Technical Guide to Service Tax - Works Contract

The Institute of Chartered Accountants of India
(Set up by an Act of Parliament)
New Delhi

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Foreword

Service Tax was introduced in India in 1994 on 3 services with an objective of broadening of the tax base, augmentation of revenue and larger participation of citizens in the economic development of the nation. The system of taxing services witnessed a sea-change in the year 2012, with the introduction of taxation based on Negative List. This method of taxation has further increased the significance of service tax in the economy.

Considering the fact that though the broad structure of service tax is uniform, its applicability to different sectors may differ due to difference in business practices followed, the Indirect Taxes Committee of the Institute of Chartered Accountants of India (ICAI) took upan initiative during 2014-15 to develop sector specific Technical Guide/ Background Material on Service Tax. Technical Guide to Service Tax – Works Contract is one of the outcomes of this initiative.

Every year respective Finance Acts bring in gamut of changes in the taxation laws. Accordingly, the Committee has been revising all the guides with the changes made by Finance Act, 2015, as a publication in tax laws retains its significance only when it is updated and reflects the current position of the law.

I heartily compliment CA. Atul Gupta, Chairman, CA. Shyam Lal Agarwal, Vice-Chairman and other members of Indirect Taxes Committee of ICAI for their untiring efforts in bringing out the revised edition of Technical Guide to Service Tax – Works Contract duly updated with changes. I am sure that this updated Guide would be warmly received and appreciated by the members and other interested readers.

I trust that this material would prove to be very useful to the members in their day to day practice and support them in their endeavours.

Date: 18th August, 2015
Place: New Delhi

CA. Manoj Fadnis
President, ICAI

Preface

A paradigm shift in the area of taxation took place in the year 1994-95 when the concept of Service Taxon three services was introduced. Since thendifferent Finance Ministers have brought in new services under its tax ambit. Another major development took place in the year 2012, when all servicesbarring a few specifically mentioned in the negative list were brought into the service tax net.The large number of changes in the law and introduction of new rules for taxation of services has brought up the requirement of having in depth knowledge of service tax for different sectors.

In order to facilitate the understanding of provisions of Service Tax applicable to various sectors of the economy, the Indirect Taxes Committee of ICAI developed sector specific Technical Guide/ Background Material on Service Tax during the year 2014-15. Considering the changes made through Finance Act 2015, notifications/ circulars etc., the Committee thought it fit to revise all these guides/ background materials as a publication in tax laws retains its significance only when it is updated and reflects the current position of the law. Accordingly, this *Technical Guide on Service Tax - Works Contracthas been updated with all the amendment made by Finance Act, 2015,* notifications/ circulars etc. It intends to support the members to address the various issues arising in relation to works contract.

I am extremely thankful to CA. Manoj Fadnis, President and CA. M. Devaraja Reddy, Vice-President, ICAI and members of the Committee for their support and guidance in this initiative. Further, I thank CA. Ravi Mansaka for thoroughly revising the Guide with updated provisions of Finance Act, 2015. I must also compliment and appreciate the substantial assistance provided by the Indirect Taxes Committee Secretariat to bring this publication to its being.

I am confident that this revised publication would help the readers to be well equipped with the nuances of service tax related to works contract.

I look forward to receiving feedback for further improvements at idtc@icai.in.

Date: 18th August, 2015
Place: New Delhi

CA. Atul Gupta
Chairman
Indirect Taxes Committee

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Terms, Abbreviations used in this book

1.	**The Act**	:	Finance Act, 1994
2.	**STR, 1994**	:	Service Tax Rules, 1994
3.	**POP Rules**	:	Place of Provision of Service Rules, 2012
4.	**POT Rules**	:	Point of Taxation Rules, 2011
5.	**Valuation Rules**	:	Service Tax (Determination of Value) Rules, 2006
6.	**CENVAT Credit Rules**	:	CENVAT Credit Rules, 2004
7.	**POT**	:	Point of Taxation
8.	**CENVAT**	:	Central Value Added Tax
9.	**MODVAT**	:	Modified Value Added Tax
10.	**Mega Exemption Notification**	:	Mega Exemption Notification No. 25/2012 Dated 20.06.2012
11.	**Abatement Notification**	:	Notification No. 26/2012 Dated 20.06.2012
12.	**Education Guide**	:	Education Guide issued by CBEC on 20.06.2012
13.	**RCM**	:	Reverse Charge Mechanism
14.	**Reverse Charge Notification**	:	Notification No. 30/2012 Dated 20.06.2012

Chapter 1
Works Contract - A Composite Contract

Introduction

The Finance Act, 2012 made a paradigm shift from positive list to the negative list of services. The Negative List regime has both negative and positive impact on the taxability of works contracts and construction services. This paradigm shift has affected the way of functioning of persons providing works contract services. The new regime has extended taxability to the works contracts in relation to movable properties also.

A composite contract means a contract which involves 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.

The nature and 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 **Honourable 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 Article 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(29A), 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 as to what is the substance of the contract. We will, for the want of a better phrase, call this the dominant nature test."*

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.

The principle emerging from the said judgement is that works contract and catering contract are the only composite contracts which can be split into contract of sale and contract of service.

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' These have also been declared as a service under section 66E of the Act.

Chapter 2
Declared Service

1.1 As such the definition of 'service' provided under section 65B(44) of the Act is very wide to cover any type of activity done for a consideration and accordingly, works contract is also covered in the definition of 'service'. However, there exist a few activities which would overlap with the other levies of state with a marginal difference, thereby questioning the constitutional validity of the levy under service tax. To rest the doubt about the validity of a transaction to be considered as service, the government has intended to declare such activities to be a service. To give an instance, the declared service – service portion in execution of works contracts was challenged as to whether it was a service so as to levy service tax under the competence of the Union or it was a sale which is a subject to state governance. Similarly most of the declared services were challenged. For all events and purposes these transactions shall be deemed to be service. 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.

1.2 The Finance Act, 2012 has listed the service portion in execution of works contract as a *"Declared Service"* under section 66E of the Act. Clause (h) of Section 66E reads as under:

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

Chapter 3
Definition of Works Contract

1.1 The term "Works Contract" has not been defined in constitution of India. Constitution of India has also not delegated any power to Central or State Government to define 'Works contract'. Hence, common understanding of the term is actually more relevant than definition under any tax law. Nevertheless, the definitions under different laws are discussed hereunder for better understanding.

1.2 Under Central Sales Tax Law

Section 2(ja) of Central Sales Tax Act, 1956 defines Works Contract as follows:

"Works Contract means a contract for carrying out any work which includes constructing, altering, building, assembling, manufacturing, processing, fabricating, erection, installation, fitting out, improvement, repair or commissioning of any movable or immovable property."

1.3 Maharashtra Value Added Tax Act

Under MVAT Act, Explanation (b)(ii) to section 2(24) of Maharashtra VAT Act states that Works Contract includes an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufacturing, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property.

1.4 Service Tax Law – Under New Regime

Clause (54) of Section 65B of the Act defines *'works contract'* **as under:**

"works contract" means 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 movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property.

1.5 The basic requirements for defining a contract to be a works contract remain the same under new negative list regime also. These cumulative requirements are:

(i) There is a transfer of property in goods involved in the execution of such contract, and

(ii) Such transfer of property in goods is leviable to tax as sale of goods (such as sales tax, VAT or WCT, etc.).

It must be noted that the words which are used here are "leviable to tax as sale of goods', therefore, it is not necessary that VAT has been actually paid on the transfer of property involved in such contract. It is enough if transfer of property is leviable to tax as sale of goods for determining whether such contract is a works contract or not.

(iii) Such contract is for the purpose of carrying out:

(a) construction,

(b) erection,

(c) commissioning,

(d) installation,

(e) completion,

(f) fitting out,

(g) repair,

(h) maintenance,

(i) renovation,

(j) alteration

1.6 The definition provided under service tax law is an exhaustive definition but simultaneously ends with an inclusive limb i.e. *"any other similar activity".* Hence, the last part of the definition 'for carrying out any other similar activity or a part thereof in relation to such property' has wide implication and prone to litigation.

1.7 Expansion of Scope of Works Contract

Under the positive list scheme the term "works contract" was defined in explanation to section 65(105); and its scope was restricted to construction

related activities, erection, commissioning and installation of plant & machinery etc. However, under new regime the scope of works contract has been enhanced so as to include movable properties also. The effect of this amendment is that now services related to movable properties involving the material therein like authorized service station, repairs and maintenance services, photography services, etc. will fall under works contract service provided the material involved therein is leviable to VAT/sales tax under State VAT Law. These are composite contracts where both service and material value is involved and as such will be covered under the works contract. Thus, the annual maintenance contracts involving material along with service will also fall under the purview of works contract.

Pure labour contracts are outside the scope of works contract as for classifying a contract to be 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.

Contracts for erection, commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise are to be treated as a works contract provided other conditions are also satisfied.

Chapter 4

Reverse Charge Mechanism for Works Contract

1.1 Under negative list scenario, reverse charge mechanism has also been extended to works contract services. Reverse Charge means where service tax has to be paid by a person other than the service provider. According to **Notification No. 30/2012-ST Dated 20.06.2012,** in case of service portion in execution of works contract, the partial reverse charge mechanism would also be applicable. **'Partial reverse charge'** is a concept wherein both the service providers as well as service receiver are liable to pay service tax as per defined percentage.

1.2 Partial Reverse Charge Mechanism

The Para I(A)(v) read with serial number 9 of table mentioned at Para II of said Notification provides that in case of taxable services provided or agreed to be provided by way of **service portion in execution of works contract** by any individual, Hindu Undivided Family or partnership firm, whether registered or not, including association of persons, located in the taxable territory to a business entity registered as body corporate, located in the taxable territory, the percentage of service tax payable by service provider and service receiver would be as under:

Sl. No.	*Description of a service*	*Percentage of service tax payable by the person providing service*	*Percentage of service tax payable by any person liable for paying service tax other than the service provider i.e. Service Receiver in case of Works Contract Services*
9.	In respect of services provided or agreed to be provided in service portion in execution of works contract	50%	50%

In other words, the service provider is liable only to the extent of 50% of total service tax liability to be deposited in the Government Treasury and balance 50% shall be deposited by the service receiver on reverse charge basis directly in the Government Treasury subject to certain conditions.

1.3 Conditions for Applicability of Partial Reverse Charge Mechanism

(a) The **service receiver** must be *a business entity* registered as *body corporate;*

(b) The **service provider** must be –

- an individual;
- HUF;
- proprietary firm;
- partnership firm *(whether registered or not);*
- limited liability partnership *(as definition of partnership firm includes limited liability partnership)*; or
- AOP.

(c) Both service provider and service receiver must be located in *taxable territory.*

1.4 The partial reverse charge mechanism is applicable only where the above conditions are fulfilled. Here, it is important to understand the scope of certain terms, such as (a) Business Entity (b) Body Corporate (c) Taxable Territory. The scope of such terms are elaborated below:

(a) Business Entity

Clause (17) of Section 65B of the Act provides interpretation of term **"Business entity" and accordingly, it means any** *person* **ordinarily carrying out any activity relating to industry, commerce or any other business.**

The definition of 'business entity' has very wide scope to include all type of persons such as a corporate, firm, limited liability partnership, association and even an individual subject to a condition that such person must carry out any activity relating to industry, commerce or any other business.

Thus, a charitable organization not carrying any business or profession, even if it is a body corporate would not be liable under reverse chare mechanism as it is not a *'business entity'.*

(b) Body Corporate

According to Service Tax Rules, 1994, ***"body corporate"*** has the meaning assigned to it in clause (7) of section 2 of the Companies Act, 1956.

Clause (7) of section 2 of the Companies Act, 1956 provides an inclusive definition of the term 'body corporate'. It provides that *"body corporate" or "corporation"* includes a company incorporated outside India but does not include -

(a) a corporation sole ;

(b) a co-operative society registered under any law relating to co-operative societies ; and

(c) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

A reference can also be taken from the definition provided under **New Companies Act, 2013. Clause (11) of Section 2 of the Companies Act, 2013** which provides that *"body corporate" or "corporation"* includes a company incorporated outside India, but does not include—

(i) a co-operative society registered under any law relating to co-operative societies; and

(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

The basic point of difference between these two definitions is that under New Companies Act, 2013, 'a corporate sole' is now not excluded from the definition and accordingly, under new law, it is a 'body corporate'.

Further, the definition of 'Partnership Firm' as given in Service Tax Rules, 1994 also includes Limited Liability Partnership in its ambit.

The reverse charge mechanism in relation to works contract services, are summarized hereunder:

If Service Provider is a	If Service Receiver is a	Service tax is payable by	
		Service Provider	**Service Receiver**
Individual, Proprietary Firm, Partnership Firm including LLP	Body Corporate	50%	50%
	Other than Body Corporate	100%	0%
Government or Local Authority	Any Person	0%	100%
Body Corporate	Any Person	100%	0%
If Service Provider is a	**If Service Receiver is a**	**Service tax is payable by**	
		Service Provider	**Service Receiver**
Govern-mental Authority	Any Person	0%	100%
Any Person	Govern-mental Authority	100%	0%

(c) Taxable Territory

The term **"taxable territory"** has been defined under Clause (52) of Section 65B of the Act to mean the territory to which the provisions of this Chapter apply.

Sub-section (1) of Section 64 of Chapter V of the Act provides that *"this Chapter extends to the whole of India except the State of Jammu and Kashmir".*

The term "India" has also been defined under Clause (27) of Section 65B of the Act. It provides that *"India" means,–*

(a) the territory of the Union 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 seabed 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;

As such the definition is self-explanatory and it is not relevant to elaborate the same here.

The partial reverse charge mechanism provides that both service provider and service receiver must be located in *taxable territory.* Accordingly, where any person out of these two is located in non-taxable territory, the partial reverse charge mechanism would not come into play. In such a situation either reverse charge mechanism would not be applicable at all or applicable on 100% basis but not on partial reverse charge basis. Accordingly, the service provider shall pay service tax in full or service tax is not payable at all or service tax would be payable by service receiver on 100% reverse charge mechanism basis. The provisions can be understood through the following table:

Service Provider other than a *'body corporate'*, located in	**Service receiver being a *'body corporate'* located in**		**Service tax payable by Service Receiver**	**Service tax payable by Service Provider**
Taxable Territory	Taxable Territory		50%	50%
Non-Taxable Territory	Taxable Territory		100%	0%
Taxable Territory	Non-Taxable Territory	Where POP – Outside India	Not – Taxable	Not – Taxable
		Where POP – Inside India	0%	100%
Non-Taxable Territory	Non-Taxable Territory		Exempted as per Entry No. 34 of Mega Exemption Notification	

1.5 Reverse Charge Mechanism – 100%

In case of service portion in execution of works contract, the 100% reverse charge mechanism would also be applicable in following situations:

(a) where service provider is located in non-taxable territory and place of provision is in taxable territory;

Reverse Charge Notification provides that in respect of any taxable services provided or agreed to be provided by any person who is located in a non-taxable territory and received by any person located in the taxable territory, 100% service tax would be payable by service receiver only. Accordingly, in case of works contract services, where the works contractor is located in non-taxable territory and service receiver is located in taxable territory, the service tax would be payable by service receiver only.

Example:

Service Provider located at	**Service Receiver located at**		**Reverse Charge Mechanism**
USA	Jaipur		100% RCM
J&K	Jaipur		100% RCM
Jaipur	USA	POP – Outside India	Not Taxable At All – As Export of Service
		POP – Inside India	Taxable but RCM Not Applicable
Jaipur	J&K		Taxable but RCM Not Applicable

(b) where the service provider is the Government or Local Authority;

As per Reverse Charge Notification, where any services (other than renting of immovable property) are provided by the Government or Local Authority to any business entity, the service tax would be payable by service receiver only. In other words, 100% reverse charge mechanism is applicable.

Example:

Service Provider	**Service Receiver**	**Taxability**
Government or Local Authority	Business Entity	100% tax payable by such Business Entity
Government or Local Authority	Non-Business Entity	Covered under Negative List
Business Entity	Government or Local Authority (other than for business, commerce, industry or profession purposes)	Partly Exempted under Mega Exemption Notification – Entry No. – 12

1.6 Reverse Charge Mechanism is Not Applicable

In case of service portion in execution of works contract, there are some situations, where reverse charge mechanism is not applicable at all and accordingly, service tax is payable by service provider (i.e. works contractor) only. The situations are:

(a) where conditions of partial reverse charge mechanism are not fulfilled;

(b) where service receiver is located in non-taxable territory and place of provision is inside India;

Example: where reverse charge mechanism is not applicable:

Service Provider	**Service Receiver**
Individual, Proprietary Firm, Partnership Firm including LLP	Other than Body Corporate
Body Corporate	Any Person
Located in India other than J&K	Located in USA & POP inside India
Located in India other than J&K	Located in J&K

Thus, the status of both the service provider and service receiver is important to decide the applicability of reverse charge provisions.

1.7 Reverse Charge in case of Small Service Provider

A question arises, how the reverse charge mechanism works where the service provider is a Small Service Provider and is claiming exemption under Notification No. 33/2012 ST. 20.06.2012 upto an aggregate value of ₹ 10 lacs. In such a situation, scheme of reverse charge would not change and accordingly, service provider is not liable for service tax on 50% portion whereas service receiver shall pay service tax on remaining part which he is obliged to pay under partial reverse charge mechanism.

However, the service receiver is not liable to pay entire 100% service tax even if service provider does not pay his portion of service tax on any account.

Further, service recipient is not eligible to claim general exemption limit of ₹ 10 lakhs. Thus, the service recipient shall pay service tax under reverse charge from the beginning itself.

1.8 Valuation method under reverse charge mechanism

For this purpose, an explanation has been inserted in notification which provides that in works contract services, where both service provider and service recipient are the persons liable to pay tax, the service recipient has the option of choosing the valuation method as per choice, independent of the valuation method adopted by the provider of service.

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 availability and economics.

In most of the cases contractee would be depending upon the contractor's running account bills or accounting maintained by contractor for determining the amount of material and service/labour element involved in the contract. However, there may be a practical difficulty in the application of said explanation i.e. where contractee, the service receiver, wants to pay service tax on actual value of services and the service provider/contractor chooses to pay under alternate method.

If the contractor is paying service tax under alternate method then he may not bother to find out the actual services/labour element in the works contract as he has to calculate service portion at a fixed percentage of total amount under alternate method. In such a case, if contractee wants to pay service tax on actual value of services it would be very difficult for him to find out the actual value of labour/service element involved in works contract in the absence of proper accounting by contractor.

Similarly small contractors who are covered under SSP exemption i.e. having turnover less than 10 lakh may not be keeping regular books of accounts under any law i.e. under Income Tax (due to being covered u/s 44AD) or VAT laws (due to opting composite scheme), in such cases, again it would be difficult for the service receiver to pay service tax under actual scheme, so the above Explanation would become redundant.

Chapter 5
Valuation of Works Contract Service

1.1 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.

1.2 In general, the provisions of valuation of service are governed by Section 67 of the Act read with Service Tax (Determination of Value) Rules, 2006. As a general rule, value of taxable service is gross amount charged for a service whether in the form of money or otherwise.

1.3 Under the old regime of service tax, there were following two schemes for valuation of works contract services:

(a) Works Contract Composition Scheme, 2007 – where the service tax was payable @ 4.80% on gross amount charged.

(b) Rule 2A of Service Tax (Determination of Value) Rules, 2006 – where the service tax was payable at normal rate on the service portion of works contract.

1.4 In order to align this rule with the new system of taxation of services based on the negative list the old Rule 2A of said Valuation Rules and Works Contract Composition Scheme, 2007 have been replaced with new unified scheme provided under new Rule 2A by the Service Tax (Determination of Value) Second Amendment Rules, 2012 vide Notification No. 24/2012 Dated 06.06.2012.

1.5 According to new Rule 2A of Service Tax (Determination of Value) Rules, 2006, subject to the provisions of section 67, the value of service portion in the execution of a works contract, referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

(a) Regular Scheme [Rule 2A(i)]

(b) Standard Deduction Scheme [Rule 2A(ii)]

1.6 Regular Scheme

Rule 2A(i) of the said rules, provides that value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

In other words, Value of works contract service =

Gross Amount Charged for the Works Contract	XXX
Less: Value of Transfer of Property in Goods	XXX
Taxable Value	XXX

For the purpose of above formula –

(i) Exclusion from Gross Amount Charged: - Value Added Tax or Sales Tax, paid or payable, if any.

In other words, the 'gross amount charged' shall not include VAT/Sales Tax/WCT paid on such works contract. It is to be noted that it is not the VAT/Sales Tax/WCT paid on material purchased by the works contractor for such works contract (input) but the VAT/Sales Tax/WCT paid on such works contract by the works contractor (output) for which exclusion is provided.

It must also be noted that exclusion is provided only for VAT/Sales Tax/WCT and not for other taxes, cess, etc. Thus, other taxes, cess such as labour cess, etc. payable on such works contract would not be excluded for determining taxable value under service tax.

(ii) Value of Transfer of Property in Goods (for exclusion purpose)

Where VAT 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 for determination of the value of service portion in the execution of works contract under this clause.

Thus, where the service provider is paying VAT/sales tax under the respective State VAT/sales tax law on the actual value of goods in such works contract, then such actual value of goods shall be deducted from the gross amount charged for such works contract to arrive at the service element on which service tax is payable.

However, there may be a case that the service provider is paying VAT/Sales tax not on the actual value of goods involved in the execution of works contract but under a composition scheme specified under respective State VAT/sales tax law, then service element will consist of following components as mentioned in Explanation (b) to the Rule 2A of said Valuation Rules:

(a) labour charges for execution of the works;

(b) amount paid to a sub-contractor for labour and services;

(c) charges for planning, designing and architect's fees;

(d) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(e) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(f) cost of establishment of the contractor relatable to supply of labour and services;

(g) other similar expenses relatable to supply of labour and services; and

(h) profit earned by the service provider relatable to supply of labour and services;

1.7 Standard Deduction Scheme

The Standard Deduction scheme in works contract service is very famous and quite adoptable under service tax because of reduced tax rate and it becomes easy for contractors to charge service tax when it is difficult to either derive the value of works contract or separate it in terms of supply of goods or services. However, like any other tax scheme, it has its own disadvantages.

Rule 2A(ii) provides that where value has not been determined under Rule 2A(i) as above, the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

Upto 30th October, 2014:

S.N.	**In case of works contracts entered into -**	**ST shall be payable on ___ % of the total amount charged for the works contract**
(A)	For execution of Original Works	40%

(B)	For maintenance or repair or reconditioning or restoration or servicing of any goods	70%
(C)	For any other purpose not covered under (A) & (B) above, including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property.	60%

With Effect from 1st October, 2014 [Notification No. 11/2014 Dated 11 July, 2014]:

In Rule 2A of the Service Tax (Determination of Value) Rules, 2006, category "B" and "C" of works contracts are merged into one single category, with percentage of service portion as 70%; this change has come into effect from 1st October, 2014. This rationalization by way of merger of categories has been made to avoid disputes of classification between these two categories. The new provisions are as under:

S.N.	**In case of works contracts entered into -**	**ST shall be payable on ___ % of the total amount charged for the works contract**
(A)	For execution of **Original Works**	40%
(B)	in case of works contract, not covered under sub-clause (A), including works contract entered into for,- (i) maintenance or repair or reconditioning or restoration or servicing of **any goods;** or (ii) maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings of **immovable property**	70%

Meaning of Certain Terms:

(1) **"original works" means-**

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(2) **"total amount" means -**

the sum total of the 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 the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(a) the amount charged for such goods or services, if any; and

(b) the value added tax or sales tax, if any, levied thereon.

(3) **"Fair Market Value" -**

the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

1.8 A detailed analysis of the percentage scheme is as under:

Firstly, it is to be noted that percentage scheme is not to be always referred. It is to be referred only where value is not determinable as per the provisions of Rule 2A(i) of the said Valuation Rules. 2

In case of works contracts entered into -	**ST shall be payable on**	**Abatement %**
All New Constructions	40% of Total Amount Charged (TAC)	60%
all types of additions to abandoned structures on land that are required to make them workable;	40% of TAC	60%
all types of alterations to abandoned structures on land that are required to make them workable;	40% of TAC	60%
all types of additions to damaged	40% of TAC	60%

structures on land that are required to make them workable;		
all types of alterations to damaged structures on land that are required to make them workable;	40% of TAC	60%
erection, commissioning or installation of – (a) plant, machinery or (b) equipment or (c) structures, whether pre-fabricated or otherwise;	40% of TAC	60%
For – (a) maintenance or (b) repair or (c) reconditioning or (d) restoration or (e) servicing of any goods	70% of TAC	30%
maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property.	70% of TAC *(60% of TAC upto. 30.09.2014)*	30% *(40% upto. 30.09.2014)*

1.9 Repair & Maintenance Services

Upto 30.09.2014, above provisions provide that where repair and maintenance services are provided in relation to any goods, the service tax would be payable on 70% of total amount charged for such contract and where such services are provided in relation to an immovable property, the service tax would be payable on 60% of total amount charged for such contract. Hence, it is important to discuss here the definition of term “goods”.

The term “goods” has been defined under Clause (25) of Section 65B of the Act. It provides that "goods" means every kind of movable property other than actionable claim 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 the contract of sale.

In other words, where repair or maintenance services are provided in relation to a movable property, the service tax would be payable on 70% of total amount charged *(say, service tax would be 8.40% of TAC plus EC)* and where it is provided in relation to an immovable property, the service tax would be payable on 60% of total amount charged *(say, service tax would be 7.20% of TAC plus EC)* for such contract.

However, with effect from 1st October, 2014, the distinction of valuation between repair and maintenance services in relation to moveable property and immoveable property has been done away and accordingly, the service tax would also be payable on 70% of total amount charged where the repair and maintenance services are provided in relation to an immovable property.

1.10 Completion & Finishing Services

Completion and finishing services in relation to an immovable property mean such as glazing, plastering, painting, electrical fitting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services.

Chapter 6
Free Issue of Material by Service Receiver

1.1 Under works contracts, sometimes as per terms of contract, a service receiver may supply materials such as cement or steel free of cost or at reduced cost and contractor uses such materials for the execution of such works contract.

1.2 Now the question is whether the contractor is liable to pay service tax on value of material supplied by the service receiver if he chooses the composition scheme for payment of service tax on such contracts.

Answer to this question is provided in the definition of "total amount" provided under Rule 2A(d) of Valuation Rules. Rule 2A(d) defines "total amount" as under:

"total amount" means -

the sum total of the 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 the works contract****, whether or not supplied under the same contract or any other contract, after deducting-*

(a) *the amount charged for such goods or services, if any; and*

(b) *the value added tax or sales tax, if any, levied thereon.*

The underlined portion of the definition makes it clear that the contractor has to include the fair market value of free issue of materials in the composition scheme while calculating service tax under works contract.

1.3 Nature & Quantum of Free Issue of Materials

Generally, the works contracts clearly specify nature and quantum of free issue of materials, their use, obligations and responsibilities. An emphasis should be supplied on words "supplied under the contract or any other contract" provided in the definition of "total amount". Hence, there is no stipulation that free issue materials should have been disclosed in the same contract. Even if they are agreed upon under separate contract, the service tax is payable on such free issue, if the same is used against execution of such works contract.

This aspect was also quite clear under old regime of service tax where the **Notification No. 23/2009 dated 07-07-2009** included the following Explanation in works contract service valuation rules:

"the value of all goods used in or in relation to the execution of the works contract, whether supplied under any other contract for a consideration or otherwise"

1.4 Requirement of Contract for Free Issue of Materials

The intention of law is to cover all the supplies made by service receiver in valuation under composition scheme whether it is free or chargeable from service receiver. The reason behind this is that the percentage scheme rate is quite lower compare to normal service tax rate i.e. 14%.

To add conviction to above concept, it should be noted that even an oral agreement is a contract as per Indian Contracts Act, 1872. In fact, the performance of supply of free material itself becomes a free consent between both the parties and deemed contract can be implied. Hence, the value of free issue of material shall be included even if there is no such written contract.

1.5 Partial Use of Free Issue of Materials

Sometimes, it may happen that entire material supplied by the service receiver is not used by the contractors and only certain percentage of material out of total free issue of materials is consumed.

In such a situation due to the very nature of indirect taxation, only the consumed portion of free issue of material shall be liable for service tax. However, the contractor has to keep records of material used for execution of such works contract.

1.6 Reverse Charge Mechanism & Free Issue of Materials

As already provided, under works contracts 50% of service tax may be payable by service receiver, if all other prescribed conditions are satisfied.

In a case, if the Company (service receiver) provides free issue of material to such service providers then service tax shall be paid by such Company on 50% of total amount including the value of free issue of material provided.

Education Guide provides the following clarification on this aspect:

"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."

Illustration:

XYZ Ltd. has entered into a contract for construction of a building with ABC Contractions Ltd. (ACL). As per the agreement, the amount payable (excluding all taxes) by XYZ to ACL is ₹ 1, 95, 00,000 in addition to the steel and cement to be supplied by XYZ for which it charged ₹ 5,00,000 from ACL. Fair market value of the steel and cement (excluding VAT) is ₹ 10,00,000/-. The total amount charged pertaining to the said works contract for the execution of 'original works', shall be computed as under:

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.

S.N.	Particulars	Amount (₹)
1.	Gross amount received excluding taxes	1,95,00,000
2.	FMV of steel and cement supplied by XYZ excluding taxes	10,00,000
3.	Amount charged by service receiver for steel and cement	5,00,000
4	Total amount charged (1+2-3)	2,00,00,000
5.	Value of service portion (40% of 4, in case of original works)	80,00,000

1.7 Generally, it is observed that the builders or developers grant contracts to works contractors under following formats:

(a) Pure Labour Contracts; or

(b) Construction Contracts without cement and steel and basic furniture but including labour thereof; or

(c) Turn Key Contracts i.e. including cement, steel, etc.

In view of the provisions of free issue of material as discussed above, the implication of service tax under these categories may be understood through following Table:

Implication of Free Issue of Material on Construction Contracts

Particulars	**Without Material i.e. only Labour Contract**	**Without cement and steel and basic furniture but including labour thereof;**	**Turnkey Contract**
Rate of Service Tax	14%	5.6% (as it is 'Original Work' the taxable value would be of 40% of Gross Value as per the Valuation Rules)	5.6% (as it is 'Original Work' the taxable value would be of 40% of Gross Value as per the Valuation Rules)
Value for the purpose of Service tax	Whole Invoice Value	Invoice Value + *FMV of material supplied by builder or developer*	Whole Invoice Value
Reverse Charge Mechanism	RCM is not applicable. Full service tax shall be charged by contractor in invoice.	**RCM is applicable.** 50% of service tax shall be paid by service provider and 50% by service receiver	**RCM is applicable.** 50% of service tax shall be paid by service provider and 50% by service receiver
CENVAT Credit of Service Tax	Available	Available	Available
State VAT/WCT	Not Applicable	Applicable	Applicable

1.8 As regards to Point of Taxation for the liability to pay tax on free issue of material, it is to be noted that as such there are no specific provisions under the law. According to the author's opinion and as per general principles of service

tax law read with POT Rules, it may be parallel with the other liability to pay tax such as invoice date, payment date or service completion date, etc. E.g. an invoice amounting to Rs. 5, 00,000/- is issued by service provider on 02.04.2015 by charging 50% of portion of service tax @ 2.80% (Rs. 14,000/-). The service receiver make payment of Rs. 1, 14,000/- to the service provider on 15.05.2015. There is free supply of material of Rs. 1, 00,000/- by service receiver to service provider which has been consumed along with other material consumed in this invoice. In this situation, the POT for basic liability against value of Rs. 5, 00,000 for service provider will be 02.04.2015 (i.e. date of invoice) and for service receiver 15.05.2015 (i.e. the date of payment). The POT for liability against value of Rs. 1, 00,000/- may also be same i.e. 02.04.2015 and 15.05.2015 for service provider and service receiver respectively.

Chapter 7
Service Tax on Cancelled Contracts

1.1 According to Section 66B of the Act, service tax would be payable on services 'provided or agreed to be provided' in the taxable territory. Accordingly, amount retained or forfeited by service provider in the event of cancellation of contract by the service receiver become taxable as these represent consideration for a service that was *agreed to be provided.*

1.2 Further, an amount received in settlement of dispute may also be taxable if the dispute itself pertains to consideration relating to service. For example, the amount may represent payments for an executed works contract in dispute then it would be a part of consideration for such works contract service.

Chapter 8
CENVAT Credit in Works Contract

1.1 Generally, the provisions of CENVAT Credit are regulated through CENVAT Credit Rules, 2004. However, in relation to works contract services, the Valuation Rules itself contain special provisions in relation to CENVAT Credit under Works Contract Services.

1.2 Though the Credit Scheme provided under CENVAT Credit Rules allows credit of inputs used under works contract services, Explanation 2 to Rule 2A of said Valuation Rules denies availment of such credit.

1.3 Rule 2(k) and Rule 2(l) of CENVAT Credit Rules provides that CENVAT Credit would not be available in respect of input/input services used for –

(a) Construction or execution of works contract of a building or a civil structure or part thereof; or

(b) Laying of foundation or making of structures for support of capital goods,

except for providing construction or works contract services.

In other words, as per abovementioned rules, credit would be available in the following cases:

(a) where the contract amounts to 'works contract' and contract is otherwise than for building or civil structure;

(b) where input/input services are used for providing works contract services or construction services.

In short, as per CENVAT Credit Rules, a works contract services provider would be eligible for credit of duty paid on inputs and service tax paid on input services.

1.4 However, as per Explanation 2 to Rule 2A of said Valuation Rules, the provider of taxable service i.e. the works contract service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

1.5 In other words, CENVAT Credit of excise duty paid on inputs used in or in relation to said works contract would not be available. However, the above explanation provides a restriction for availing credit of duty or cess paid on

inputs and not for duty or cess paid on capital goods and service tax paid on input services. Therefore, CENVAT Credit shall be available in respect of excise duty paid on capital goods and service tax paid on input services used in or in relation to said works contract. E.g. Architect Services, Consultancy Services, PMC Services, Advisory Services, Sub-Contract Services, etc.

1.6 According to sub-rule (7) of Rule 4 of CENVAT Rules, the CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 of the said rules, is ***received.***

1.9 Credit in case of 100% Reverse Charge

First proviso to Rule 4(7) has been amended vide *Notification No. 6/2015-Central Excise (N.T.) Dated 01.03.2015* to provide that in respect of input service where ***whole or part of the service tax*** is liable to be paid by the recipient of service, credit of service tax payable by the service recipient shall be allowed ***after such service tax is paid.***

In other words, in case of an input service where the whole of the service tax is paid on reverse charge by the recipient of the service (i.e. u/s 68(2) of Finance Act, 1994), the CENVAT credit in respect of such input service shall be allowed ***after the service tax paid. He can take CENVAT credit whether or not he makes payment of value of input service to the service provider.*** *[First Proviso to Rule 4(7) of CENVAT Credit Rules, 2004 amended through Notification No. 6/2015 – Central Excise (N,T.) Dated 1.03.2015 w.e.f. 01.03.2015]*

However, the credit should be taken within One Year from date of issue of any of the documents specified in sub-rule (1) of rule 9 i.e. within one year from the date of payment/GAR-7 Challan. [Sixth Proviso to Rule 4(7) of CENVAT Credit Rules, amended vide Notification No. 6/2015 – Central Excise (N. T.) Dated 01.03.2015 w.e.f. 01-03-2015]

Before the abovementioned amendment the Sixth proviso to Rule 4(7) provided that the credit should be taken within six months from date of issue of any of the documents specified in sub-rule (1) of rule 9 i.e. within six months from the date of payment/GAR-7 Challan.

1.10 Credit in case of Partial Reverse Charge

(d) Credit of Portion of Service Tax paid under Reverse Charge Mechanism by Service Receiver

W.e.f. 01.03.2015, the First proviso to Rule 4(7) provides that in respect of input service where *whole or part of the service tax* is liable to be paid by the recipient of service, credit of service tax payable by the service recipient shall be allowed *after such service tax is paid.*

In other words, in case of an input service where the part of the service tax is paid on reverse charge by the recipient of the service (i.e. u/s 68(2) of Finance Act, 1994), the CENVAT credit in respect of such input service shall be allowed *after the service tax paid. He can take CENVAT credit whether or not he makes payment of value of input service to the service provider. [First Proviso to Rule 4(7) of CENVAT Credit Rules, 2004 amended through Notification No. 6/2015 – Central Excise (N.T.) Dated 1.03.2015 w.e.f. 01.03.2015]*

Prior to the abovementioned amendment the old Second proviso to Rule 4(7) provided that in case of partial reverse charge mechanism i.e. where the service recipient is liable to pay a part of service tax and the service provider is liable to pay the remaining part, the CENVAT credit in respect of such input service shall be allowed on or after the day on which payment is made of the value of input service and the service tax paid or payable as indicated in invoice, bill or, as the case may be, challan referred to in rule 9.

In other words, the credit of tax paid by the service recipient under partial reverse charge scheme would be available only after making payment of value of input service inclusive of service tax to the service provider and payment of service tax under partial reverse charge by recipient to the Central Government. The said credit would be available on the basis of the tax payment challan.

(e) Credit of Part of Service Tax Charged in Invoice by Input Service Provider

In respect of service tax charged in invoice by input service provider, the credit would be available in terms of rule 4(7) supra only which provides that the CENVAT credit in respect of input service shall be allowed, on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 of the said rules, is *received.*

In other words, in respect of portion of service tax charged in the invoice by the service provider, the credit would be available immediately on receipt of invoice, bill or as the case may be, challan referred to in rule 9. It is also clear from the new second proviso to Rule 4(7) of Cenvat Credit Rules, 2004.

The new second proviso to Rule 4(7) provides that in case the payment of the value of input service and the service tax paid or payable as indicated in the invoice, bill or, as the case may be, challan referred to in rule 9 is not made within three months of the date of the invoice, bill or, as the case may be, challan, the manufacturer or the service provider who has taken credit on such input service, shall pay an amount equal to the CENVAT credit availed on such input service , except an amount equal to the CENVAT credit of the tax that is paid by the manufacturer or the service provider as recipient of service, and in case the said payment is made, the manufacturer or output service provider, as the case may be, shall be entitled to take the credit of the amount equivalent to the CENVAT credit paid earlier subject to the other provisions of these rules.

In other words, in case of partial reverse charge scheme, if payment is not made to service provider within three months, the Cenvat credit taken should be reversed. Later, when he makes payment of invoice value and service tax to service provider, he can take back the Cenvat credit, which he had reversed earlier. However, this provision is not applicable on the CENVAT credit of the tax that is paid by the manufacturer or the service provider as recipient of service.

Further, the sixth proviso to Rule 4(7) provides that the manufacturer or the provider of output service shall not take CENVAT credit after one year of the date of issue of any of the documents specified in sub-rule (1) of rule 9. In other words, in any case credit has to be taken within one year from the date of invoice, bill or as the case may be, challan. It is to be noted here that the condition of one year is applicable for taking of Cenvat Credit and not for its utilization.

The summary of above credit provisions are as under:

Situation	**Time of Credit**
Where 100% of Service Tax is to be charged by service provider in invoice i.e. No Reverse Charge	on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 of the said rules, is received. Credit need to be reversed if payment to service provider is not made within 3 months.
Where 100% of Service Tax is to be paid by service recipient i.e. 100% reverse charge scheme	after the service tax paid on the basis of challan

In case of partial reverse charge mechanism for portion of service tax charged in the invoice	As explained earlier, The author has opinion that on or after the day on which the invoice, bill or, as the case may be, challan referred to in rule 9 of the said rules, is received. Credit need to be reversed if payment to service provider is not made within 3 months.
In case of partial reverse charge mechanism for portion of service tax to be paid by service receiver directly to the Government	*W.e.f. 01.03.2015: after the service tax paid on the basis of challan* *Upto 28.03.2015:* On or after the day on which payment is made of value of input service to the service provider and payment of service tax to the Central Government.
In all cases, credit has to be taken within one year from the date of issue of invoice, bill or as the case may be, challan referred in rule 9.	

1.11 Where the assessee is claiming exemption upto rupees ten lakhs as per **Notification No. 33/2012** *(supra),* he is not eligible for CENVAT Credit. However, as and when, he pays service tax, he is eligible for CENVAT Credit for services or inputs or capital goods received on or after that day.

1.12 It would be worthwhile to mention here that the above scheme of CENVAT Credit would be applicable for both methods of valuation as prescribed under Rule 2A of Service Tax (Determination of Value) Rules, 2006.

1.13 It is a point to ponder that CENVAT Credit cannot be availed off while discharging service tax liability under reverse charge mechanism by the service receiver.

Exhaustive Example:

ABC & Co. Pvt. Ltd. is providing works contract services to PQR & Co., a proprietorship firm and to MNC Pvt. Ltd. The details of billing by ABC & Co. to these concerns are as under:

Client	**Date of Invoice**	**Value of Invoice**	**Service Tax Charged**	**Date of Receipt of Payment**	
PQR & Co.	2-1-14	10,00,000	49,440	2,00,000	25-12-13
				3,00,000	3-1-14
				5,49,440	5-2-14
MNC Pvt Ltd	25-1-14	5,00,000	24,720	2,00,000	25-1-14
				3,24,720	7-2-14

Further, ABC & Co. receives following input services for providing such works contract services to abovementioned clients:

Nature of Service	**Status of Service Provider**	**Value of Service**	**Service Tax charged by Service Provider**	**Date of Invoice**	**Date of Payment to Service Provider**
Architect Services	Any Person	1,00,000	12,360	9-1-14	15-2-14
Sub-Contract Service	A Pvt. Ltd., Company	5,00,000	24,720	15-1-14	20-1-14 – ₹ 2 lacs 18-2-14 – 3,24,720
Sub-Contract Service	XYZ, A Partner-ship Firm	6,00,000	14,832 (only 50%)	20-1-14	15-1-14 – ₹ 3 lacs & 25-2-14 ₹ 3,14,832

Discuss the service tax liability for the month of January, 2014.

Solution:

(1) As the ABC & Co. Pvt. Ltd. is a body corporate, the reverse charge mechanism is not applicable for the service provided by it to others and accordingly, it has to pay service tax in full.

(2) In respect of architect services (input services), reverse charge mechanism is not applicable.

(3) In respect of sub-contract services received from A Pvt. Ltd. again reverse charge mechanism is not applicable as the provider is a 'body corporate'.

(4) In respect of sub-contract services received from XYZ, the partial reverse charge mechanism is applicable and accordingly, ABC & Co. Pvt. Ltd. has to pay 50% of total service tax directly to the Government also.

(5) According to Rule 7 of POT Rules, the POT in respect of service tax liability under reverse charge (partially or fully) is the date on which payment for such input service is made to the service provider. Accordingly, in the present case, ABC & Co. has to pay service tax of ₹ 7416/- (i.e. on ₹ 3,00,000) on or before 5-2-14 (as the POT is 15-1-14, assumed deposited on 31-1-14) and of ₹ 7416/- (i.e. on ₹ 3,00,000) on or before 5-3-14 (as the POT is 25-2-14, assumed deposited on 5-3-14).

(6) As per CENVAT Credit Rules, in respect of architect services and sub-contract services received from A Pvt. Ltd., credit would be available as and when the invoice is received.

(7) As per CENVAT Credit Rules, in respect of service tax (i.e. 50% - ₹ 14,832) charged by XYZ on sub-contract services would be available as and when the invoice is received.

(8) As per CENVAT Credit Rules, credit of service tax paid under reverse charge mechanism would be available as and when payment of input service is made to the service provider (including 50% service tax charged in invoice) and payment of service tax (50%) directly made to the Government. However, w.e.f. 01.03.2015, the CENVAT credit of service tax payable by the service recipient shall be allowed *after such service tax is paid* irrespective of status of payment of value of input service to the service provider.

On abovementioned grounds, service tax liability can be computed as under:

Month: January, 2014

	Amount (₹)
Gross Output Liability	
On Service Provided to PQR	49,440
On Service Provided to MNC	24,720
Total Gross Output Liability	**74,160**
CENVAT Credit	
Architect Services	12,360
Sub-Contract Services from A Pvt. Ltd.	24,720
Sub-Contract Services from XYZ – for Service Tax Charged in Invoice	14,832
Sub – Contract Services from XYZ – for Service tax directly paid to the Government (Credit of 7,416 would be available against the liability of January, as the same is deposited in the month of January and Credit of balance 7,416 would be available against the liability of March, as the same is deposited in the month of March)	7,416
Total CENVAT Credit available in the month of January	**59,328**
Net Output Liability for the month of January	**14,832**

In addition to Output Liability amounting to ₹ 14,832/- ABC & Co., has to pay service tax of ₹ 7416/- under reverse charge mechanism on or before 05-02-2014 (which is assumed to have been deposited on 31.01.2014 in this example). CENVAT Credit is not available against the payment to be made under reverse charge mechanism.

Chapter 9
Point of Taxation for Works Contract

1.1 POT for Service Provider

Under the provisions of Rule 2(c) of Point of Taxation Rules, 2011, the Central Government has specified *'service portion in execution of works contract'* to be a *'continuous supply of service'* for the purpose of said rules. It reads as under:

"continuous supply of service" means any service which is provided, or to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time, or where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition;

In other words, works contract services will constitute *"continuous supply of services"* irrespective of the period for which they are provided or agreed to be provided.

Notification No. 4/2012 Dated 17.03.2012 has omitted the Rule 6 dealing with point of taxation relating to 'continuous supply of services' and inserted the following new proviso under clause (a) and (b) of Rule 3 of POT Rules and thereby, has made applicable the general provision of POT on 'continuous supply of services' also:

"Provided that for the purposes of clauses (a) and (b), —

(i) in case of continuous supply of service where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service."

In other words, said Notification provides that the 'point of taxation' in case of continuous supply of service shall be determined in the same manner as provided for services other than continuous supply of services. However, for this purpose, where the provision of the whole or part of the service is determined periodically on the completion of an event in terms of a contract, which requires the receiver of service to make any payment to service provider, the date of

completion of each such event as specified in the contract shall be deemed to be the date of completion of provision of service.

The POT in case of 'continuous supply of services' would be determined as under:

Situation	*Point of Taxation*
Event Completed & Invoice Issued within 30 Days	Date of Issue of Invoice
Event Completed but invoice not issued within 30 Days	Date of Completion of Event
Event Completed & Invoice not issued but payment is received within 30 Days	Date of such Payment
Advance payment received before completion of event	Date of receipt of each such advance

1.2 POT for Service Receiver

On or after 01.10.2014: As Amended by Notification No. 13/2014-ST Dated 11.07.2014

The Point of Taxation of service receiver (for liability under reverse charge mechanism) is governed by Rule – 7 of the POT rules. According to the said rule, the POT in relation to service receiver would be the date of payment to service provider subject to the condition that *where the payment is not made within a period of three months of the date of invoice, the point of taxation shall be the date immediately following the said period of three months.*

Upto 30.09.2014:

According to the said rule, the POT in relation to service receiver would be the date of payment to service provider subject to the condition that payment has been made within six months from the date of invoice.

Let us understand this with an example:- M/s. ABC Ltd. receives works contract services from Mr. A on 01.02.2014 and receives invoice on 09.02.2014 dated 03.02.2014 in which 50% service tax is charged. ABC Ltd. makes payment to Mr. A on 25.04.2014. In such case, the POT for Mr. A being a service provider would be the date of invoice i.e. 03.02.2014 and accordingly, he has to pay service tax by the 5th or 6th March, 2014, whether or not he has received the payment upto that date.

Whereas the POT for ABC Ltd. being a service receiver would be the date of payment to service provider i.e. 25.04.2014 and accordingly, it has to pay service tax by the 5th or 6th May, 2014 to the Government.

It is true that where the liability of tax under reverse charge or partial reverse charge is on service recipient, then the POT shall be the date of payment. However in case of the following the POT would not be the date of payment.

Where invoice is issued upto 30.09.2014: As per the first proviso to Rule 7 of POT Rules, if the payment is not made within a period of six months from the date of invoice, the point of taxation shall be determined as if this rule does not exist. This would inevitably mean that even if the payment to the service provider is not made within 6 months from the date of invoice, service tax has to be deposited by the service recipient. Further, the POT would be the date of invoice or the date of completion of service, as the case may be and accordingly, the assessee may have to pay interest on such service tax also.

Where invoice is issued on or after 01.10.2014: As per the new first proviso to Rule 7 of POT Rules, if the payment is not made within a period of three months from the date of invoice, the POT shall *be the date immediately following the said period of three months*. This would inevitably mean that even if the payment to the service provider is not made within 3 months from the date of invoice, service tax has to be deposited by the service recipient. Further, the POT shall *be the date immediately following the said period of three months*.

Chapter 10
Works Contract Services by Sub-Contractor

1.1 Entry No. 29 (h) of Mega Exemption Notification No. 25/2012 dated 20.06.2012 provides exemption to sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt.

1.2 A sub-contractor providing services by way of works contract to the main contractor, 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.

1.3 As per Clause (1) of Section 66F of the Act, 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 Notification would not be available to such persons unless the activities carried out by the sub-contractor independently and by itself fall in the ambit of the exemption.

1.4 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.

1.5 In other words, sub-contractor providing works contract services are not exempt where the principal contractor is providing taxable works contract services. Further, it must be noted that the services provided by an architect, consulting engineer, painter, electrician, erection, commissioning or installation

services to the principal works contractor are not exempt as the exemption is available to sub-contractor engaged in works contract services and not to other outsourced services. In such case, the services rendered by such person would not be exempt from service tax even though such services are rendered in relation to exempt works contract service. In addition to this, 'pure labour services provided by sub-contractor to contractor, are not qualified as 'works contract services' and hence become liable for service tax.

1.6 The above entry makes it clear that if the principal contractor is providing works contract services which are exempt from service tax and if some part of the contract is sub-contracted to any other person, then such sub-contractor is not liable for service tax. E.g. principal contractor gets a contract from Government for constructing road of 100 KM. and he sub-contracts the construction of 10 KM. of road then in such case, the sub-contractor would also be exempt from service tax under clause (h) above as he will be providing services of a works contract nature.

1.7 Further, it should also be noted that a sub-contractor (who provides works contract services to the main contractor providing works contract services which are exempt from tax) also sub-contracts such contract to another sub-contractor then also such sub-sub-contractor is also not liable to services as the terms which are used in entry 29(h) are "services by way of works contract to another contractor" and not the ""services by way of works contract to main/principal contractor". Hence, works contract services provided by sub-sub-contractor to sub-contractor who provides exempted works contract services are also not liable to Service Tax.

Chapter 11

Taxability of Re-development including Slum Rehabilitation Projects

1.1 Generally in this model, land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. When it becomes necessary after the lapse of a certain period, society/flat owners engage a builder/developer for undertaking re-construction.

Society /individual flat owners give 'No Objection Certificate' (NOC) or permission to 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 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.

1.2 Position prior to 01.07.2010: Construction as well as Reconstruction Service provided by the builder/developer was not taxable, in terms of Circular No. 108/02/2009-ST dated 29. 01. 2009.

1.3 Position from 01.07.2010 to 30.06.2012: Re-construction Services provided by the builder/developers to the original owner(s) of the land would not be taxable because the reconstructed flats are for the personal use of original owners. The statutory definition of term 'residential complex' as given in Section 65(91a) inter alia provides that it does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person. However, if additional flats are

constructed and sold to persons other than original owners then the same will be subject to service tax if payment has been received before obtaining the completion certificate.

With regard to taxability of aforesaid re-construction activities, the Para 2.2 of Circular No.151/2/2012-ST dated 10.02.2012 provides that:

(ii) Re-construction undertaken by a building society by directly engaging a builder/developer will not be chargeable to service tax as it is meant for the personal use of the society/its members. Construction of additional flats undertaken as part of the reconstruction, for sale to the second category of service receivers, will also not be a taxable service, during the period prior to 01/07/2010;

(iii) For the period after 01/07/2010, construction service provided by the builder/developer to second category of service receivers is taxable in case any payment is made to the builder/ developer before the issuance of completion certificate.

1.4 Position from 01.07.2012 onwards

According to Explanation II to Section 66E (b) of Finance Act, 1994, the term 'Construction' includes additions, alterations, replacements or re-modelling of any existing civil structure.

Further, definition of term 'Residential Complex' has also been changed with effect from 01.07.2012. According to Clause 2(zc) of Mega Exemption Notification, 'Residential Complex' means any complex comprising of a building or buildings having more than one single residential unit. And the term "single residential unit" means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family as per clause 2(ze) of Mega Exemption Notification.

Reconstruction Services provided by the builder/developer who is engaged directly by the concerned building society *(which consists of several members and each member is entitled to his share by way of an apartment)* are taxable with effect from 01.07.2012 because, as explained above, the definition of term 'Residential Complex' has been changed.

In essence, negative list scenario has changed the crux of the said circular and the Education Guide provides that "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."

Chapter 12
Taxability of Infrastructure Sector – BOT Projects

1.1 Since 2005, the service tax law was made applicable to the construction sector but it has been smooth sailing for the infrastructure sector. Construction of roads, railways, transport terminals, airports, ports, dam, non commercial structures etc., were exempted from the levy of Service tax on wholesome basis. Only certain service providers like engineers, consultants to these projects were made to pay the service tax.

1.2 *With regard to taxability of BOT projects, the Education Guide provides as under*:

"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 around thirty years, 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."

1.3 The Government infrastructure basically works on two models, these are as under:

1. *Traditional Contract Model:* The Government or Local Authority gives a contract to a successful bidder/contractor who quotes the lowest amount. The service provided under this model may directly be classified as

'works contract services', subject to prescribed conditions. The Contractor has to construct the whole project as per the design and specifications of the Government or Local Authority. The Contractor raises periodical invoices to the Government or Local Authority which after due verifications releases payments.

2. *Build-Operate-Transfer Model or Public Private Partnership Model*: Under this model the contract is awarded to a concessionaire on BOT (Build-Operate-Transfer) basis. Under this model, the concessionaire has to construct the whole project as per the design and specifications of the Government but the Government does not pay him anything. However, instead of payments, the concessionaire gets a right to use and grant access to others for which it can collect a Government notified 'User Fee' for a specified period ranging up to 30 years or more. Generally, the Governments prefer this model because of paucity of funds with them and need for quality infrastructure.

1.4 The taxability of these two models can be analyzed with the following example:

Tender for: Construction of 10 Border Check Posts (BCP) in Rajasthan

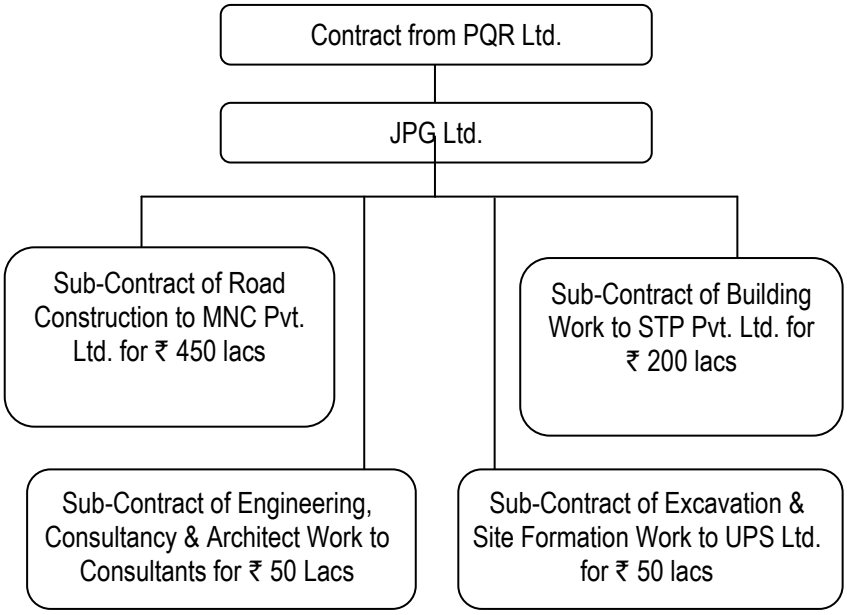
Tender Model:

A. Traditional Contract Model – Amount Payable on % Completion Basis – Contract Amount ₹ 1000 lacs

B. BOT Model – The Concessionaire will have right to collect 'User Fee' from all the visitors of BCP for next 20 years.

Contractor Company: PQR Limited

PQR Limited sub-contracted the entire project to JPG Limited for ₹ 800 lacs under both Models. JPG Limited works in following manner:



Taxability of Entire Contract under both Models:

There are total seven transactions in this example, these are:

1. Between Government of Rajasthan (GoR) & PQR Ltd.
2. Between PQR Ltd. & JPG Ltd.
3. Between JPG Ltd. & MNC Pvt. Ltd.
4. Between JPG Ltd. & STP Pvt. Ltd.
5. Between JPG Ltd. & UPS Ltd.
6. Between JPG Ltd. & Consultants
7. Between PQR Ltd. & Users (Only under BOT Model)

1. Transaction between GoR & PQR Ltd.

A. Under Traditional System

Government gives contract to PQR Ltd. for ₹ 1,000 lacs. Under new law, the services provided by PQR Ltd. to GoR are classifiable under Works Contract Services.

Entry No. 12(a) of Mega Exemption Notification provide exemption where *services are 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 civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession.

Here, the PQR Ltd. is providing construction services to Government of Rajasthan and the structure being constructed is meant for non-commercial purpose, being Border Check Post. Hence, all the conditions prescribed under Entry No. 12(a) of Mega Exemption Notification are satisfied and accordingly, the services provided by the PQR Ltd. to GoR is exempt from service tax.

However, w.e.f. 01.04.2015, Entry No. 12(a) has been omitted vide Notification No. 06/2015-ST Dated 01.03.2015. Accordingly, the abovementioned services provided by PQR Ltd. to the Government of Rajasthan is made liable to service tax w.e.f. 01.04.2015.

B. Under BOT Model

GoR gives a Contract to PQR Ltd. wherein the Concessionaire (PQR Ltd.) will have right to collect 'User Fee' from all the visitors of BCP for next 20 years.

Under BOT Model PQR is constructing the BCPs for the GoR but there is no transfer of property in goods involved in this transaction. PQR being the concessionaire keeps the right to grant access for a specified period only and there is no consideration flowing from GoR to PQR Ltd.

After the lapse of the predefined period the project gets transferred to the Government. As there is no transfer of property in goods from PQR to GoR, there is no liability of VAT on PQR to GoR hence the contract cannot be classified under Works Contract Services. Accordingly, under this transaction, there is no liability of service tax at all.

2. Transaction between PQR Ltd. & JPG Ltd.

A. Under Traditional System

PQR Ltd. has sub-contracted the contract to JPG Ltd. for ₹ 800 lacs. Entry No. 12(a) of Mega Exemption Notification provides exemption for services provided to the Government and not to the contractor. **Further, w.e.f. 01.04.2015, the services provided to the Government is also not exempted. [Notification No. 06/2015-ST Dated 01.03.2015]** However, **Entry No. 29(h) of Mega Exemption Notification** provides exemption where *sub-contractor is providing services by way of works contract to another contractor providing works contract services which are exempt.*

In the present case, the JPG Ltd. (the sub-contractor) is providing services by way of works contract to another contractor (PQR Ltd.) providing works contract services which are exempt (works contract services provided by PQR Ltd. to GOR is exempt from service tax as already discussed). In other words, all the conditions prescribed under Entry No. 29(h) are satisfied and accordingly, this transaction is exempt from service tax.

B. Under BOT Model

If PQR Ltd. works under BOT Model then it would become a 'concessionaire' instead of a 'contractor'. In the present case, the service provided by JPG Ltd. to PQR Ltd. would not be classified as 'sub-contract of services' as the PQR, being the awarder is not the contractor but a concessionaire. Accordingly, the services provided by the JPG to PQR under BOT Model would not get exemption under Entry No. 29(h) of Mega Exemption Notification and accordingly, whole amount of ₹ 800 lacs would be liable to service tax.

3. Transaction between JPG Ltd. & MNC Pvt. Ltd.

The road construction work done by MNC Ltd. for JPG Ltd. would be exempt from service tax under both models by virtue of Entry No. 13(a) of Mega Exemption Notification which provides that *services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a road, bridge, tunnel, or terminal for road transportation for use by general public would be exempt from service tax.*

Even otherwise if PQR Ltd. works under traditional contract system, the sub-contract services provided by JPG to PQR are exempt from service tax by virtue of Entry No. 29(h) of Mega Exemption Notification. Further, the contract between MNC & JPG would also be regarded as sub-contract in the hands of MNC Pvt. Ltd. and accordingly, it would also be exempted by virtue of Entry No. 29(h) of Mega Exemption Notification providing exemption where sub-contractor (MNC Pvt. Ltd.) is providing services by way of works contract to another contractor (JPG Ltd.) providing works contract services which are exempt *(services provided by JPG to PQR under traditional contract system are exempt, as discussed in Point No. 2).*

4. Transaction between JPG Ltd. & STP Pvt. Ltd.

A. If PQR Ltd. works under Traditional System

If the PQR Ltd. works under traditional contract system, the sub-contract services provided by JPG to PQR are exempt from service tax by virtue of Entry

No. 29(h) of Mega Exemption Notification. Further, the contract between STP & JPG would also be regarded as sub-contract in the hands of STP Pvt. Ltd. and accordingly, it would also be exempted by virtue of Entry No. 29(h) of Mega Exemption Notification providing exemption where sub-contractor (STP Pvt. Ltd.) is providing services by way of works contract to another contractor (JPG Ltd.) providing works contract services which are exempt (services provided by JPG to PQR under traditional contract system are exempt, as discussed in Point No. 2).

B. If PQR Ltd. works under BOT Model

If PQR works under BOT Model then services provided by JPG to PQR would not get exemption as discussed in Point No. 2(B). Accordingly, even though the services provided by STP to JPG are sub-contract services but the same are not exempted under Entry No. 29(h) of Mega Exemption Notification as works contract services are not provided to another contractor who provides exempted works contract services.

5. Transaction between JPG Ltd. & UPS Ltd.

A. If PQR Ltd. works under Traditional System

The site formation and excavation work does not qualify the conditions of a 'works contract' as there is no involvement of transfer of property in goods. Hence, the site formation and excavation work done by UPS Ltd. for JPG would not get exemption under Entry No. 29(h) of Mega Exemption Notification and accordingly, liable to service tax.

B. If PQR Ltd. works under BOT Model

The site formation and excavation work done by UPS Ltd. for JPG would not get exemption under Entry No. 29(h) of Mega Exemption Notification as it is not a works contract as well as not provided to a contractor who provide exempted works contract services. Accordingly, it is liable to tax at full rate under other provisions.

6. Transaction between JPG Ltd. & Consultants

A. If PQR Ltd. works under Traditional System

The services of engineering, consultancy and architect provided to JPG Ltd. would not get exemption under Mega Exemption Notification. It would be having extra costing in the hands of JPG Ltd.

B. If PQR Ltd. works under BOT Model

The services of engineering, consultancy and architect provided to JPG Ltd. would not get exemption under Mega Exemption Notification under BOT model also. However, JPG would take credit of service tax charged by consultants as the services provided by JPG are liable for service tax where PQR works under BOT Model and accordingly, net outflow or profit in the hands of JPG would remain same.

7. Transaction between PQR Ltd. & Users (Only under BOT Model)

Under BOT Model the transaction between PQR Ltd. and GoR is not liable to service tax due to want of consideration. However, PQR Ltd. would collect 'User Fee' from all visitors of BCPs (Boarder Check Post) over the next 20 years. The User Fee charged by PQR Ltd. would be liable for service tax because neither the Mega Exemption Notification nor the Negative List provides exemption for such user fee collected from visitors. Though the Clause (h) of section 66D of the Act contain "*service by way of access to a ROAD or a BRIDGE on payment of toll charges"* under Negative List but the same is for Road or Bridge and not for 'BCP', therefore, the user fee collected from the visitors of BCP would be liable to service tax.

Summary of Above Transactions

Service Provider / Service	**Traditional**	**BOT**
PQR Ltd (Main Contractor) to GOR	Exempt **[Taxable w.e.f 01.04.2015]**	Not Taxable
JPG Ltd (Main Sub Contractor)	Exempt	Taxable
MNC Pvt. Ltd. – Road Work (Sub-Contractor)	Exempt	Exempt
STP Pvt. Ltd. – Building Work (Sub-Contractor)	Exempt	Taxable
UPS Pvt. Ltd. – Site Formation Work (Sub-Contractor)	Taxable	Taxable
Consultants	Taxable	Taxable
PQR Ltd to Visitors	NA	Taxable

Chapter 13
Printing Contracts

1.1 In a printing contract, both textile and paper, there may be involvement of material as well as services such as book printing, flex printing, stationery, bed sheets, etc.. Normally, such printing contracts involving material as well as labour have been held to be a **'works contract'** under the sales tax laws. Hence, such contracts may also be classified as 'works contracts' under service tax law as such contracts are leviable to sales tax and under new regime, movable property contracts are also classified as works contracts.

1.2 However, even though printing contracts are works contracts but the same would not be taxable under the service tax law. The taxability of printing contracts can be understood through succeeding paras.

1.3 Printing Contracts on Job Work Basis (i.e. without material)

Where printing is done on job work basis and material is provided by service receiver only, it is exempted under Entry No. 30(a) of Mega Exemption Notification. The said Entry provides that carrying out an intermediate production process as job work in relation to agriculture, printing or textile processing would be exempt from service tax. Thus, if printing is done on job-work basis, it is out of purview of service tax subject to the condition that Job Work is done for intermediate production process.

1.4 Printing Contracts with Material

Where printing contracts are done with material i.e. invoice printing, file printing, books printing, etc. such contracts may be liable as works contract under service tax law. However, in general such activity may amount to 'manufacture'. According to Clause (f) of Negative List provided under section 66D of the Act, any *process amounting to manufacture or production of goods* is not a taxable service. The Clause (40) of Section 65B of the Act defines *"Process amounting to manufacture or production of goods"* to mean 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 for the time being in force.

In other words, where a process amounts to manufacture or production of goods then instead of service tax, excise duty is payable on such activity.

Products printed on paper are excisable goods – Products printed on paper are excisable goods covered under Chapter 49 of First Schedule of Central Excise Tariff Act, 1985. The Heading 4911 99 90 covers all residual printed matter. Thus, these are 'excisable goods' and hence the activity of printing on paper are ultimately liable for excise duly only.

No service tax even if excise duty is exempt, if activity is manufacture – 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 – *Para 4.6.2 of Education Guide.*

In short, printing contracts are not liable for service tax at all.

Chapter 14
Pest Control Services

Works contracts services cover the contracts wherein transfer of property in goods is involved. Further, another essential condition is that, the same contract must be subject to VAT/ Sales Tax.

In the business model of Pest Control Services, the material supply is merely incidental to provide 'Pest Control or Cleaning Services' and the material does not get transferred to purchaser / customer but instead gets consumed while providing such service.

Further, the intention of the purchaser is not to buy that material, but to receive pest control or cleaning services. Also, to classify this service under Works Contract Services, the material should be subject to sales tax or VAT, this is the fact which is absent in Pest Control Services.

In view of the above, the Pest Control Services are not covered under works contract services and accordingly, reverse charge mechanism is also not applicable on such service recipients.

Chapter 15
Tyre Retreading Services

1.1 Meaning of Tyre Retreading Service

In the manufacture of a new tyre, approximately 75%-80% of the manufacturing cost is incurred in tyre body and remaining 20%-25% in the TREAD, the portion of the tyre which meets the road surface. Hence, by applying a new TREAD over the body of the worn tyre, a fresh lease of life is given to the tyre, at a cost which is less than 50% of the price of a new tyre. This process is termed as 'tyre retreading'.

The tyre retreading process requires both material as well as labour. It has been a debatable issue that the tyre retreading process is a manufacturing process or not. Further, there is a sales tax levied on a particular portion of tyre retreading activity by the State as per the Article 366(29A) of the Constitution.

1.2 CBEC Clarification on Tyre Retreading Service

The CBEC in its letter F.No. 137/125/2011-ST Dated 27.02.2012 have addressed this issue and relied upon the judgement of Hon'ble Supreme Court in the case of M/s P.C. Cheriyan v. Mst. Barfi Devi.

In the said judgement, the Apex Court observed that though tyre retreading would qualify as 'excisable goods' as they are specified in Central Excise Tariff, however, for the Central Excise Duty to come into operation, as per Section 3 of the Central Excise Act, 1944, the additional requirement of these goods to have been produced or manufactured in India would also have to be satisfied.

The Apex Court further held that:

"The retreading of old tyres does not bring into being a commercially distinct or different entity. The old tyre retains its original character, or identity as a tyre. Retreading does not completely transform it into another commercial article, although it improves its performance and serviceability as a tyre. Retreading of old tyres is just like resoling of old shoes."

"Though this judgment is given in the context of Transfer of Property Act, however, the basic principle behind "manufacture" of coming into existence of a commercially different and distinct entity is equally applicable to Central Excise Act and has been relied upon by the Tribunal in certain cases

while interpreting 'manufacture' under section 2(f) of the Central Excise Act, 1944. "

The clarification has concluded and rightfully so, that the activity of retreading of tyre fails the test of Manufacturing as defined in section 3 of Central Excise Act and well settled parameters laid down by numerous cases . Accordingly, retreading of tyres is covered under the ambit of the service 'Management Maintenance & Repair Service' and is liable to payment of service tax.

1.3 Taxability under New Regime

Even though the above clarification was issued in the context of positive regime of service tax, the essence of the same is also applicable under new negative regime. Under new regime, the term "service" has been defined under clause 44 of Section 65B of the Act as under:

"any activity carried out by a person for another for consideration, and includes a declared service, but shall not include- ……..Constitution; or. ……."

Since, the process of 'tyre retreading' has already been clarified as 'service' and it meets the conditions of definition of service under new regime also, it is liable to service tax. However, a question arises that:-

(a) Whether 'tyre retreading' is covered under the definition of 'works contracts' and accordingly, liable for service tax only on service portion in the execution of works contract? or

(b) Is it a normal service assuming that material has been consumed during the course of providing service and accordingly, liable for service tax on gross amount charged?

An analysis of definition of 'Works Contract' in the context of 'tyre retreading service' reveals as under:

(i) *There is a transfer of property in goods being TREAD involved in the execution of such contract, and*

(ii) *Such transfer of property in goods (i.e. TREAD) is leviable to tax as sale of goods (such as sales tax, VAT or WCT, etc.).*

(iii) *such contract is for the purpose of carrying out repair, maintenance, renovation, alteration of any movable property (being tyre in the present case) or for carrying out any other similar activity or a part thereof in relation to such property.*

In other words, under new regime, the tyre retreading activity is squarely covered within the ambit of new definition of 'works contract services' and accordingly, liable for service tax as 'declared service'.

1.4 Valuation of Tyre Retreading Service

Once it is defined as 'works contract service', the valuation schemes provided under Rule 2A of Valuation Rules come into play and accordingly, valuation of 'tyre retreading services' can be done under regular scheme as well as under composition scheme.

Under regular scheme, the value of material and sales tax charged thereon shall be reduced from the gross amount charged and the service portion would be liable for service tax.

Under composition scheme, the 'tyre retreading service' is covered under Clause (B) of Rule 2A(ii) of valuation rules which provides that in case of works contracts entered into for maintenance, repair, reconditioning, restoration or servicing of goods, the service tax would be payable on 70% of total amount charged towards such contract.

So depending upon the option exercised, the taxable value has to be determined. It may be noted that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs i.e. TREAD, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.

1.5 Onus of Discharging Tax liability

Under old regime, the onus of discharging the tax liability was completely on the service provider. However, under new regime, the partial reverse charge mechanism has been made applicable for works contract services also and accordingly service receiver will also be liable for service tax subject to fulfilment of prescribed conditions as already discussed.

Example:

A Transport Company (Corporate) gets its tyres retreaded from a service provider (proprietorship firm) for which the Company pays ₹ 3, 00,000/- which includes the value of material also. In this case, 50% of service tax (i.e. ₹ 3, 00,000 x 70% x 14%) is payable by service receiver and 50% of service tax is payable by service provider.

Chapter 16

Works Contract Services provided by Government or Local Authority

The Finance Bill, 2015 has proposed to make a remarkable change in Section 66D (a)(iv) to exclude all services provided by the Government or local authority to business entity from the negative list. Consequently, the definition of "support service" provided under section 65B (49) has also been proposed to be omitted. However the effective date of implementation of this notification is yet to be notified. Accordingly, as and when this amendment is given effect to, all services provided by the Government or local authority to a business entity, except the services that are specifically exempted, or covered by any other entry in the Negative List, shall be liable to Service Tax.

Even though the abovementioned amendment has made taxable all services provided by the Government or local authority to a business entity but there is no impact of the said amendment on the works contract services provided by the Government or local authority to business entity. Prior to the said amendment 'works contract services' were covered in the definition of 'Support Services' provided by the Government or local authority to the business entity which were already taxable. Accordingly, the works contract services provided by the Government or local authority to the business entity are taxable before or after the said amendment. All services provided by Government and local authorities are covered under Negative List. However, some specified services to the extent they are not covered elsewhere are liable for service tax which includes the support services provided to business entities and accordingly, support services provided by the Government or local authorities to business entities are made liable for service tax.

For the sake of understanding, the definition of *"Support Services"* provided in Clause (49) of Section 65B of the Act reads as under:

"Support service" *means 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 immovable property, security, testing and analysis.*

The said definition has been proposed to be omitted.

By virtue of above provisions, works contract services provided by the Government are made liable for service tax if such services are provided to business entities. However, the works contract services provided to business entities would not be charged to tax if they are otherwise exempt or specified elsewhere in the negative list.

The phrase “business entity” has been defined in the law to provide that "business entity" means any person ordinarily carrying out any activity relating to industry, commerce or any other business.

It is also important to take a note on the meaning of Government or local authorities.

Meaning of Government:

Earlier the term ‘Government’ was not defined in service tax law. Hence, the definition was taken over from General Clauses Act, 1897, which provides that ‘Government’ would include various departments and offices of the Central or State Government or the U.T.A which carry out their functions in the name and by order of the President of India or Governor of a State.

The Finance Bill, 2015 has defined the term “Government” to mean the Departments of the Central Government, a State Government and its Departments and a Union territory and its Departments, but shall not include any entity, whether created by a statute or otherwise, the accounts of which are not required to be kept in accordance with article 150 of the Constitution or the rules made thereunder. [Section 65B(26A)]

Thus, in terms of above, and as per the settled position of law, corporations formed under Central Acts or State Acts or various government companies registered under the Companies Act, 1956 or Companies Act, 2013 or autonomous institutions set up by special Acts are not included in the definition of ‘Government’.

Meaning of Local Authority:

The term “Local Authority” has been defined in Clause (31) of Section 65B of the Act to include (a) A Panchayat; (b) A Municipality; (c) 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; (d) A Cantonment Board; (e) A regional council or a district council; (f) A development board; (g) A regional council.

Further, for the works contract services provided by the Government to business entities, Government departments will not have to get registered because service tax will be payable on such services by the service receiver i.e. the business entities receiving the service under reverse charge mechanism in terms of section 68 of the Act.

In conclusion, the works contract services provided by Government or local authority to persons other than business entities are not liable for service tax.

Chapter 17

Works Contract Services provided by Governmental Authority

1.1 It must be noted that the negative list nowhere provides exemption for services provided by "Governmental Authorities". Hence, works contract services provided by "Governmental Authorities" would be liable to service tax unless otherwise exempted by Entry No. 39 of Mega Exemption Notification which provides exemption for 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.**

1.2 Meaning of Governmental Authority

The meaning of "governmental authority" is defined in Mega Exemption Notification itself as amended by Notification No. 2/2014 dated 30.01.2014. Both old and new definitions are reproduced hereunder for ready reference:

Amended Definition – w.e.f. 30.01.2014

"governmental authority" means an authority or a board or any other body;

(i) set up by an Act of Parliament or a State Legislature; or

(ii) established by Government, with 90% or more participation by way of equity or control, to carry out any function entrusted to a municipality under article 243W of the Constitution.

Old Definition – Prior to 30.01.2014

"governmental authority'' means a board, or an authority or any other body –

(a) *established with 90% or more participation by way of equity or control by Government and*

(b) *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;

An analysis of both the definitions reveals that this amendment has expanded the scope of definition of "Governmental Authority" and widened the exemption base for services to be provided even by an authority or a board or any other

body, set up by an Act of Parliament or a State Legislature with a condition of 'established with 90% or more participation by way of equity or control by Government'.

Further, such board or any other body is required to carry out any function entrusted to a municipality under Article 243W of the Constitution as the same has been made mandatory only for that body or board or authority which is established by the Government with 90% or more participation by way of equity or control by the Government.

1.3 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.

1.4 In conclusion, all the services provided by governmental authority are not exempt. 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 exempt. All other services are subjected to service tax if they are not otherwise exempt.

Chapter 18

Works Contract Services provided to the Government or Local Authority or Governmental Authority

1.1 Entry No. 12 of Mega Exemption Notification No. 25/2012 Dated 20.06.2012 provides an exemption for services provided to the Government or local authority or a governmental authority.

1.2 The Entry grants exemption for 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; *[Clause (a) has been omitted by Notification No. 6/2015-ST Dated 01.03.2015 W.e.f. 01.04.2015]*

(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;

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

[Clause (c) has been omitted by Notification No. 6/2015-ST Dated 01.03.2015 W.e.f. 01.04.2015]

(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 65B of the said Act.

[Clause (f) has been omitted by Notification No. 6/2015-ST Dated 01.03.2015 W.e.f. 01.04.2015]

If the above mentioned services are provided to a person other than Government, a local authority or a governmental authority then these are not exempt from service tax.

1.3 Analysis of Exemption Entry No. 12 – Clause(a)

Clause (a) of Entry No. 12 provides that 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 civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession are exempt from service tax.

This clause provides that such infrastructural services must be provided in respect of a civil structure or original works only and must be meant predominantly for use other than for commerce, industry or any other business or profession.

Example:

Particular	Taxability
Jaipur Development Authority (JDA) gets constructed flats from a contractor under various schemes of Government and selling them to ultimate buyer	Not Exempted as it will amount to business activity and accordingly liable to service tax.

However, Notification No. 6/2015-ST Dated 01.03.2015 has omitted Clause (a) from Entry No. 12 and accordingly, with effect from 01.04.2015, the abovementioned services are liable to service tax.

1.4 Analysis of Exemption Entry No. 12 – Clause(b)

Clause (b) of Entry No. 12 provides that 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 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 are exempt from service tax.

Some examples, of this entry could be the services provided in relation to construction, repair maintenance, renovation or alternation of Amer Fort, Hawamahal, Albert Hall, Jantar-Mantar, City Palace, etc. in Jaipur City.

1.5 Analysis of Exemption Entry No. 12 – Clause(c)

Clause (c) of Entry No. 12 provides that 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 structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment are exempt from service tax.

Some examples, which could be covered by this entry may be the infrastructural services provided in relation to:

(a) Government schools, colleges or universities such as Rajasthan University, Central Schools, Government Schools, etc.

(b) Government Hospitals such as SMS Hospital Jaipur, Satellite Hospital Jaipur, etc.

(c) Cultural Establishments such as Jahawar Kala Kendra, etc.

However, Notification No. 6/2015-ST Dated 01.03.2015 has omitted Clause (c) from Entry No. 12 and accordingly, with effect from 01.04.2015, the abovementioned services are liable to service tax.

1.6 Analysis of Exemption Entry No. 12 – Clause (d & e)

Clause (d) & (e) of Entry No. 12 provides that 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 canal, dam or other irrigation works or pipeline, conduit or plant for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal are exempt from service tax.

It is important to note that if a private establishment or industry gets the infrastructural work done in relation to canal, dam or other irrigation works or water supply or water treatment or sewerage treatment or disposal, it would be liable to tax.

1.7 Analysis of Exemption Entry No. 12 – Clause (f)

Clause (f) of Entry No. 12 provides that 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 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 65B of the said Act are exempt from service tax.

Explanation 1 to Clause 44 of Section 65B of the said Act specifies following persons:

(A) Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or

(B) any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or

(C) any person as a Chairperson/ Member/ Director in a body established by the Central or State Govt or local authority and who is not deemed as an employee before the commencement of this section.

Example:

Particular	**Taxability**
Government gets constructed buildings for department of Service Tax or Colony for residence of officers of Service Tax	Exempted by virtue of this entry as it is to be used for other than commerce or industry or business

However, Notification No. 6/2015-ST Dated 01.03.2015 has omitted Clause (f) from Entry No. 12 and accordingly, with effect from 01.04.2015, the abovementioned services are liable to service tax.

Chapter 19
Other Exemptions – Works Contract Services

The Government has issued Mega Exemption Notification No. 25/2012-ST containing host of exemptions with respect to various services. Out of which, exemption entries relating to works contract services are as under:

1.1 Entry No. 13 - Mega Exemption Notification

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;

Earlier, works contract services in relation to construction of roads, whether meant for general public or otherwise were exempt from service tax. However, under new provisions, as per above entry, the construction of road meant for general public only is exempt. In other words, construction of road in a factory, premises, complex or township is not exempt from service tax.

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

It is a self explanatory entry which grants exemption for works contract services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of 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 12AA of the Income tax Act, 1961 and meant predominantly for religious use by general public;

For availing exemption under this entry, following conditions must be fulfilled:

(i) works contract services are provided to an entity registered under section 12AA of the Income-tax Act, 1961 and

(ii) works contract services such as construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or

alteration are provided in relation to a building which is meant predominantly for religious use by general public.

Mega Exemption Notification defines "General public" to mean the body of people at large sufficiently defined by some common quality of public or impersonal nature.

(d) a pollution control or effluent treatment plant, except located as a part of a factory; or

It is a self explanatory entry which provides that works contract services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a pollution control or effluent treatment plant are exempt from service tax. However, if these plants are located as a part of a factory, it would be liable to service tax.

(e) a structure meant for funeral, burial or cremation of deceased.

It is a self explanatory entry, no explanation is required.

1.2 Entry No. 14 – Mega Exemption Notification

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 meters 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 storage; or

(e) Mechanized food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages.

Analysis:

(a) Services by way of construction, erection, commissioning, or installation of original works pertaining to an airport, port or railways, including monorail or metro;

It is a self explanatory entry, which provides that works contract services such as construction, erection, commissioning or installation are provided in relation to original work pertaining to an airport, port or railways, including monorail or metro would be exempted from service tax. However, the point to ponder here is that the exemption is relating to "original work" only, therefore, following are outside the purview of this exemption entry:

(i) services provided in relation to maintenance or repair or reconditioning or restoration or servicing of *any goods* at such airport, port or railways including monorail or metro; or

(ii) maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property at such airport, port or railways including monorail or metro;

(b) Services by way of construction, erection, commissioning, or installation of original works pertaining to a single residential unit otherwise than as a part of a residential complex;

The terms *"residential complex"* and *"a single residential unit"* are defined under Mega Exemption Notification itself. These are as under:

"residential complex" means any complex comprising of a building or buildings, having more than one single residential unit.

'A single residential unit' means a self-contained residential unit which is designed for use, wholly or principally, for residential purposes for one family.

The essence of this entry is that works contract services in relation to 'original works' when provided to a person pertaining to a single residential unit would be exempt from service tax. However, if such single residential unit is a part of a residential complex, the exemption would not be extended for such residential unit.

Further, by providing the definition of 'residential complex' in such a manner that it would include a complex comprising building or buildings, the intention of law is to include the independent villas in a township in the taxable ambit.

Further, it is also to be noted that again this exemption is relating to 'original works only', therefore, if repair and maintenance services (being works contract services) are provided pertaining to single residential unit then it would not get exemption by virtue of this entry.

This exemption entry has made taxable all residential complexes such as G+2 or G+3 complex which were earlier exempted on account of having less than or equal to 12 residential units in a residential complex.

(c) Services by way of construction, erection, commissioning, or installation of original works pertaining to low- cost houses up to a carpet area of 60 square meters 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;

The basic conditions to get exemption under this entry are:

(i) Such services must be provided in relation to 'original works' only;

(ii) Such original works must be pertaining to low cost houses up to a carpet area of 60 square meters per house only;

(iii) Such low cost houses must be 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) Services by way of construction, erection, commissioning, or installation of original works pertaining to post- harvest storage infrastructure for agricultural produce including a cold storage; or

(e) Services by way of construction, erection, commissioning, or installation or original works pertaining to mechanized food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages.

Analysis of Clause (d) & (e) :

The basic conditions to get exemption under these entries are:

(i) Such services must be provided in relation to 'original works' only;

(ii) Such 'original works' must be pertaining to -

- post harvest storage **infrastructure** for agriculture produce including cold storage; or
- *Mechanized food grain handling system, machinery or equipment for units processing agricultural produce as food stuff excluding alcoholic beverages.*

Section 65B(5) of the Act**,** defines **agriculture produce** to mean *any produce of agriculture on which either no further processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market.*

For example, 'rice' is not covered in the abovementioned definition of 'agriculture produce', therefore, construction of warehouse for storage of 'rice' will not get exemption under this entry. Further, at the time of construction of warehouse, if it is not known that what kind of commodity will be stored therein i.e. wheat, rice or some other commodity, the construction of such warehouse shall be subjected to service tax.

Chapter 20
Place of Provision of Service

The determination of place of provision in respect of works contracts service depends upon the nature of property in respect of which it is entered into such as immovable property or movable property. The place of provision can be determined in the following manner:

1.1 Where Works Contracts is entered for Immovable Property

Where a works contract is entered in respect of an immovable property, the Rule – 5 of POPS comes into play. Rule – 5 of said rules reads as under:

"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."

Accordingly, in order to determine the place of provision for works contract services in relation to an immovable property, what is important is the location of immovable property and not the location of service provider (works contractor) or service receiver (works contractee or awarder).

1.2 Works Contracts is entered for Movable Property

Where a works contract is entered in respect of a movable property, the Rule – 4 of POPS comes into play. Rule – 4 of said rules reads as under:

"The place of provision of following shall be the location where services are actually performed, namely:-

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

(b) ……. "

Accordingly, where works contract is entered in respect of any goods i.e. movable property, the place of provision would be the place where the services are actually performed. It means, where the goods is made available by service receiver at the place of service provider, the place of provision would be the 'place of service provider' or vice versa.

Chapter 21
Service Tax Registration

1.1 According to Service Tax (Registration of Special Category of Persons) Rules, 2005, any provider of taxable service *(including works contract service)* whose aggregate value of taxable service in a financial year exceeds *nine lakhs rupees* shall make an application to the jurisdictional Superintendent of Central Excise/Service Tax in Form ST-1 for registration within a period of thirty days of exceeding the aggregate value of taxable service of nine lakh rupees.

1.2 Though the assessee is liable for registration as and when the taxable value exceeds rupees nine lakhs but he may register voluntarily even before crossing this limit or at the time of commencement of business of providing services. Further, even after registration, he is not liable for payment of service tax unless the taxable value exceeds rupees ten lakhs.

1.3 However, once registered, the assessee is liable for filing half yearly service tax returns, whether or not, he is liable for service tax payment on account of SSI exemption.

1.4 Service Tax Registration by Service Receiver

Where service receiver is liable for service tax under the provisions of reverse charge mechanism, he has to get himself registered without any exemption limit. In other words, threshold exemption limit is not applicable for payment under reverse charge mechanism. For example, a company manufacturer who does not provide services but receives works contract services for its factory building repair for ₹ 10,000/- on which manufacturer company is liable for service tax amounting to ₹ 433/- under reverse charge mechanism. For depositing ₹ 433/- only, such company has to get registered under service tax law also.

Chapter 22
Applicability of Threshold Exemption of ₹ 10 lacs

1.1 Notification No. 33/2012 Dated 20.06.2012 exempts taxable services of 'aggregate value' not exceeding ten lakh rupees in any financial year from the whole of the service tax leviable thereon subject to a condition that the aggregate value of taxable services rendered/provided by a provider of taxable service from one or more premises does not exceed rupees ten lakhs in the preceding financial year. This exemption is applicable for all categories of services including works contract services. Further, this exemption is not service wise but assessee wise.

1.2 The term *"aggregate value"* has been defined in this notification to mean the sum total of value of taxable services charged in the first consecutive invoices issued during a financial year but does not include value charged in invoices issued towards such services which are exempt from whole of service tax leviable thereon u/s 66B of the Act under any other notification issued by the Central Government in Official Gazette.

1.3 Therefore, where a service provider providing works contract services, the aggregate value of taxable works contract services excluding exempted works contract service in the preceding financial year does not exceed ₹ 10 lakhs then such service provider can get exemption in the current year for invoices issued for taxable services excluding exempted services upto a value of ₹ 10 lakhs.

1.4 For example, if a person, in the preceding year, has provided works contract services for ₹ 8.5 lacs, then such person can get exemption in the current year as the value of taxable services provided in the preceding year does not exceed ₹ 10 lakhs.

1.5 *It must be noted that threshold exemption of ₹ 10 lacs is available only to service providers and not to service receiver. Therefore, where service receiver is liable for service tax under reverse charge mechanism then he has to pay service tax from very starting and is not eligible for threshold exemption of ₹ 10 lacs.*

Chapter 23

Payment of Service Tax – Rule 6 of STR

1.1 General Due Dates

<table>
<tr><td rowspan="2">Category</td><td rowspan="2">Frequency</td><td colspan="2">Due Date</td></tr>
<tr><td>Payment through Bank</td><td>Electronic Payment</td></tr>
<tr><td rowspan="2">In case of Individuals, Proprietary Firms & Partnership Firms (including LLP)</td><td rowspan="2">Quarterly</td><td>By 5th of the month -</td><td>By 6th of the month -</td></tr>
<tr><td colspan="2">immediately following the quarter in which service is deemed to be provided as per the rules framed in this regard. However, in case of last quarter (i.e. Jan to Mar.), the payment should be made before 31st March.</td></tr>
<tr><td rowspan="2">Others (e.g. Companies, Societies, Trusts, HUF, etc.)</td><td rowspan="2">Monthly</td><td>By 5th of the month -</td><td>By 6th of the month -</td></tr>
<tr><td colspan="2">immediately following the month in which service is deemed to be provided as per the rules framed in this regard. However, in case of last month (i.e. March), the payment should be made before 31st March.</td></tr>
<tr><td colspan="4">Service tax can be paid by cheque. The date of deposit of cheque is the date of payment of Service Tax. If the cheque is dishonoured, it would mean as if the Service Tax has not been paid and the relevant penal consequences would follow.
If the last day of payment of ST is a public holiday, tax can be paid on next working day.
The expression "service is deemed to be provided" means the "point of taxation" as defined in Point of Taxation Rules, 2011.</td></tr>
</table>

1.2 Electronic Payment of Service Tax

Upto 30th September, 2014:

According to Rule 6(2) of STR read with Notification No. 16/2013 dated 22.11.2013, where an assessee has paid a total service tax of *rupees one lakh or more* including the amount paid by utilization of CENVAT credit, in the preceding financial year, he shall deposit the service tax liable to be paid by him electronically, through internet banking.

With effect from 01st October, 2014:

The Notification No. 09/2014 – ST Dated 11.07.2014 (Finance Act (No. 2), 2014 has made mandatory for all assessees to electronically pay the service tax payable by him, through internet banking:

However, the Assistant Commissioner or the Deputy Commissioner of Central Excise, as the case may be, having jurisdiction, may for reasons to be recorded in writing, allow the assessee to deposit the service tax by any mode other than internet banking.

Chapter 24
Interest on Late Payment of Service Tax

1.1 Section 75 of the Act provides that every person, liable to pay the tax in accordance with the provisions of section 68 or rules made there under, who fails to credit the tax or any part thereof to the account of the Central Government within the period prescribed, shall pay simple interest at such rate as may be notified by the Central Government, by Notification in the Official Gazette for the period by which such crediting of the tax or any part thereof is delayed.

1.2 Upto 30.09.2014: Fixed Rate of Interest

With reference to above, the Central Government has notified the interest rate as 18% per annum. Such interest is payable from the first day after the due date till the date of payment of any defaulted service tax amount. Interest payments are mandatory in nature and can not be waived.

1.3 On or after 01.10.2014: Variables Rate of Interest

To encourage prompt payment of service tax, the Finance Act (No. 2) Act, 2014 has introduced interest rates which would vary on the extent of delay vide Notification No.12/2014-ST Dated 11.07.2014. Simple interest rates per annum payable on delayed payments under section 75 are prescribed as follows:

Extent of delay	Simple interest rate per annum
Up to six months	18%
More than six months & upto one year	18% for first six months, and 24% for the period of delay beyond six months
More than one year	18% for first six months, 24% for second six months, and 30% for the period of delay beyond one year

This new interest rate regime will become operational only on 1st October 2014. In other words, upto 1st October, 2014, the rate of interest of 18%, presently applicable, will continue to apply. The variable interest rates will apply only on or after 1st October, 2014.

As an illustration, assume a case where service tax became due, say, on the 6th of July, 2012 and the assessee pays the dues on 6th of December, 2014. In such a case, the interest to be charged would be as below:

(i) 18% simple interest upto September, 30th, 2014.

(ii) For the period from 1st October, 2014 to 6th December, 2014, the rate of interest will be 30% since the period of delay is beyond one year.

(Departmental Clarification – Letter No. D.O.F. No. 334/15/2014-TRU, Dated 10.07.2014)

1.4 However, proviso to Section 75 provides that in the case of a service provider, whose value of taxable services provided in a financial year does not exceed sixty lakh rupees during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest, shall be reduced by three per cent per annum.

1.5 In other words, in case of small service providers whose value of taxable services provided in a financial year does not exceed ₹ 60 lacs during any of the financial years covered by the notice or during the last preceding financial year, as the case may be, such rate of interest shall be reduced by 3% p.a. Thus, the interest rate in current year will be 15% or 21% or 27% p.a. instead of 18% or 24% or 30% p.a. respectively, in following two cases:

(a) in case of small service providers whose value of taxable services provided in a financial year does not exceed ₹ 60 lacs during the last preceding financial year even though in current year the turnover has exceeded ₹ 60 lacs;

(b) in case of small service providers who have been served with a show cause notice containing demand for different financial years then if value of taxable services provided does not exceed ₹ 60 lacs during any of the financial years covered by the notice.

Chapter 25
Invoicing of Works Contract Services

Under service tax law, the invoice related provisions are contained in Rule 4A of STR, 1994. The service provider shall issue an invoice complying with Rule 4A of the STR, 1994. The invoice shall indicate the name, address and the registration number of the service provider; name and address of service recipient receiving taxable service; the description and value of taxable service provided or agreed to be provided; and the service tax payable thereon.

Under reverse charge, preparing an invoice is itself a problematical issue. In invoice, the service provider must charge service tax only to the extent for which he is liable for service tax. For part of service tax which is payable by service receiver under reverse charge mechanism, a note may be inserted in the invoice indicating that *"balance 50% of service tax would be payable by service receiver directly to the government".* Further, the service provider may show total amount of service tax on such service but will charge only 50% of total service tax and may indicate the above description.

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 availability and economics. In other words, it is not mandatory that service provider and service receiver pay same amount of service tax. For further details please see Para 5.8 of this book.

Chapter 26

Service tax where Contract Terms are not clear

Generally, under works contract services, the contract terms in relation to payment of service tax are not mentioned clearly. The contract agreement generally contains following clauses in relation to payment of service tax:

(a) Service tax would be payable extra as per the statutory provisions;

(b) The rates are inclusive of service tax as per the applicable rate;

(c) The rates are net of service tax;

(d) The contract is silent for service tax clause.

On account of above clause(s), generally there may be disputes for payment of service or amount of service tax, especially under the reverse charge scheme. In some cases, the contractee deducts the service tax amount from total amount payable to contractor as the contractee has to pay the same under reverse charge mechanism. It is pertinent to mention here that service tax is not like "TDS" which is deducted from total amount payable to the contractor. It is the statutory liability on contractee who has to discharge tax liability under reverse charge mechanism directly to the Government on his own account and not after recovery from Contractor.

In other words, to avoid disputes and litigations, it is better to clear contract terms and write specifically about person liable to pay service tax. It is advisable to mention the contract amount exclusive of service tax and service tax would be payable extra as per law. Accordingly, the contractor would charge 50% of total service tax in his invoice and will pay to the Government. Further, the contractee would pay balance 50% of total service tax (other than charged by contractor) to the Government directly through GAR-7 Challan without deduction of the same from contract amount.

Reference to Relevant Notifications

S.N.	Notification No.	Dated	Particulars
1.	25/2012-ST	20-06-2012	Mega Exemption Notification
2.	26/2012-ST	20-06-2012	Abatement Notification
3.	30/2012-ST	20-06-2012	Reverse Charge Mechanism
4.	28/2012-ST	20-06-2012	Place of Provision of Service Rules, 2012
5.	33/2012-ST	20-06-2012	Exemption to Small Service Providers

Accounting Codes – Works Contract Services

Heads	Works Contract Services	Education Cess	Secondary & Higher Education Cess
Tax Collection	00440410	00440408	00440426
Other Receipts (Interest)	00440411	00440299	00440427
Penalties	00441457	00441486	00441487
Deduct Refunds (for use by the field formations)	00440412	00440300	00440428

Frequently Asked Questions – FAQ

1. How should the invoice be prepared where service receiver is liable for paying 50% of service tax?

In the invoice, service provider should charge only 50% of service tax and state that balance is payable by service receiver under Notification No. 30/2012-ST dated 20-6-2012. He should also indicate the valuation method adopted by him for calculating his tax liability.

2. Whether Service receiver can avail SSI exemption limit?

No, the service recipient cannot avail SSI exemption while discharging service tax liability under reverse charge in terms of Notification No. 33/2012- ST dated 20-06-2012.

3. Whether the service provider can get the benefit of CENVAT Credit of excise duty paid on inputs used in works contract by paying service tax @ 14% on gross amount of works contract?

No, as per section 66E of the Act, only 'service portion in the execution of a works contract' is declared service. Hence, there is no option to pay service tax on entire value of works contract. Further, valuation rules also do not allow for CENVAT Credit of excise duty paid on inputs under both schemes of valuation.

4. Whether through a mutual agreement, service provider can charge 100% of service tax instead of charging 50%?

A statutory obligation cannot be passed on to other by mutual agreement. Even though service provider has paid 100% of service tax on works contracts, the service receiver has to discharge his liability by paying 50% of service tax directly to the Government.

5. Whether Service Recipient paying Service tax under reverse charge needs to get registered under Service Tax?

Yes, Service Recipient will have to get registered under Service tax, even if he is not providing any service. He will have to file the return as well even if it is a nil return.

As per Section 69 of Finance Act, 1994, "every person liable to pay the service tax under this Chapter or the rules made there under shall within such time and

in such manner and in such form as may be prescribed, make an application for registration to the Superintendent of Central Excise".

6. The works contractor (service provider) is not charging service tax in his invoice. Is the service receiver still liable to pay service tax? Is he required to pay entire 100% service tax?

Whether or not service provider has charged service tax in his invoice, the service receiver has to discharge his liability if the reverse charge mechanism is applicable on him. The service provider may not be charging service tax due to claiming small service provider exemption or due to any other reason. However, in any case service receiver is not required to pay entire 100% service tax to the Government.

7. 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?

It has been provided by way of Explanation in the Notification referred above that Service tax liability of the Service Provider and Service Recipient are different and independent of each other. The Service Recipient can independently avail or forgo abatement or choose a valuation option, which is independent of Service Provider.

8. 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.

9. 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 movable 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 on the service portion of such a contract.

10. Whether Service Receiver can pay Service Tax by utilizing CENVAT Credit?

No. Explanation to Rule 3(4) of Cenvat Credit Rules, 2004 specifically provides that "Cenvat Credit cannot be used for payment of service tax in respect of services where the person liable to pay tax is the service recipient." Therefore, Service Receiver has no option but to make payment of Service tax in cash.

11. 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.

12. 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 therein.

13. Is Cenvat Credit allowed to be taken of the service tax partially billed by the Service Provider and partially paid by a Service Recipient under the Partial Reverse Charge Mechanism?

Yes, CENVAT Credit can be availed of the service tax amount paid to the Service Provider as well as paid by the Service Recipient in cash, directly into the Government Treasury under the Partial Reverse Charge Mechanism provided the same is Input Service for the Service Recipient. The credit of service tax paid to the service provider would be available on the basis of the invoice issued provided the payment of the value of input service and the service tax is made within three months from date of invoice otherwise service recipient shall pay/reverse an amount equal to the CENVAT credit availed on such input service and take credit whenever subsequent payment is made of the value of input service and the service tax by the Service Recipient.

The credit of service tax paid by service receiver under partial reverse charge would be available on the basis of tax payment challan as per Rule 9(1)(e) of Cenvat Credit Rules, 2004 on or after the day on which payment is made of the value of input service and the service tax as indicated in invoice, bill or, as the case may be, challan referred to in Rule 9 of Cenvat Credit Rules, 2004.

14. Whether a company registered under section 25 of Companies Act, 1956 and Section 8 of Companies Act, 2013 would be liable to pay service tax under reverse charge mechanism?

In a plethora of judgements, it is upheld that a non-profit company incorporated under section 25 of Companies Act, 1956 and under section 8 of Companies Act, 2013 is not undertaking any 'commercial' activity - Great Lakes Institute of Management v. CST (2008) 12 STT 306 (CESTAT), Great Lakes Institute of Management v. CST (2008) 12 STT 296 (CESTAT) followed in CCE v. Karl Kubel Institute for Development Education (2009) 22 STT 513 (CESTAT SMB), CCE v. Badruka Institute of Foreign Trade (2010) 24 STT 575 (CESTAT) * CCE v. Institute of Insurance and Risk Management (2010) 25 STT 234 (CESTAT).

Hence, a company registered u/s 25 of the Companies Act, 1956 and u/s 8 of Companies Act, 2013 should not be liable to pay service tax under reverse charge.

15. Would an educational institute be liable to pay service tax under reverse charge mechanism?

Generally an educational institute is registered as a society or trust, hence it is not a body corporate and accordingly, reverse charge is not applicable on it. Even if such educational institute is registered as a company under section 25 of the Companies Act, 1956, it is not a 'business entity' and accordingly not liable under reverse charge.

16. Whether a registered Cooperative Society is liable to pay service tax under reverse charge?

A registered cooperative society is a 'body corporate', but the same has been specifically excluded from definition of 'body corporate' under Companies Act and hence registered cooperative society is not liable under reverse charge.

17. Is tax deduction at source (TDS) applicable on gross value of works contract including service tax or excluding service tax?

The **CBDT** has examined the matter afresh and clarified vide **Circular No. 1/2014 dated 13-1-2014** that wherever in terms of the agreement/contract between the payer and the payee, the service tax component comprised in the amount payable to a resident is indicated separately, tax shall be deducted at source under Chapter XVII-B of the Act on the amount paid/ payable without including such service tax component.

18. Whether works contract services provided to a Delhi Public School for construction of their school building is liable to service tax?

Yes, as Entry No. 12 of Mega Exemption Notification provides exemption for such services provided to Government, Local Authority or Governmental Authority and not to a private organisation or society.

However, w.e.f. 01.04.2015, such services provided to Government, Local Authority or Governmental Authority are also made liable to service tax. [Notification No. 06/2015-ST Dated 01.03.2015]

19. Whether works contract services provided to a Charitable Trust/Organisation is liable for service tax?

Yes, as Entry No. 13 of Mega Exemption Notification provides exemption only for such services provided in relation to a building owned by an entity registered under section 12AA of the Income tax Act, 1961 and meant predominantly for religious use by general public. In other words, works contract services provided to a Charitable Trust are not exempted and liable to service tax in normal manner.

20. Where the Service Provider is claiming SSI Exemption (being turnover less than ₹ 10 Lakhs), how will the Reverse Charge Mechanism operate?

Where the service provider is availing exemption owing to turnover being less than ₹ 10 lakhs then he shall not be obliged to pay any service tax. However, Service Receiver shall have to pay service tax to the extent of his service tax liability under the partial Reverse Charge Mechanism.

21. Can a works contract service provider avail the benefit of abatement under Entry No. 12 of the Notification 26/2012 – ST?

Entry No. 12 refers to Section 66E(b), viz. Construction Services and not works contract services. Works contract services are valued as per Rule 2A of Service Tax (Determination of Value) Rules, 2006. A works contract service provider cannot, therefore, avail the benefit of Entry No. 12 of Notification No. 26/2012-ST.

22. Whether maintenance services in respect of office equipments such as computers, photocopiers etc. would be liable as works contract services where parts and labour are separately billed?

In a contract where goods and services are supplied together and sale of material is leviable to sales-tax, such contract would be classified as "works contract". In the present case, whether or not separate billing is done, such contract would be classified as "works contract" and charged accordingly. Further, reverse charge mechanism would also be applicable, if specified conditions are fulfilled.

23. Can the service provider and service receiver choose different valuation methods?

According to Explanation provided in Abatement Notification and Clarification provided by CBEC vide its Education Guide, 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 case, data available and economic.

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)

However, as stated above, valuation under rule 2A(ii) of Valuation Rules (under composition scheme) is permissible only if valuation under rule 2A(i) (on actual basis) has not been done. Hence, if the service provider has made valuation under rule 2A(i), it will not be correct on part of service receiver to adopt rule 2A(ii) for valuation.

However, the service receiver is responsible for his part of valuation and his part of liability of service tax. Hence, if he is not satisfied with valuation done by service provider, he can do valuation independently.

24. What is the meaning of 'body corporate' and 'Business Entity'?

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

As per Rule 2(bc) of Service Tax Rules, 'body corporate' has meaning assigned to it in section 2(7) of Companies Act, 1956. [Section 2(11) under New Companies Act, 2013)]

As per Section 2(7) of Companies Act, 'body Corporate' or 'corporation' includes a company incorporated outside India, but does not include – (a) Corporation Sole (b) Registered Cooperative Society (c) Any other body corporate (Except a company defined under Companies Act) as may be notified by Central Government.

As per Section 2(11) of Companies Act, 2013 "body corporate" or "corporation" includes a company incorporated outside India, but does not include—

(i) a co-operative society registered under any law relating to co-operative societies; and

(ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf;

Under new Companies Act, a Corporation Sole now has been included in definition of 'body corporate' by introduction of new concept namely 'One Person Company' (OPC).

Society registered under Societies Registration Act and trust is not a 'body corporate'.

A company registered under section 25 of Companies Act, 1956 and Section 8 of Companies Act, 2013 is a 'body corporate'. However, it is not 'business entity' and hence reverse charge mechanism does not apply if works contract services are provided to such company. Consequently, the entire service tax will be payable by service provider.

25. In case of AMC, service tax is payable on 70% of Gross Value while in some States VAT is payable on 60% of Gross Value. Thus, total tax payable comes to 130% of Gross Value of AMC. Is it legally correct?

Service Tax and State VAT both are separate laws and independent to each other. Service Tax is the matter of Centre whereas VAT is of State. Service tax is payable only on value of services and Vat is payable only on value of material. If the service provider is not able to calculate the value of material and services separately, he may opt for optional composition schemes provided under respective laws. Hence, once you willingly and knowingly opt for that scheme, you are bound by the conditions specified in the composition scheme. Hence, it is legally correct.

Appendix – 1

Extracts of 'Taxation of Services: A Education Guide'

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.

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

It has to be appreciated that the wordings used in the exemption are 'services by way of construction of roads etc' and not 'services in relation to construction of roads etc'. It is thus apparent that just because the main contractor is providing the service by way of construction of roads, airports, railways, transport terminals, bridges, tunnels, dams etc., it would not automatically lead to the classification of services being provided by the sub-contractor to the contractor as an exempt service.

However, a sub-contractor providing services by way of works contract to the main contractor, providing exempt works contract services, has been exempted from service tax under the mega exemption if the main contractor is engaged in providing exempt services of works contracts. It may be noted that the exemption is available to sub-contractors engaged in works contracts and not to other outsourced services such as architect or consultants.

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 16(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.

<table>
<tr><th>Gross amount includes</th><th>Gross amount does not include</th></tr>
<tr><td>Labour charges for execution of the works</td><td rowspan="4">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.</td></tr>
<tr><td>Amount paid to a sub-contractor for labour and services</td></tr>
<tr><td>Charges for planning, designing and architect's fees</td></tr>
<tr><td>Charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract</td></tr>
</table>

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	forty percent of the total amount charged for the works contract
(B) maintenance or repair or reconditioning or restoration or servicing of any goods	seventy per cent of the total amount charged including such gross amount
(C) in case of other works contracts, not for the included in serial nos. (A) and (B) above, works contract including contracts for maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings.	sixty percent of the total amount charged

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 ₹)
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	25,00,000
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.

Appendix 2

Extracts of Service Tax (Determination of Value) Second Amendment Rules, 2012 [Notification No. 24/2012 Dated 06th June, 2012 covering Rule 2A]

"2A. **Determination of value of service portion in the execution of a works contract.-** Subject to the provisions of section 67, the value of service portion in the execution of a works contract , referred to in clause (h) of section 66E of the Act, shall be determined in the following manner, namely:-

Value of service portion in the execution of a works contract shall be equivalent to the gross amount charged for the works contract less the value of property in goods transferred in the execution of the said works contract.

Explanation.- For the purposes of this clause,-

(a) gross amount charged for the works contract shall not include value added tax or sales tax, as the case may be, paid or payable, if any, on transfer of property in goods involved in the execution of the said works contract;

(b) value of works contract service shall include, -

(i) labour charges for execution of the works;

(ii) amount paid to a sub-contractor for labour and services;

(iii) charges for planning, designing and architect's fees;

(iv) charges for obtaining on hire or otherwise, machinery and tools used for the execution of the works contract;

(v) cost of consumables such as water, electricity, fuel used in the execution of the works contract;

(vi) cost of establishment of the contractor relatable to supply of labour and services;

(vii) other similar expenses relatable to supply of labour and services; and

(viii) profit earned by the service provider relatable to supply of labour and services;

(c) 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 for determination of the value of service portion in the execution of works contract under this clause.

Where the value has not been determined under clause (i), the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely:-

(A) in case of works contracts entered into for execution of original works, service tax shall be payable on forty per cent of the total amount charged for the works contract;

(B) in case of works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods, service tax shall be payable on seventy per cent of the total amount charged for the works contract;

(C) in case of other works contracts, not covered under sub-clauses (A) and (B), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property , service tax shall be payable on sixty per cent of the total amount charged for the works contract;

Explanation 1. For the purposes of this rule,-

(a) "original works" means-

(i) all new constructions;

(ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

(iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

(b) "total amount" means the sum total of the 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 the works contract, whether or not supplied under the same contract or any other contract, after deducting-

(i) the amount charged for such goods or services, if any; and

(ii) the value added tax or sales tax, if any, levied thereon:

Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

Explanation 2.--For the removal of doubts, it is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any inputs, used in or in relation to the said works contract, under the provisions of CENVAT Credit Rules, 2004.".