengers to a State transport undertaking is exempt (refer entry no. 22 of Exhibit A3).

**4.15.2 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. (Refer entry No. 23 of Exhibit A3).

**4.15.3 Are national waterways covered in the definition of inland waterways?**

Yes.

**4.15.4 Would services by way of transportation of passengers on a vessel, from say Chennai to Port Blair (mainland – island) or Port Blair to Havelock (inter island), be covered in the negative list entry?**

Yes in case the transportation is not predominantly for tourism purpose. Such transportation by a vessel (of any size) is covered in negative list since such transportation is between two places located in India.

**4.15.5 What is the scope of the phrase ‘predominantly for tourism purpose’ which qualifies the negative list entry relating to public transportation of passengers by a vessel in sub-clause (v) of clause (o) of section 66D?**

The words ‘other than predominantly for tourism purpose’ qualify the preceding words “public transport”. This implies that the public transport by a vessel should not be predominantly for

tourism purposes. Normal public ships or other vessels that sail between places located in India would be covered in the negative list entry even if some of the passengers on board are using the service for tourism as predominantly such service is not for tourism purpose. However services provided by leisure or charter vessels or a cruise ship, predominant purpose of which is tourism, would not be covered in the negative list even if some of the passengers in such vessels are not tourists.

## **4.16 Service relating to transportation of goods**

The following services provided in relation to transportation of goods are specified in the negative list of services:-

- by road except the services of (i) a goods transportation agency; or (ii) a courier agency
- by aircraft or vessel from a place outside India up to the customs station of clearance in India; or
- by inland waterways.

### **4.16.1 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 transportation 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.

### **4.16.2 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.

### **4.16.3 Some transporters under-take door-to-door transportation of goods or articles and they have made special arrangements for speedy transportation and timely delivery of such goods or articles. Such services are known as ‘Express Cargo Service’ with assurance of timely delivery. Whether such ‘Express cargo service’ is excluded as courier agency service under this negative list entry?**

“Courier” has been defined in section 65B as any person engaged in door-to-door delivery of time sensitive documents, goods or articles utilizing the services of a person, either directly or indirectly, to carry or accompany such documents, goods or articles. The nature of service provided by ‘Express Cargo Service’ falls within the scope and definition of the courier agency.

Hence, the said service is excluded from the negative list entry relating to transportation of goods by road.

**4.16.4 Whether services provided by ‘angadia’ are liable to service tax as a courier service?**

‘Angadia’ undertakes delivery of documents, goods or articles received from a customer to another person for a consideration. Therefore, ‘angadias’ are covered within the definition of a ‘courier’ and services provided by angadia are liable to service tax.

**4.16.5 Are the following services of transportation of goods covered in the negative list entry?**

Nature of service relating to transportation of goods	Whether covered in the negative list entry?
By railways	No
By air within the country or abroad	No
By a vessel in the coastal waters	No
By a vessel on a national waterway	Yes
Services provided by a GTA	No

**4.16.6 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. (for guidance on this rule please refer to **Guidance Note 9**)

**4.16.7 If transportation of goods takes place from Delhi to Jammu by road then how would the taxability of such transportation be determined considering that Jammu is located in at a place outside taxable territory?**

Please refer to Guidance note 5 relating to **Place of Provision of Services**.

**4.17 Funeral, burial, crematorium or mortuary services including transportation of the deceased**

This negative list entry is self-explanatory.



## Guidance Note 5

### Place of Provision of Services Rules, 2012

## 5.1 Introduction

### 5.1.1 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.

### 5.1.2 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.

### 5.1.3 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.

## 5.2 Basic Framework

### 5.2.1 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.

### 5.2.2 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 other than 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.

### **5.2.3 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.

### **5.2.4 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”.

Flow Diagram F1 at the end of this section illustrates the manner of determination of location.

#### **5.2.5 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.

#### **5.2.6 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 5.3.4.

#### **5.2.7 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. For further guidance in this regard, please see section 5.3.4.

### **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.*

## **5.2.8 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 pre-paid) and a unique identification number (10-digit or 8-digit, as the case may be) by the service provider.

5.3 Main Rule- Rule 3- Location of the Receiver

5.3.1 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- see para 5.14 of this guidance paper). 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:-

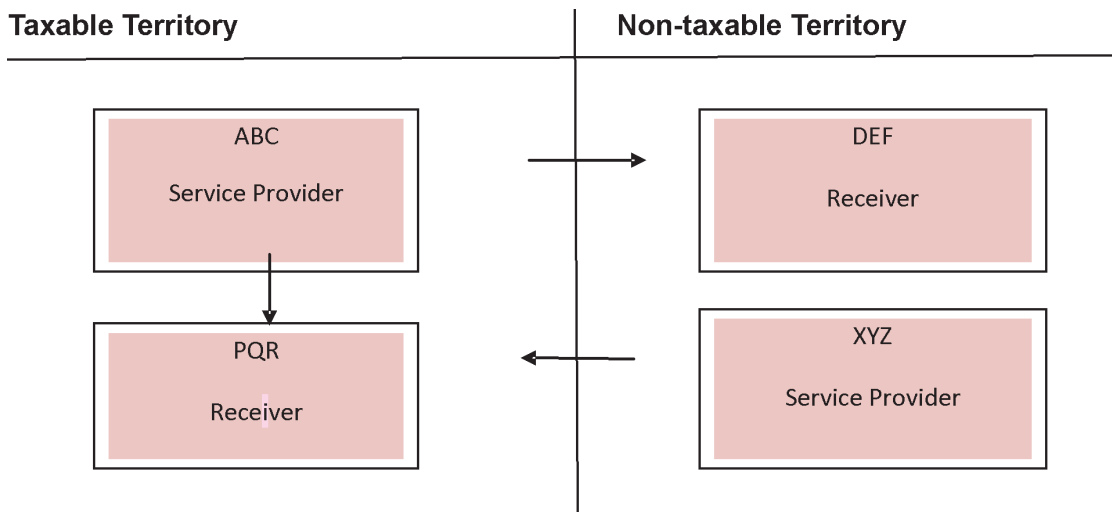
- A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.
- B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service.

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.

Following illustration will make this clear:-



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 non-taxable territory, the tax liability would be discharged by the receiver, under the reverse charge principle (also referred to as “tax shift”).

**5.3.3 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 chauffeur to collect the car from the service station later in the day, after the servicing is over. The chauffeur 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.*

**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.

**Illustration**

The following example illustrates the above, by comparing the place of provision of services rendered under a Global Agreement<sup>1</sup> vis-à-vis a Global Framework Agreement<sup>2</sup>.

AAA is a firm with its manufacturing unit and business establishment located in the taxable territory A. It has got two other manufacturing plants located in countries X and Y (say, AAA-X and AAA-Y respectively). AAA wishes to obtain IT services for a new production process for its three manufacturing plants in the region.

BBB is an IT firm located in the taxable territory (location of business establishment). BBB Ltd also has fixed establishments (subsidiaries) located in country X (say BBB-X) and in country Y (say, BBB- Y).

AAA engages BBB for meeting its IT service requirement.

**Scenario 1 [See Flow Diagram F 2 at the end of this section]**

AAA enters into a **Global (centralized purchasing) agreement** with BBB for provision of IT services for the whole group. Following are the different transactions under which services are provided:-

- a) Under the global agreement, some component of IT service is provided by BBB to AAA in country A (say, Transaction 1).
- b) To meet the requirements of providing IT solutions specific to the plants AAA-X and AAA-Y in countries X and Y, BBB enters into agreements with its subsidiaries BBB-X (in country X) and BBB-Y (in country Y), under which they provide IT services to

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<sup>1</sup> A ‘Global Contract or Agreement’ is between two parent companies for provision of services from one to the other, where actual provision of services is to be made to subordinate offices of the recipient company in different tax jurisdictions.

<sup>2</sup> A ‘Global Framework Agreement’ is between two parent companies for provision of services, but here, the ‘framework agreement’ only specifies the broad terms of the agreement i.e. fees, terms and conditions, the list of recipient branches/offices or even the details of provision of services to be made. The subsidiaries in different locations then enter into separate and independent business agreements, for provision of services and payments.



BBB (say, Transaction 2 and Transaction 3). Though these services are provided by BBB-X and BBB-Y to BBB, these are rendered as under:-

- By BBB-X to AAA-X (in country X)- under transaction 2, and
  - By BBB-Y to AAA-Y (in country-Y) – under transaction 3.
- c) AAA enters into separate agreements with AAA-X and AAA-Y, under which AAA Ltd provides IT services to them (transaction 4 and transaction 5).

The transactions and provision of service under each are illustrated in the Flow diagram F2 titled 'Scenario1' at the end of this section.

### **Scenario 2 [See Flow Diagram F 3 at the end of this section]**

AAA enters into a **Framework Agreement** with BBB for provision of IT services for the whole group. The Framework agreement covers the broad contours of supply between the two parties, payment milestones, obligations relating to confidentiality, penalty for default, limitations of liability and warranties etc, which would apply as and when group companies enter into separate agreements, in accordance with the terms envisaged in the framework agreement. BBB-X and BBB-Y could then enter into separate and independent business agreements with AAA-X and AAA-Y, in countries X and Y respectively, for provision of IT services. There are four agreements, but only three transactions involving provision of services, as indicated in the Flow diagram F3- Scenario 2 at the end of this section.

#### **5.3.5 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.

### **5.4 Rule 4- Performance based Services**

#### **5.4.1 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.

**5.4.2 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.

**5.4.3 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).

**5.4.4 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.*

## **5.5 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.

### **5.5.1 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.

### **5.5.2 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.

### **5.5.3 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.

### **5.5.4 What if a service is not directly related to immovable property?**

The place of provision of services rule 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 a retail chain to design a common décor for all its stores in India, this service would not be land-related. The default rule i.e. Rule 3 will apply in this case.

**5.5.5 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.

**5.6 Rule 6- Services relating to Events**

**5.6.1 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.

**5.6.2 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.*

**5.6.3 What is a service ancillary 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.

**5.6.4 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.

**5.7 Rule 7- Part performance of a service at different locations**

**5.7.1 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”.*

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.

## **5.8 Rule 8- Services where the Provider as well as Receiver is located in Taxable Territory**

### **5.8.1 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.

### **5.8.2 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.*

## **5.9 Rule 9- Specified services- Place of provision is location of the service provider**

### **5.9.1 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.



### **5.9.2 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).

### **5.9.3 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.

### **5.9.4 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.



### 5.9.5 What are “Online information and database access or retrieval services”?

“Online information and database access or retrieval services” are services in relation to on-line 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.

### 5.9.6 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’:-

- 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 freight 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.

### **5.9.7 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 (explained in guide at point 6.6), 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;
- vi) 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.

### **5.9.8 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 upto 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).

## **5.10 Rule 10- Place of Provision of a service of transportation of goods**

### **5.10.1 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.

**5.10.2 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.*

**5.10.3 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.*

5.11 Rule 11- Passenger Transportation Services

5.11.1 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.

5.11.2 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

5.11.3 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.

5.11.4 The Table below contains illustrations which explain the principle enunciated in this Rule.

Illustrations

S. No.	Journey	Place of Provision	Taxability
Single Ticket (No stopover)			
1	Mumbai-Delhi	Mumbai	Yes, Mumbai being the place of embarkation.
2	Mumbai-Delhi-Jaipur	Mumbai	Yes, Mumbai, being the place of embarkation for the continuous journey.
3	Mumbai-Delhi-London-Delhi-London	Mumbai	-do-
4	Delhi-London-New York-London-New York	Delhi	Yes, New Delhi, being the place of provision for continuous journey with single return ticket.
5	Delhi-London-New York	Delhi	-do-
6	New York-London-Delhi	New York	No, New York is place of provision for continuous journey with single return ticket.

S. No.	Journey	Place of Provision	Taxability
7	New York-London-Delhi-Mumbai-Delhi-London-New York	New York	-do-
8	Delhi-Jammu-Delhi	Delhi	Yes, Delhi is the place of provision for continuous journey.
9	Jammu-Delhi-Jammu	Jammu	No, Jammu is the place of provision for continuous journey with single return ticket
<b>More than one ticket for a journey (issued by a single service provider, or by a single agent, for more than one service providers)</b>			
1	(a) Delhi-Bangkok-Delhi (b) Bangkok-Bali-Bangkok	Delhi is place of provision for journey (a); Bangkok is place of provision for journey (b)	Journey (a) is taxable since place of provision is in taxable territory; Journey (b) is not taxable since place of provision is outside taxable territory.
2	(a) Delhi-New York-Delhi (b) New York-Boston-New York	Delhi is place of provision for journey (a); New York is place of provision for journey (b)	Journey (a) is taxable since place of provision is in taxable territory; Journey (b) is not taxable since place of provision is not in taxable territory.
3	(a) London-Delhi-London (b) Delhi-Chandigarh (c) Chandigarh-Amritsar (d) Amritsar-Delhi	London is place of provision for journey (a); Delhi is place of provision for journey (b); Chandigarh is place of provision for journey (c); Amritsar is place of provision for journey (d)	Journey (a) is not taxable since place of provision is outside taxable territory; Journeys (b), (c) and (d) are taxable since place of provision is in taxable territory.
4	(a) Delhi-Jammu (b) Jammu-Delhi	Delhi is place of provision for journey (a) Jammu is place of provision for journey (b)	Journey (a) is taxable since place of provision is in taxable territory. Journey (b) is not taxable since place of provision is outside taxable territory.
5	(a) Jammu-Delhi-Jammu (b) Delhi-Bangkok-Delhi	Jammu is place of provision for journey (a); Delhi is place of provision for journey (b)	Journey (a) is not taxable since place of provision is outside taxable territory for the continuous journey with single, return ticket. Journey (b) is taxable, since place of provision is in taxable territory for the journey with single, return ticket.
6	(a) Jammu-Delhi (b) Delhi-Bangkok-Delhi (c) Delhi-Lucknow (d) Lucknow-Jammu	Jammu is place of provision for journey (a); Delhi is place of provision for journey (b); Delhi is place of provision for journey (c); Lucknow is place of provision for journey (d)	Journey (a) is not taxable since place of provision is not in taxable territory; Journeys (b), (c) and (d) are taxable since place of provision is in taxable territory for each of these.

It may also be pertinent to mention that for flights originating from, or terminating in, the north-east region, though the place of provision will be determined in terms of this rule, there is an exemption for air transportation of passengers, embarking from, or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal. The examples in the table below illustrate some situations.

S. No.	Journey	Place of Provision	Taxability
<b>Single ticket (No stopover)</b>			
1	Dibrugarh-Kolkata-Mumbai	Dibrugarh is the place of provision	Journey is taxable, but no service tax is payable owing to the exemption.
2	Dibrugarh-Kolkata-Mumbai-Kolkata-Dibrugrah	Dibrugarh is the place of provision	Journey is taxable, but no service tax is payable owing to the exemption. Here it is relevant to note that the journey is against a single, return ticket.
3	Guwahati-Kolkata-Bangkok-Kolkata-Guwahati	Guwahati is the place of provision for the continuous journey	Place of provision being in the taxable territory, the service is taxable, but no service tax is payable owing to the exemption and journey is deemed continuous.
4	Kolkata-Guwahati-Kolkata	Kolkata is the place of provision for the continuous journey.	Place of provision being in the taxable territory, the service is taxable, but no service tax is payable owing to the exemption (the onward and return legs of journey terminate and originate in exempted territory respectively).
<b>More than one ticket for a journey (issued by a single service provider, or by a single agent, for more than one service providers)</b>			
1	(a) Bagdogra-Kolkata (b) Kolkata-Delhi	Place of provision for journey (a) is Bagdogra. Place of provision for journey (b) is Kolkata.	In these cases, generally, the passenger would be required to change aircraft after exiting the airport, and is required to obtain a fresh boarding pass for the next leg. This is deemed to be a stopover. Thus, journey (b) is taxable, and service tax is payable on leg (b).
2	(a) Guwahati-Kolkata-Guwahati (b) Kolkata-Bangkok-Kolkata	Each journey is deemed continuous based on the assumption that two single return tickets are purchased. For journey (a) place of provision is Guwahati, and for journey (b) place of provision is Kolkata.	Generally, in such cases, since separate return tickets have been purchased for the two journeys, after completing journey (a) the passenger will be required to disembark from the aircraft and complete check-in formalities for journey (b). Thus, the journey will not be deemed to be continuous and place of provision for journey (b) will be Kolkata.



**5.12 Rule 12- Services provided on board conveyances**

**5.12.1 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.

**5.12.2 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).*

**5.13 Rule 13- Power to notify services or circumstances**

**5.13.1 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.

**5.14 Rule 14- Order of application of Rules**

**5.14.1 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.*

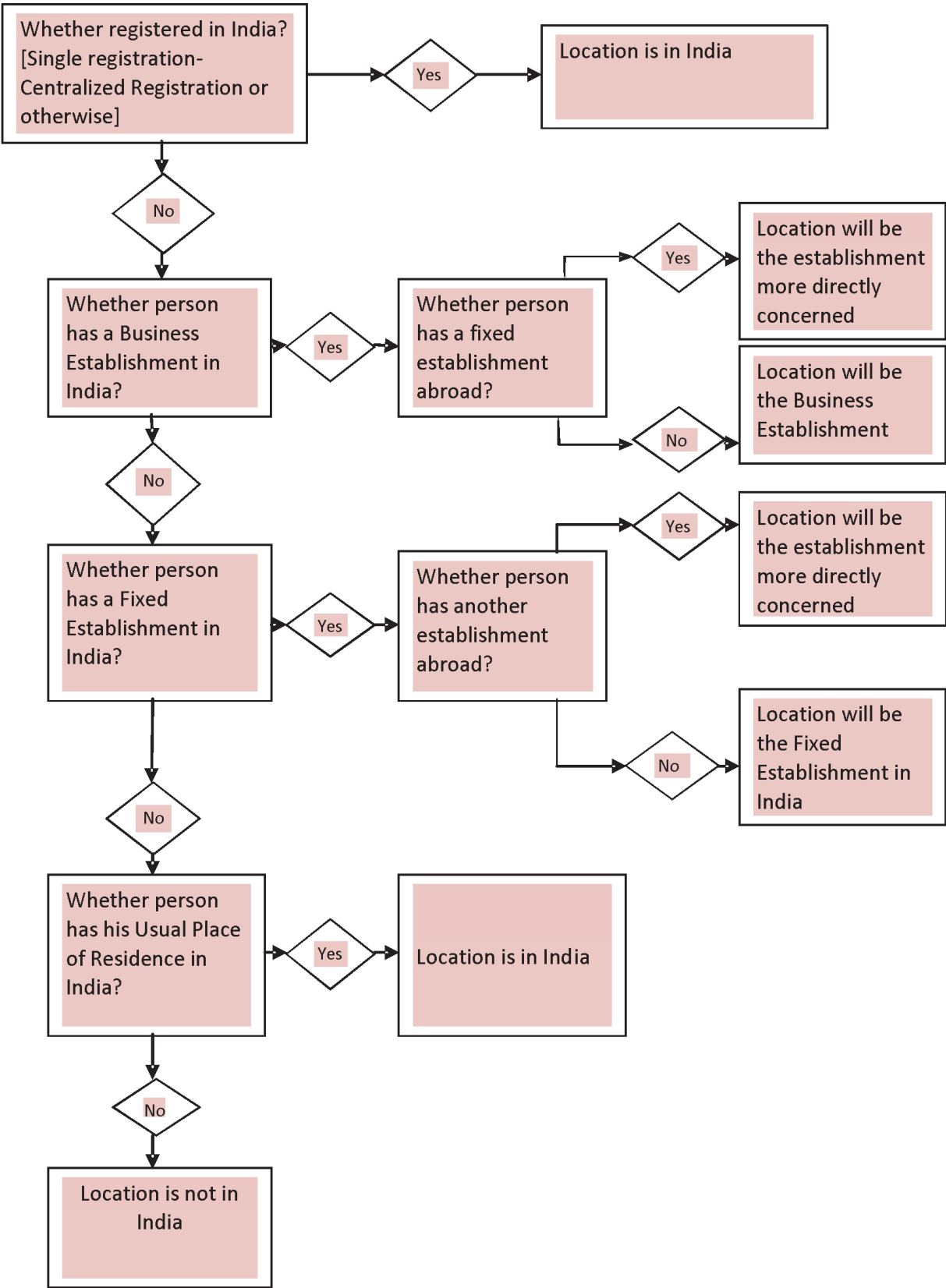
*Whereas, by application of Rule 8, since both the provider and the receiver are located in taxable territory, the place of provision would be the location of the service receiver i.e. New Delhi. Place of provision being in the taxable territory, the service would be taxable in India.*

*By application of Rule 15, the later of the Rules i.e. Rule 8 would be applied to determine the place of provision.*

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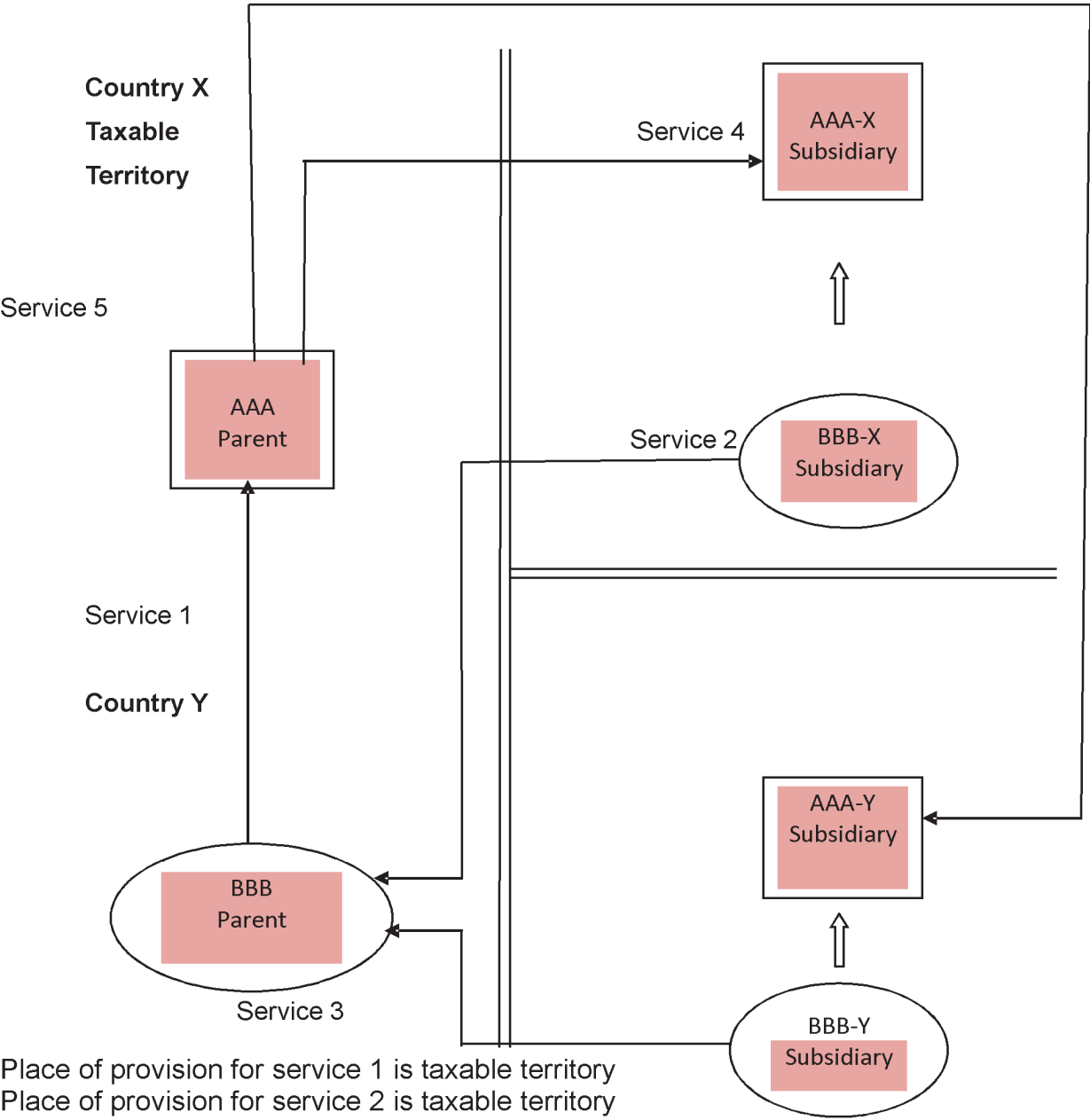
FLOW DIAGRAM F1 (Refer para 5.2.4)

HOW TO DETERMINE LOCATION?



FLOW DIAGRAM F 2 (Refer para 5.3.4)

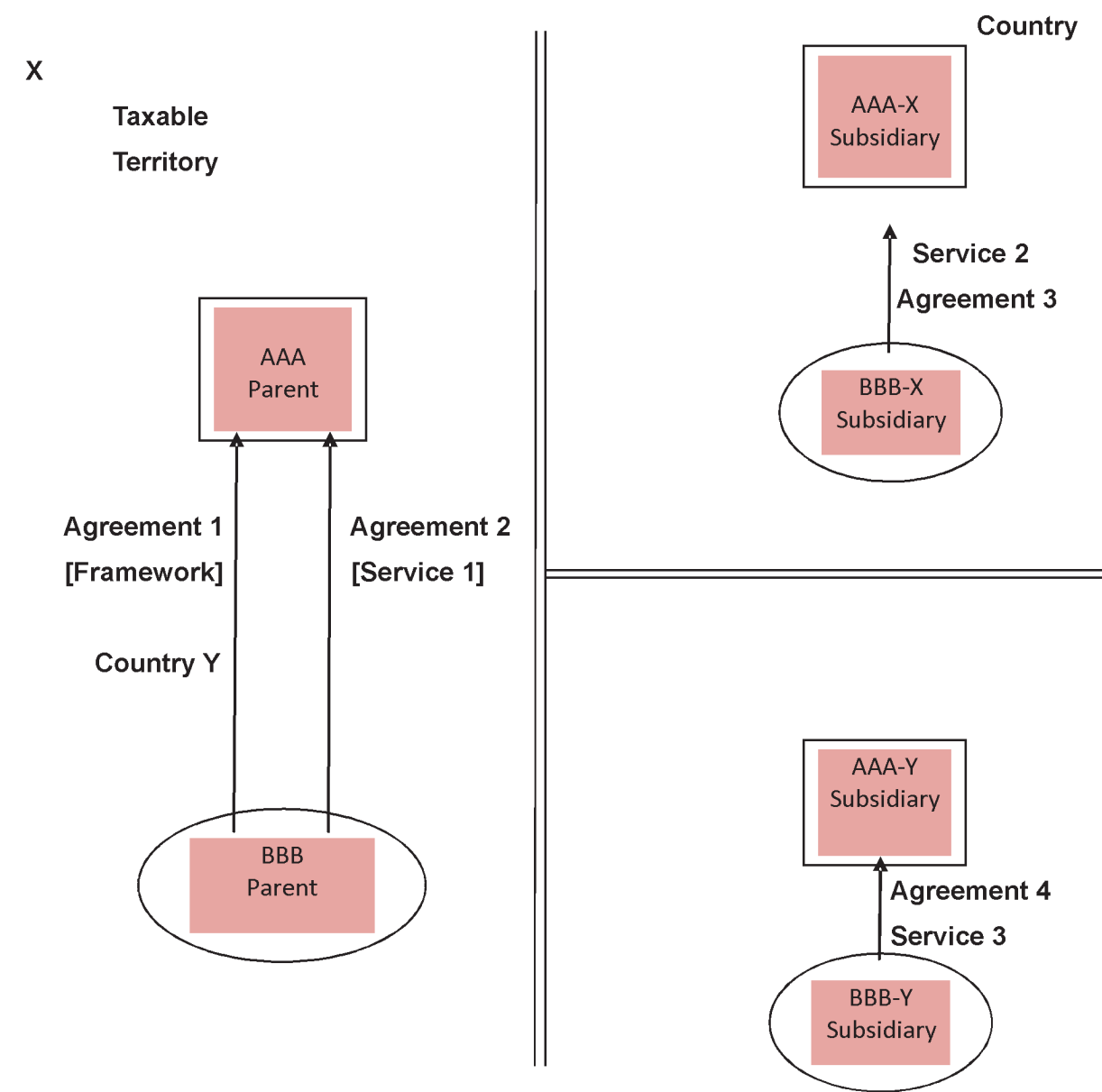
PROVISION OF SERVICES UNDER A 'GLOBAL AGREEMENT'- Scenario 1



Place of provision for service 1 is taxable territory  
Place of provision for service 2 is taxable territory  
Place of provision for service 3 is taxable territory  
Place of provision for service 4 is country X  
Place of provision for service 5 is country Y.

FLOW DIAGRAM F 3 (Refer para 5.3.4)

PROVISION OF SERVICES UNDER ‘FRAMEWORK AGREEMENT’- Scenario 2



Agreement 1 is not transactional, has no consideration, and does not create a provision of service. Agreement 1 stipulates the terms and conditions which are activated only when the parties (i.e. group subsidiaries on either side enter into separate and independent business agreements, in accordance with the terms specified in the framework agreement.

Under Agreement 2, service 1 is provided by BBB Ltd to AAA Ltd, and the place of provision of this service, under the main rule, is the location of the receiver i.e. within the taxable territory. Under Agreement 3, service 2 is provided by BBB-X to AAA-X, and the place of provision of this service, under the main rule, is country X i.e. outside the taxable territory. Under Agreement 4, service 3 is provided by BBB-Y to AAA-Y, and the place of provision of this service, again under the main rule, is country Y i.e. outside the taxable territory.

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## Guidance Note 6 – Declared Services

In the definition of ‘service’ contained in clause (44) of section 65B of the Act it has also 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 a competent authority;
3. temporary transfer or permitting the use or enjoyment of any intellectual property right;
4. development, design, programming, customization, adaptation, up gradation, 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.

The above activities when carried out by a person for another for consideration would amount to provision of service. Most of these services are presently also being taxed except in so far as Sl. No.5 is concerned. It is clarified that they are 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.

### 6.1 Renting of Immovable Property

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’

#### 6.1.1 Is renting of all kinds of immovable properties taxable?

No. Renting of certain kinds of immovable properties 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. (d) (iv) of Exhibit A1)

- renting of residential dwelling for use as residence (Sl. No. (m) of Exhibit A1)
- renting out of any property by the Reserve Bank of India
- renting out of any property by a Government or a local authority to a non-business entity.

Renting of all other immovable properties would be taxable unless covered by an exemption (refer 6.1.2).

**6.1.2 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.
- 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.
- Renting to an exempt educational institution

**6.1.3 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 immoveable property.

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

S. No.	Journey	Taxability
1.	Renting of property to an educational body	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.
2.	Renting of vacant land for animal husbandry or floriculture	Not chargeable to service tax as it is covered in the negative list entry relating to agriculture
3.	Permitting use of immoveable property for placing vending/dispensing machines	Chargeable to service tax as permitting usage of space is covered in the definition of renting
4.	Allowing erection of a communication tower on a building for consideration.	Chargeable to service tax as permitting usage of space is covered in the definition of renting
5.	Renting of land or building for entertainment or sports	Chargeable to service tax as there is no specific exemption.
6.	Renting of theatres by owners to film distributors (including under a profit-sharing arrangement)	Chargeable to service tax as the arrangement amounts to renting of immovable property.



**6.1.5 Whether hotels/restaurants/convention centres 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.

**6.2 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.**

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 or any other person, 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.

**6.2.1 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 judgement 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."*

Value, in the case of flats given to first category of service receiver will be the value of the land when the same is transferred and the point of taxation will also be determined accordingly.

**6.2.2 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 re-construction; (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.

**6.2.3 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.

**6.2.4 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.

**6.2.5 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.

**6.2.6 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. As clarified at serial no. 5 of the table in point no 2.3.2 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.

**6.2.7 In certain States requirement of completion certificate are waived of for certain specified types of buildings. How would leviability of service tax be determined in such cases?**

In terms of Explanation to clause (b) of section 66E in such cases the completion certificate issued by an 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.

**6.2.8 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 immoveable property given in the General Clauses Act, 1897 is part of immoveable property. Such transfer would therefore be outside the ambit of 'service' being a transfer of title in immoveable 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.

## **6.3 Temporary transfer or permitting the use or enjoyment of any intellectual property right**

### **6.3.1 What is the scope of the term 'intellectual property right'?**

'Intellectual property right' has not been defined in the Act. The phrase has to be understood as in normal trade parlance as per which intellectual property right includes the following:-

- Copyright
- Patents
- Trademarks
- Designs
- Any other similar right to an intangible property

### **6.3.2 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 also 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.

## **6.4 Development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software**

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'.

### **6.4.1 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.

### **6.4.2 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.



#### **6.4.3 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 a 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.

#### **6.4.4 Would providing a license to use pre-packaged 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 judgement 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. For understanding the concept of transfer of right to use please refer to point no 6.6.1.
- 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 restrains 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.



**6.4.5 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.

**6.5 Activities in relation to delivery of goods on hire purchase or any system of payment by instalments**

**6.5.1 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. (For guidance on this aspect please refer to point no. 2.7 of this Guide) However activities or services provided in relation to such delivery of goods are covered in this declared list entry.

**6.5.2 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 deliverer 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.

### **6.5.3 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.

### **6.5.4 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’

**6.5.5 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.

**6.5.6 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 plus other charges explicitly charged as mentioned above.

**6.6 Transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods**

**6.6.1 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 judgment of the Supreme Court in the case of State of Andhra Pradesh vs Rashtriyaspat 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.

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

S.No.	Nature of transaction	Whether transaction involves transfer of right to use
1	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	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.
2	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.	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.
3.	Hiring of bank lockers	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)
4.	Hiring out of vehicles where it is the responsibility of the owner to abide by all the laws relating to motor vehicles	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)
5	Hiring of audio visual equipment where risk is of the owner	No transfer of right to use goods as effective control and possession is not transferred

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 conditions of an agreement relating to such transaction.

## **6.7 Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act**

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.

### **6.7.1 Would non-compete agreements be considered a provision of service?**

Yes. By virtue of a non-compete agreement one party agrees, for consideration, not to compete with the other in any specified products, services, geographical location or in any other manner. Such action on the part of one person is also an activity for consideration and will be covered by the declared services.

## **6.8 Service portion in execution of a works contract**

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 moveable or immoveable property or for carrying out any other similar activity or a part thereof in relation to such property.

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 to point no. 8.2 of this Guide.

**6.8.1 Would labour contracts in relation to a building or structure be 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.

**6.8.2 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.

**6.8.3 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.

**6.8.4 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.

**6.8.5. 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.

**6.8.6 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 immoveable 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.



**6.8.7 What is the way to segregate service portion in execution of a works contract from the total contract or what is the manner of determination of value of service portion involved in execution of a works contract?**

For detailed discussion on this topic please refer to Guidance Note 8, in particular point no 8.2.

**6.9 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**

**6.9.1 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.

**6.9.2 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 air-heating 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

**6.9.3. How is the value of service portion to be determined?**

For detailed discussion on this topic please refer to Guidance Paper 8 and in particular point no 8.4.



## Guidance Note 7 – Exemptions

Under the present system there are 88 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 (list of such exemptions is placed as **Exhibit A3**). The exemptions requiring some clarification are explained below:

### **7.1 Are services provided to all international organizations exempt from service tax?**

No. Services to only specified international organisations are exempt. ‘Specified international organisation’ 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
21. Asian Development Bank
22. South Asian Association for Regional Co-operation
23. International Jute Organisation, Dhaka, Bangladesh

*Note: As the list is subjected to addition (or even deletion), the officers are advised to verify the eligibility of the concerned organizations as and when required.*

## **7.2 Health Care Services (Details at Sr. No 2 of Exhibit A3)**

### **7.2.1 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

### **7.2.2 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.

## **7.3 Services provided to or by a governmental authority**

### **7.3.1 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.

### **7.3.2 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—

- (i) the preparation of plans for economic development and social justice;
- (ii) 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.
6. Public health, sanitation conservancy and solid waste management.
7. Fire services.
8. Urban forestry, protection of the environment and promotion of ecological aspects.
9. Safeguarding the interests of weaker sections of society, including the handicapped and mentally retarded.
10. Slum improvement and upgradation.
11. Urban poverty alleviation.
12. Provision of urban amenities and facilities such as parks, gardens, playgrounds.
13. Promotion of cultural, educational and aesthetic aspects.
14. Burials and burial grounds; cremations, cremation grounds; and electric crematoriums.

15. Cattle pounds; prevention of cruelty to animals.
16. Vital statistics including registration of births and deaths.
17. Public amenities including street lighting, parking lots, bus stops and public conveniences.
18. Regulation of slaughter houses and tanneries.

### **7.3.3 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.

### **7.3.4 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 Exhibit A3 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.

## **7.4 Charities (Details at Sr. No. 4 of Exhibit A3)**

### **7.4.1 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 –
  - (I) 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
  - (II) 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.

#### **7.4.2 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 7.4.1, 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'.

### **7.5 Religious places/ceremonies (Details at Sr. No. 5 of Exhibit A3)**

#### **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'.

#### **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.

### **7.6 Advocates or arbitral tribunals (Details at Sr. No.6 of Exhibit A3)**

#### **7.6.1 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
- 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.

**7.6.2 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.

**7.7 Recreational coaching or training (Details at Sr. No. 8 of Exhibit A3)**

**7.7.1 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.

**7.8 Sports (Details at Sr. No 10 of Exhibit A3)**

**7.8.1 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.

**7.8.2 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.

## **7.9 Construction (Details at Sr No 12 to 14 of Exhibit A3)**

### **7.9.1 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

### **7.9.2 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.

### **7.9.3 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.

### **7.9.4 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.



### **7.9.5 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.

### **7.9.6 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.

### **7.9.7 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.

### **7.9.8 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.

### **7.9.9 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.

## **7.10 Copyright (Details at Sr No 15 of Exhibit A3)**

### **7.10.1 Will a music company having the copyright for any sound recording be taxable for his 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.

**7.10.2 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 sub-section (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.

**7.10.3 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.

## **7.11 Miscellaneous**

**7.11.1 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.

**7.11.2 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.

**7.11.3 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.

**7.11.4 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 to serving of food or beverages in these restaurants?**

Serving of food or beverages in a centrally air-conditioned premise will be taxed if its restaurant has a license to serve alcoholic beverages. However, those restaurants which do not have license to serve alcoholic beverages will be exempt from service tax. Serving of food or beverages outside the restaurant, say near the swimming pool, will be taxed if service is from a restaurant having license to serve alcoholic beverages.

**7.11.5 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.

**6.11.6 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.

**7.11.7 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.

**7.11.8 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.

**7.11.9 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.

**7.11.10 What is the tax liability on services by the intermediaries to entities those are liable to pay tax on their final output services? (Details at Sr. No 29 of Exhibit A3)**

Services by following intermediaries are exempt from service tax:

- A. sub-broker or an authorised person to a stock broker;
- B. authorised 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;

**7.11.11 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 66 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.

**7.11.12 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 30 of the mega notification, the same is liable to service tax.

**7.11.13 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'.

**7.11.14 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"

**7.11.15 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.

**7.11.16 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.

**7.11.17 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.

**7.11.18 I am an individual receiving services from a service provider located in non-taxable 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.

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## Guidance Note 8 – 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.

### 8.1. Broad Scheme of Valuation.

#### 8.1.1 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.

#### 8.1.2 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.

**8.1.3 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 ( $1500 \times 100/112$ ) 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.

**8.1.4 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.

**8.1.5 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’.

For detailed discussion on consideration please refer to Point 2.2 of this Guide. The consideration could be monetary or non-monetary.

**8.1.6 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.

### 8.1.7 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.

### 8.1.8 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.

### 8.1.9. 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.

These specified aspects of determination of value under the Service Tax (Determination of Value) Rules 2006 and the Service Tax Rules, 1994 have been dealt individually with in point nos. 8.2 to 8.7 below.

**8.1.10 In addition to the two set of rules explained in point no 8.1.9 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 in point no. 8.8 below.

## **8.2 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. The new provisions have been explained in this note

**8.2.1 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.

Gross amount includes	Gross amount does not include
Labour charges for execution of the works	Value of transfer of property in goods involved in the execution of the said works contract. Note: 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, 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.
Amount paid to a sub-contractor for labour and services	
Charges for planning, designing and architect's fees	
Charges for obtaining on hire or otherwise, machinery and tools used for 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 and other similar expenses 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
Profit earned by the service provider relatable to supply of labour and services	

8.2.2. 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 -

Where works contract is for...	Value of the service portion shall be...
(A) execution of original works	<b>forty percent</b> of the <b>total amount charged</b> for the works contract
(B) maintenance or repair or reconditioning or restoration or servicing of any goods	<b>seventy per cent</b> of the <b>total amount charged</b> including 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 <b>total amount charged</b> 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.

**8.2.3 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.

**8.2.4. 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.

**8.2.5 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’.

S. No.	NOTATION	AMOUNT (in Rs.)
1	Gross amount received excluding taxes	95,00,000
2	Fair market value of goods supplied by the service receiver excluding taxes	10,00,000
3	Amount charged by service receiver for 2	5,00,000
4	Total amount charged (1+2-3)	1,00,00,000
5	Value of service portion(40% of 4 in case of original works)	40,00,000

**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.

**8.3 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.



### **8.3.1 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'.

### **8.3.2 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 ( $1000 \times 0.73$ ).

### **8.3.3 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.

### **8.3.4 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.

## **8.4 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)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. 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.

**8.4.1 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, and which has a license to serve alcoholic beverage.
- Below the threshold exemption

**8.4.2. 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-

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.....	Shall be ..... percent of the total amount charged:
In a restaurant	40
As part of outdoor catering	60

**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 8.2.5 above would, mutatis mutandis, apply to valuation in this case also.

### **8.4.3. What are the restrictions, if any, on availment of Cenvat credit by such service providers?**

In terms of the Explanation<sup>2</sup> 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.

### **8.4.4 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 8.8 below.

## **8.5 Inclusion or exclusion from value of certain expenditure or costs borne by the service provider.**

Rule 5 of Service Tax (Determination of Value) Rules, 2012 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.

### **8.5.1 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).

### **8.5.2 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:

- 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;

- 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;
- the recipient of service is liable to make payment to the third party;
- the recipient of service authorises the service provider to make payment on his behalf;
- 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;
- 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;
- the service provider recovers from the recipient of service only such amount as has been paid by him to the third party; and
- 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.

### **8.5.3 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.

### **8.6 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 immovable;
- 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;*
- *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)

### **8.6.1. 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.

### **8.6.2. 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.

### **8.6.3. 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.

## **8.7. Compounding schemes for determination of value under the Service Tax Rules, 1994.**

In addition to the Service Tax (Determination of Value) Rules, 2006 various sub-rules Rule (6) of the Service Tax 1994 also provides for simplified compounding mechanism for determining the amount of service tax payable. These sub-rules either specify the service tax payable as a certain percentage of the gross amount of a specified sum received by the service provider or also provide for manner of determination of value of taxable service for other specified

services. This facility is normally available as an option to the person responsible to pay service tax. These compounding schemes are tabulated below:

Sub-rule of rule 6	Specified service	Compounding scheme	Conditions
(7)	Services provided by an air travel agent	Pay an amount calculated at the rate of 0.6% of the basic fare (i.e. that part of the fare on which commission is normally paid to the travel agent by the airlines) in the case of domestic bookings, and at the rate of 1.2% of the basic fare in the case of international bookings, of passage for travel by air, during any calendar month or quarter	Option, once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances
(7A)	An insurer carrying on life insurance business	Option to pay tax (i) on the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing of service; (ii)in all other cases 3% of the gross amount of premium charged in the first year and 1.5% of the premium charged in the subsequent years.	Option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance
(7B)	Service of purchase or sale of foreign currency, including money changing, provided by a foreign exchange broker, including an authorised dealer in foreign exchange or an authorized money changer	Option to pay an amount calculated at the following rate (a) 0.12 per cent. of the gross amount of currency exchanged for an amount upto rupees 100,000, subject to the minimum amount of rupees 30; and (b) rupees 120 and 0.06 per cent. of the gross amount of currency exchanged for an amount of rupees exceeding rupees 100,000 and upto rupees 10,00,000; and (c) rupees 660 and 0.012 per cent. of the gross amount of currency exchanged for an amount of rupees exceeding 10,00,000, subject to maximum amount of rupees 6000	The person providing the service shall exercise such option for a financial year and such option shall not be withdrawn during the remaining part of that financial year.
(7C)	Services by distributor or selling agent of promotion, marketing, organising or in any other manner assisting in organising lottery,	Option to pay- (i)Rs. 7000/- on every Rs. 10 Lakh (or part of Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw (If guaranteed prize payout is more than 80%) (ii)Rs. 11000/- on every Rs. 10 Lakh (or part of Rs. 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw (If guaranteed prize payout is less than 80%)	1. In case of online lottery, the aggregate face value of lottery tickets for the purpose of this sub-rule shall be taken as the aggregate value of tickets sold 2. The distributor or selling agent shall exercise such option within a period of one month of the beginning of each financial year and such option shall not be withdrawn during the remaining part of the financial year.

8.8 Notified abatements for determining the taxable value.

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

Sl.No.	Description of taxable service	%	Conditions
(1)	(2)	(3)	(4)
1	Services in relation to financial leasing including hire purchase	10	Nil.
2	Transport of goods by rail	30	Nil.
3	Transport of passengers, with or without accompanied belongings by rail	30	Nil.
4	Bundled service by way 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 other place, specially arranged for organizing a function) together with renting of such premises	70	CENVAT credit on any goods classifiable under chapter 1 to 22 of the Central Excise Tariff Act, 1985 (5 of 1986) has not been taken under the provisions of the CENVAT Credit Rules, 2004.
5	Transport of passengers by air, with or without accompanied belongings	40	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.
6	Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes	60	Same as above.
7	Services of goods transport agency in relation to transportation of goods.	25	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.
8	Services provided in relation to chit	70	Same as above.
9	Renting of any motor vehicle designed to carry passengers	40	Same as above.
10	Transport of goods in a vessel	50	Same as above.



Sl.No.	Description of taxable service	%	Conditions
(1)	(2)	(3)	(4)
11	Services by a tour operator in relation to,- (i) a package tour	25	(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.
	(ii) a tour, if the tour operator is providing services solely of arranging or booking accommodation for any person	10	(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.
	(iii) services other than those specified in (i) and (ii) above	40	(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 indicates that the amount charged in the bill is the gross amount charged for such a tour.
12.	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	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 recipient.

**8.8.1 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).

**8.8.2 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.

**8.9 Person responsible for determining the value of taxable service**

**8.9.1 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.

**8.9.2 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.

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## Guidance Note 9 – Rules of Interpretation

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 –

### 9.1 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.

#### 9.1.1 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.

#### 9.1.2 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.

## **9.2 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.

### **9.2.1 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.

### **9.2.2 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.’

#### **Illustrations -**

- 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.

### **9.2.3 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’ (refer para 9.1.2 above). 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 in the second bullet in para 9.1.2 above explains the operation of this rule.

### **9.2.4 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 of 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.

#### **9.2.5 Manner of determination of taxability of ‘composite transactions’ wherein an element of provision of service is combined with an element of sale of goods**

Please refer to **point no 2.6.3 of this Guidance Note.**

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## Guidance Note 10 – Miscellaneous

### 10.1 Partial Reverse Charge

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.

The manner of operation of the reverse charge mechanism has been explained in this point.

#### **10.1.1 What are the services on which such partial reverse charge mechanism shall be applicable?**

In terms of serial nos. 7(b), 8 and 9 of the table in notification no. 30/2012 dated 20.6.12, the new partial reverse charge mechanism is applicable to services provided or agreed to be provided by way of

- (a) renting of a motor vehicle designed to carry passengers on non-abated value to any person who is not engaged in a similar business, or
- (b) supply of manpower for any purpose, or
- (c) service portion in execution of a 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 a body corporate located in the taxable territory. Thus the nature of the service and the status of both the service provider and service receiver are important to determine the applicability of partial reverse charge provisions.

#### **10.1.2 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.

**10.1.3 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.

**10.1.4 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.

**10.1.5 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 5<sup>th</sup>/6<sup>th</sup> August, 2012 or 5<sup>th</sup>/6<sup>th</sup> 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 5<sup>th</sup>/6<sup>th</sup> September 2012.

**10.1.6 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.

#### **10.1.7 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.

### **10.2 Export of Services**

#### **10.2.1 What does the export of a service mean under the new system?**

Export of services shall now be governed by new provisions in the Service Tax Rules 1994, namely rule 6A. The essential requisites before a service can be designated as export service are:

- It must be a service as defined under sub-section 44 of section 65B
- by a service provider located in the taxable territory
- to a service receiver located outside India
- the service is not a service specified in the negative list
- the place of provision of the service is outside India
- the payment for such service is received by the service provider in convertible foreign exchange
- the service provider and service receiver are not merely establishments of a distinct person by virtue of item (b) of Explanation 2 of clause 44 of section 65B of the Act

The answer to all questions above must be yes to avail the status of export of service.

#### **10.2.2 Can there be an export between an establishment of a person in taxable territory and another establishment of same person in a non-taxable territory?**

No. Even though such persons have been specified as distinct persons under the explanation to clause (44) of section 65B, the transaction between such establishments have not been recognized as exports under the above stated rule.

### **10.3 ISD: Input Service Distributor**

The facility of registering as an input service distributor exists to allow businesses to operate at their convenience and allow centralized procurement of services and the distribution of credit to units where such services are used. The provisions have been slightly altered in Budget 2012 to align the practice with the intent stated above.

### **10.3.1 Credit of which services can be distributed?**

Credit of only “input services” can be distributed. Hence a service procured needs to be assessed whether it is an “input service” at any of the units of the ISD. Only if it qualifies as an “input service” it can be distributed. Further the credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services cannot be distributed.

### **10.3.2 How do I calculate the credit to be distributed?**

While the status of the service as “input service” is ascertained, the units where it is used is also ascertained. The credit of a service used exclusively in one unit can be distributed only to that unit. If it is used in more than one unit, the credit can be distributed proportionate to the turnover of the units. The total turnover shall be determined in the same manner as determined under rule 5 and shall be determined for the month previous to the month during which the CENVAT credit is distributed. In case if any of its unit pays tax or duty on quarterly basis as provided in rule 6 of Service Tax Rules, 1994 or rule 8 of Central Excise Rules, 2002 then the relevant period shall be the quarter previous to the quarter during which the CENVAT credit is distributed. The turnover so calculated would be ex-duty i.e not inclusive of the taxes and duties on the goods and services supplied.

e.g. a company manufactures fans in 2 units and other appliances in 2 other units. Advertisement services for fans would qualify as an input service for the units manufacturing fans and hence could be distributed to such units based on the turnover of the previous month of the 2 units.

### **10.3.3 How do I distribute credit in a new unit when there is no turnover?**

In case of an assessee who does not have any total turnover in the said period as in the case of a new company, the ISD shall distribute any credit only after the end of such relevant period wherein the total turnover of its units are available. In case of a new unit wherein any credit is exclusively used, the credit can be distributed in total to such unit.

### **10.3.4 Will such credit which is distributed need to be reversed on account of any exempted turnover?**

Credit so distributed is availed on the strength of a challan issued by the ISD. It shall be subject to rule 6 of CENVAT Credit Rules 2004 and depending upon the option exercised under the rule 6 due reversals will be required to be effected by the unit to which the credit has been distributed.

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## **Exhibit A1 : Negative List of Services.**

- (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 seed 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 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 recognized by law;
  - (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 authorized 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 air conditioned 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 up to the customs station of clearance in India; or
  - (iii) by inland waterways;
- (q) Funeral, burial, crematorium or mortuary services including transportation of the deceased.

## Exhibit A2 : Place of Provision of Services Rules, 2012

### Notification No. 28/2012 - Service Tax dated 20/6/12

G.S.R. (E).- In exercise of the powers conferred by sub-section (1) of section 66C and clause (hhh) of sub-section (2) of section 94 of the Finance Act, 1994 and in supersession of the notification of the Government of India in the Ministry of Finance, Department of Revenue, number 9/2005-ST, dated the 3<sup>rd</sup> March, 2005 published in the Gazette of India Extraordinary, Part II, ...vide number G.S.R. 151 (E) dated the 3<sup>rd</sup> March, 2005 and the notification of the Government of India in the Ministry of Finance, Department of Revenue, number 11/2006-ST dated the 19<sup>th</sup> May, 2006 published in the Gazette of India Extraordinary, Part II, Section 3, Sub-Section (i) vide number G.S.R. 227 (E) dated the 19<sup>th</sup> May, 2006.., except as respects things done or omitted to be done before such supersession, the Central Government hereby makes the following rules for the purpose of determination of the place of provision of services, namely:-

- 1. Short title, extent and commencement.-** (1) These rules may be called the Place of Provision of Services Rules, 2012.

(2) They shall come into force on 1st day of July, 2012.

- 2. Definitions.-** In these rules, unless the context otherwise requires,-

- (a) “Act” means the Finance Act, 1994 (32 of 1994);
- (b) “account” means an account bearing interest to the depositor, and includes a non-resident external account and a non-resident ordinary account;
- (c) “banking company” has the meaning assigned to it in clause (a) of section 45A of the Reserve Bank of India Act, 1934 (2 of 1934);
- (d) “continuous journey” means a journey for which a single or more than one ticket or invoice is issued at the same time, either by one service provider or through one agent acting on behalf of more than one service provider, and which involves no stopover between any of the legs of the journey for which one or more separate tickets or invoices are issued;
- (e) “financial institution” has the meaning assigned to it in clause (c) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);
- (f) “intermediary” means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the ‘main’ service) between two or more persons, but does not include a person who provides the main service on his account.;
- (g) “leg of journey” means a part of the journey that begins where passengers embark or disembark the conveyance, or where it is stopped to allow for its servicing or refueling, and ends where it is next stopped for any of those purposes;

- (h) “location of the service provider” means-
- (a). where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;
  - (b). where the service provider is not covered under sub-clause (a):
    - (i) the location of his business establishment; or
    - (ii) where the services are provided from a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or
    - (iii) where services are provided from more than one establishment, whether business or fixed, the establishment most directly concerned with the provision of the service; and
    - (iv) in the absence of such places, the usual place of residence of the service provider.
- (i) “location of the service receiver” means:-
- (a). where the recipient of service has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;
  - (b). where the recipient of service is not covered under sub-clause (a):
    - (i) the location of his business establishment; or
    - (ii) where services are used at a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or
    - (iii) where services are used at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service; and
    - (iv) in the absence of such places, the usual place of residence of the recipient of service.
- Explanation:-* For the purposes of clauses (h) and (i), “usual place of residence” in case of a body corporate means the place where it is incorporated or otherwise legally constituted.
- Explanation 2:-* For the purpose of clause (i), in the case of telecommunication service, the usual place of residence shall be the billing address.
- (j) “means of transport” means any conveyance designed to transport goods or persons from one place to another;
- (k) “non-banking financial company” means-



- (i) a financial institution which is a company; or
- (ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner; or
- (iii) such other non-banking institution or class of such institutions, as the Reserve Bank of India may, with the previous approval of the Central Government and by notification in the Official Gazette specify;
- (l) “online information and database access or retrieval services” means providing data or information, retrievable or otherwise, to any person, in electronic form through a computer network;
- (m) “person liable to pay tax” shall mean the person liable to pay service tax under section 68 of the Act or under sub-clause (d) of sub-rule (1) of rule (2) of the Service Tax Rules, 1994;
- (n) “provided” includes the expression “to be provided”;
- (o) “received” includes the expression “to be received”;
- (p) “registration” means the registration under rule 4 of the Service Tax Rules, 1994;
- (q) “telecommunication service” means service of any description (including electronic mail, voice mail, data services, audio tex services, video tex services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro-magnetic means but shall not include broadcasting services.
- (r) words and expressions used in these rules and not defined, but defined in the Act, shall have the meanings respectively assigned to them in the Act.

**3. Place of provision generally.-** The place of provision of a service shall be the location of the recipient of service:

Provided that in case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the provider of service.

**4. Place of provision of performance based services.-** The place of provision of following services shall be the location where the services are actually performed, namely:-

- (a) services provided in respect of goods that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service:

Provided that when 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:

Provided further that this sub-rule shall not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs, reconditioning or reengineering for re-export, subject to conditions as may be specified in this regard.

- (b) services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service.
5. **Place of provision of services relating to immovable property.-** The place of provision of services provided directly in relation to an immovable property, including services provided in this regard by experts and estate agents, provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever name called, grant of rights to use immovable property, services for carrying out or co-ordination of construction work, including architects or interior decorators, shall be the place where the immovable property is located or intended to be located.
6. **Place of provision of services relating to events.-** The place of provision of services provided by way of admission to, or organization of, a cultural, artistic, sporting, scientific, educational, or entertainment event, or a celebration, conference, fair, exhibition, or similar events, and of services ancillary to such admission, shall be the place where the event is actually held.
7. **Place of provision of services provided at more than one location.-** Where any service referred to 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.
8. **Place of provision of services where provider and recipient are located in taxable territory.-** Place of provision of a service, where the location of the provider of service as well as that of the recipient of service is in the taxable territory, shall be the location of the recipient of service.
9. **Place of provision of specified services.-** The place of provision of following services shall be the location of the service provider:-
- (a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to account holders;
  - (b) Online information and database access or retrieval services;
  - (c) Intermediary services;
  - (d) Service consisting of hiring of means of transport, upto a period of one month.
10. **Place of provision of goods transportation services.-** The place of provision of services of transportation of goods, other than by way of mail or courier, shall be the place of destination of the goods:

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

- 11. Place of provision of passenger transportation service.-** The place of provision in respect of a passenger transportation service shall be the place where the passenger embarks on the conveyance for a continuous journey.
- 12. Place of provision of services provided on board a conveyance.-** Place of provision of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the first scheduled point of departure of that conveyance for the journey.
- 13. Powers to notify description of services or circumstances for certain purposes.-** 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.
- 14. Order of application of rules.-** Notwithstanding anything stated in any rule, 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.

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### **Exhibit A3 : Exemptions under Mega Notification.**

- A.** The following taxable services have been exempt from the whole of the service tax leviable thereon under section 66B of the said Act vide mega exemption notification no. 25/2012 – ST dated 20/6/12 namely:-
1. Services provided to the United Nations or a specified international organization;
  2. Health care services by a clinical establishment, an authorised medical practitioner or para-medics;
  3. Services by a veterinary clinic in relation to health care of animals or birds;
  4. Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities;
  5. Services by a person by way of-
    - (a) renting of precincts of a religious place meant for general public; or
    - (b) conduct of any religious ceremony;
  6. Services provided by-
    - (a) an arbitral tribunal to -
      - (i) any person other than a business entity; or
      - (ii) a business entity with a turnover up to rupees ten lakh in the preceding financial year;
    - (b) an individual as an advocate or a partnership firm of advocates by way of legal services to,-
      - (i) an advocate or partnership firm of advocates providing legal services ;
      - (ii) any person other than a business entity; or
      - (iii) a business entity with a turnover up to rupees ten lakh in the preceding financial year; or
    - (c) a person represented on an arbitral tribunal to an arbitral tribunal;
  7. Services by way of technical testing or analysis of newly developed drugs, including vaccines and herbal remedies, on human participants by a clinical research organisation approved to conduct clinical trials by the Drug Controller General of India;
  8. Services by way of training or coaching in recreational activities relating to arts, culture or sports;
  9. Services provided to or by an educational institution in respect of education exempted from service tax, by way of,-
    - (b) auxiliary educational services; or

- (c) renting of immovable property;
10. Services provided to a recognised sports body by-
    - (a) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body;
    - (b) another recognised sports body;
  11. Services by way of sponsorship of sporting events organised,-
    - (a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, state or zone;
    - (b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat;
    - (c) by Central Civil Services Cultural and Sports Board;
    - (d) as part of national games, by Indian Olympic Association; or
    - (e) under Panchayat Yuva Kreedha Aur Khel Abhiyaan (PYKKA) Scheme;
  12. Services provided to the Government, a local authority or a governmental authority 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 the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 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; or
    - (f) 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;
  13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-
    - (a) a road, bridge, tunnel, or terminal for road transportation for use by general public;
    - (b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

- (c) a building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;
  - (d) a pollution control or effluent treatment plant, except located as a part of a factory; or
  - (e) a structure meant for funeral, burial or cremation of deceased;
14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-
    - (a) an airport, port or railways, including monorail or metro;
    - (b) a single residential unit otherwise than as a part of a residential complex;
    - (c) low- cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority empowered under the 'Scheme of Affordable Housing in Partnership' framed by the Ministry of Housing and Urban Poverty Alleviation, Government of India;
    - (d) post- harvest storage infrastructure for agricultural produce including a cold storages for such purposes; or
    - (e) mechanised food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages;
  15. Temporary transfer or permitting the use or enjoyment of a copyright covered under clauses (a) or (b) of sub-section (1) of section 13 of the Indian Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical, artistic works or cinematograph films;
  16. Services by a performing artist in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre, excluding services provided by such artist as a brand ambassador;
  17. Services by way of collecting or providing news by an independent journalist, Press Trust of India or United News of India;
  18. Services by way of renting of a hotel, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent;
  19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages;
  20. Services by way of transportation by rail or a vessel from one place in India to another of the following goods -
    - (a) petroleum and petroleum products falling under Chapter heading 2710 and 2711 of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986);
    - (b) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap;



- (c) defence or military equipments;
  - (d) postal mail or mail bags;
  - (e) household effects;
  - (f) newspaper or magazines registered with the Registrar of Newspapers;
  - (g) railway equipments or materials;
  - (h) agricultural produce;
  - (i) foodstuff including flours, tea, coffee, jaggery, sugar, milk products, salt and edible oil, excluding alcoholic beverages; or
  - (j) chemical fertilizer and oilcakes;
21. Services provided by a goods transport agency by way of transportation of -
- (a) fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;
  - (b) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or
  - (c) 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;
22. Services by way of giving on hire -
- (a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or
  - (b) to a goods transport agency, a means of transportation of goods;
23. Transport of passengers, with or without accompanied belongings, by -
- (a) air, embarking from or terminating in an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal;
  - (b) a contract carriage for the transportation of passengers, excluding tourism, conducted tour, charter or hire; or
  - (c) ropeway, cable car or aerial tramway;
24. Services by way of vehicle parking to general public excluding leasing of space to an entity for providing such parking facility;
25. Services provided to Government, a local authority or a governmental authority by way of -
- (a) carrying out any activity 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; or
  - (b) repair or maintenance of a vessel or an aircraft;

26. Services of general insurance business provided under following schemes -
- (a) Hut Insurance Scheme;
  - (b) Cattle Insurance under Swarnajayanti Gram Swarozgar Yojna (earlier known as Integrated Rural Development Programme);
  - (c) Scheme for Insurance of Tribals;
  - (d) Janata Personal Accident Policy and Gramin Accident Policy;
  - (e) Group Personal Accident Policy for Self-Employed Women;
  - (f) Agricultural Pumpset and Failed Well Insurance;
  - (g) premia collected on export credit insurance;
  - (h) Weather Based Crop Insurance Scheme or the Modified National Agricultural Insurance Scheme, approved by the Government of India and implemented by the Ministry of Agriculture;
  - (i) Jan Arogya Bima Policy;
  - (j) National Agricultural Insurance Scheme (Rashtriya Krishi Bima Yojana);
  - (k) Pilot Scheme on Seed Crop Insurance;
  - (l) Central Sector Scheme on Cattle Insurance;
  - (m) Universal Health Insurance Scheme;
  - (n) Rashtriya Swasthya Bima Yojana; or
  - (o) Coconut Palm Insurance Scheme;
27. Services provided by an incubatee up to a total turnover of fifty lakh rupees in a financial year subject to the following conditions, namely:-
- (a) the total turnover had not exceeded fifty lakh rupees during the preceding financial year; and
  - (b) a period of three years has not been elapsed from the date of entering into an agreement as an incubatee;
28. Service by an unincorporated body or a non- profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution -
- (a) as a trade union;
  - (b) for the provision of carrying out any activity which is exempt from the levy of service tax; or
  - (c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

29. Services by the following persons in respective capacities -
  - (a) sub-broker or an authorised person to a stock broker;
  - (b) authorised 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;
30. Carrying out an intermediate production process as job work in relation to -
  - (a) agriculture, printing or textile processing;
  - (b) cut and polished diamonds and gemstones; or plain and studded jewellery of gold and other precious metals, falling under Chapter 71 of the Central Excise Tariff Act ,1985 (5 of 1986);
  - (c) any goods on which appropriate duty is payable by the principal manufacturer; or
  - (d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of one hundred and fifty lakh rupees in a financial year subject to the condition that such aggregate value had not exceeded one hundred and fifty lakh rupees during the preceding financial year;
31. Services by an organiser to any person in respect of a business exhibition held outside India;
32. Services by way of making telephone calls from -
  - (a) departmentally run public telephone;
  - (b) guaranteed public telephone operating only for local calls; or
  - (c) free telephone at airport and hospital where no bills are being issued;
33. Services by way of slaughtering of bovine animals;
34. Services received from a provider of service located in a non- taxable territory by-
  - (a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;

- (b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or
    - (c) a person located in a non-taxable territory;
  - 35. Services of public libraries by way of lending of books, publications or any other knowledge- enhancing content or material;
  - 36. Services by Employees' State Insurance Corporation to persons governed under the Employees' Insurance Act, 1948 (34 of 1948);
  - 37. Services by way of transfer of a going concern, as a whole or an independent part thereof;
  - 38. Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets;
  - 39. 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.
- B. Definitions.** - For the purpose of the notification, unless the context otherwise requires, certain terms used in the notification have been defined in the notification itself –
- (a) “advocate” has the meaning assigned to it in clause (a) of sub-section (1) of section 2 of the Advocates Act, 1961 ( 25 of 1961);
  - (b) “appropriate duty” means duty payable on manufacture or production under a Central Act or a State Act, but shall not include ‘Nil’ rate of duty or duty wholly exempt;
  - (c) “arbitral tribunal” has the meaning assigned to it in clause (d) of section 2 of the Arbitration and Conciliation Act, 1996 (26 of 1996);
  - (d) “authorised medical practitioner” means a medical practitioner registered with any of the councils of the recognised system of medicines established or recognized by law in India and includes a medical professional having the requisite qualification to practice in any recognised system of medicines in India as per any law for the time being in force;
  - (e) “authorised person” means any person who is appointed as such either by a stock broker (including trading member) or by a member of a commodity exchange and who provides access to trading platform of a stock exchange or a commodity exchange as an agent of such stock broker or member of a commodity exchange;
  - (f) “auxiliary educational services” means any services relating to imparting any skill, knowledge, education or development of course content or any other knowledge – enhancement activity, whether for the students or the faculty, or any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution;
  - (g) “banking company” has the meaning assigned to it in clause (a) of section 45A of the Reserve Bank of India Act, 1934(2 of 1934);

- (h) “brand ambassador” 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;
- (i) “business facilitator or business correspondent” means an intermediary appointed under the business facilitator model or the business correspondent model by a banking company or an insurance company under the guidelines issued by Reserve Bank of India;
- (j) “clinical establishment” means a hospital, nursing home, clinic, sanatorium or any other institution by, whatever name called, that offers services or facilities requiring diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India, or a place established as an independent entity or a part of an establishment to carry out diagnostic or investigative services of diseases;
- (k) “charitable activities” means activities relating to -
  - (i) public health by way of -
    - (a) 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
    - (b) public awareness of preventive health, family planning or prevention of HIV infection;
  - (ii) advancement of religion or spirituality;
  - (iii) advancement of educational programmes or skill development relating to,-
    - (a) abandoned, orphaned or homeless children;
    - (b) physically or mentally abused and traumatized persons;
    - (c) prisoners; or
    - (d) persons over the age of 65 years residing in a rural area;
  - (iv) preservation of environment including watershed, forests and wildlife; or
  - (v) advancement of any other object of general public utility up to a value of,-
    - (a) eighteen lakh and seventy five thousand rupees for the year 2012-13 subject to the condition that total value of such activities had not exceeded twenty five lakhs rupees during 2011-12;
    - (b) twenty five lakh rupees in any other financial year subject to the condition that total value of such activities had not exceeded twenty five lakhs rupees during the preceding financial year;
- (l) “commodity exchange” means an association as defined in section 2 (j) and recognized under section 6 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952);

- (m) “contract carriage” has the meaning assigned to it in clause (7) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);
- (n) “declared tariff” 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;
- (o) “distributor or selling agent” has the meaning assigned to them in clause (c) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs, published in the Gazette of India, Extraordinary, Part-II, Section 3, Sub-section (i), *vide* number G.S.R. 278(E), dated the 1st April, 2010 and shall include distributor or selling agent authorised by the lottery- organising State;
- (p) “general insurance business” has the meaning assigned to it in clause (g) of section 3 of General Insurance Business (Nationalisation) Act, 1972 (57 of 1972);
- (q) “general public” means the body of people at large sufficiently defined by some common quality of public or impersonal nature;
- (r) “goods carriage” has the meaning assigned to it in clause (14) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);
- (s) “governmental authority” means a board, or an authority or any other body established with 90% or more participation by way of equity or control by Government and set up by an Act of the Parliament or a State Legislature to carry out any function entrusted to a municipality under article 243W of the Constitution;
- (t) “health care services” means any service by way of diagnosis or treatment or care for illness, injury, deformity, abnormality or pregnancy in any recognised system of medicines in India and includes services by way of transportation of the patient to and from a clinical establishment, but does not include hair transplant or cosmetic or plastic surgery, except when undertaken to restore or to reconstruct anatomy or functions of body affected due to congenital defects, developmental abnormalities, injury or trauma;
- (u) “incubatee” means an entrepreneur located within the premises of a Technology Business Incubator (TBI) or Science and Technology Entrepreneurship Park (STEP) recognised by the National Science and Technology Entrepreneurship Development Board (NSTEDB) of the Department of Science and Technology, Government of India and who has entered into an agreement with the TBI or the STEP to enable himself to develop and produce hi-tech and innovative products;
- (v) “insurance company” means a company carrying on life insurance business or general insurance business;
- (w) “legal service” means any service provided in relation to advice, consultancy or assistance in any branch of law, in any manner and includes representational services before any court, tribunal or authority;
- (x) “life insurance business” has the meaning assigned to it in clause (11) of section 2 of the Insurance Act, 1938 (4 of 1938);



- (y) “original works” means has the meaning assigned to it in Rule 2A of the Service Tax (Determination of Value) Rules, 2006;
- (z) “principal manufacturer” means any person who gets goods manufactured or processed on his account from another person;
- (za) “recognized sports body” means - (i) the Indian Olympic Association, (ii) Sports Authority of India, (iii) a national sports federation recognised by the Ministry of Sports and Youth Affairs of the Central Government, and its affiliate federations, (iv) national sports promotion organisations recognised by the Ministry of Sports and Youth Affairs of the Central Government, (v) the International Olympic Association or a federation recognised by the International Olympic Association or (vi) a federation or a body which regulates a sport at international level and its affiliated federations or bodies regulating a sport in India;
- (zb) “religious place” means a place which is primarily meant for conduct of prayers or worship pertaining to a religion, meditation, or spirituality;
- (zc) “residential complex” means any complex comprising of a building or buildings, having more than one single residential unit;
- (zd) “rural area” means the area comprised in a village as defined in land revenue records, excluding-the area under any municipal committee, municipal corporation, town area committee, cantonment board or notified area committee; or any area that may be notified as an urban area by the Central Government or a State Government;
- (ze) “single residential unit” means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family;
- (zf) “specified international organization” means an international organization declared by the Central Government in pursuance of section 3 of the United Nations (Privileges and Immunities) Act, 1947 (46 of 1947), to which the provisions of the Schedule to the said Act apply;
- (zg) “state transport undertaking” has the meaning assigned to it in clause (42) of section 2 of the Motor Vehicles Act, 1988 (59 of 1988);
- (zh) “sub-broker” has the meaning assigned to it in sub-clause (gc) of clause 2 of the Securities and Exchange Board of India (Stock Brokers and Sub-brokers) Regulations, 1992;
- (zi) “trade union” has the meaning assigned to it in clause (h) of section 2 of the Trade Unions Act, 1926 (16 of 1926).

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**Customs & Central Excise**  
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# **Taxation of Services: An Education Guide**

## **ERRATA**

1. In Q 2.9.1 the expression “employer to the employee” may be read as “employee to the employer”
2. In Q 7.11.18 the answer may read as “If you are using these services in relation to any purpose other than commerce, industry or any other business or profession, you are not required to pay tax under reverse charge since the same is exempt.”
3. In answer to Q 2.4.2 the expression “Explanation 2” maybe read as “Explanation 3”
4. In answer to Q 10.2.1 the expression “Explanation 2” maybe read as “Explanation 3”