Background Material

Certificate Course on

# Service Tax

Volume-I
Service Tax

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

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# Foreword

The dynamism in the taxation area has interested many Chartered Accountants who are excelling professionally in the domain. The paradigm shift in policies and focus in tax laws both at micro and macro level has made it imperative for the professionals to update themselves with the latest developments. Members need to be remain updated and align with the evolving knowledge.

It is indeed a pleasure that Chartered Accountants have carved a niche for themselves in the field of Indirect Taxes in the last decade especially in service tax and CST/ VAT. The GST implementation in near future would also require professionals with up-to-date knowledge for a hassle free transition.

Of various Indirect Taxes levied, Service Tax has become the largest revenue earner for the central government. In order to enhance the knowledge, it has become mandatory for the professionals to study, analyse, update and discuss the changes taking place in service tax law from time to time. In order to provide an enhanced learning opportunity to its members the Indirect Taxes Committee of ICAI has launched "Certificate Course on Service Tax".

This Background Material has been specifically designed to support the members attending the course which provides in depth knowledge of service tax and allied subjects in a very practical and simplified manner.

At this juncture, we would heartily appreciate CA. Madhukar N. Hiregange, Chairman, CA. Sushil Kumar Goyal, Vice-Chairman and other members of the Indirect Taxes Committee for launching the "Certificate Course on Service Tax" and bringing out this well aligned and updated material. We are sure this Certificate Course would facilitate our members in practice as well as in industry to acquire specialized knowledge and cope-up with the challenges and complexities relating to the Service Tax.

We welcome the members to a fruitful and enriching experience.

CA. Nilesh S Vikamsey
Vice-President
ICAI

CA. M Devaraja Reddy
President
ICAI

Date: 03.06.2016

Place: New Delhi

# Preface

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. We have come a long way since then with all the services being made liable to service tax except the ones cover by the Negative List or Mega Exemption Notification. Union Budget 2016-17 estimates service tax collection ₹2, 31,000 crore *viz-a-viz* Budget estimates of ₹600 crores in 1994. The increase in collections of service tax revenue over 20 years further indicate the potential professional opportunities in the field service tax for our members. Taking these facts into account, the Indirect Taxes Committee of ICAI has decided to organise Certificate Course on Service Tax in lieu of earlier certificate course on Indirect Taxes.

Certificate Course on Service Tax aims to provide a detailed and thorough study of service tax along with its relevance to other areas like value added tax, central excise duty, customs duty, Foreign Trade Policy and GST. The Background Material of the Course has been divided into two volumes i.e. Service Tax and General & Other allied laws relevant to Service Tax which have been duly updated with all the amendments made by the Finance Act, 2016 and notification issued till date. In addition to above, the Technical guide on CENVAT Credit Rules and Background Material on GST would also be provided to the delegates.

We would like to express our sincere gratitude and thanks to CA M. Devaraja Reddy, President, ICAI, as well as other members of the Committee for their suggestions and support in this initiative. We must also thank indirect tax experts' viz. CA. S. Venkataramani, CA. A Jatin Christopher, CA. M.P. Tony, CA. V. Raghuraman and CA. Nehal Banthiya for revising and adding value to this material.

We encourage you to make full use of this learning opportunity. We request you to share your feedback at idtc@icai.in to enable us to make this course/ material more value additive and useful.

Welcome to a professionalized learning experience in Indirect Taxation.

CA. Sushil Kumar Goyal
Vice Chairman
Indirect Taxes Committee

CA. Madhukar Narayan Hiregange
Chairman
Indirect Taxes Committee

Date: 25.05.2016

Place: New Delhi

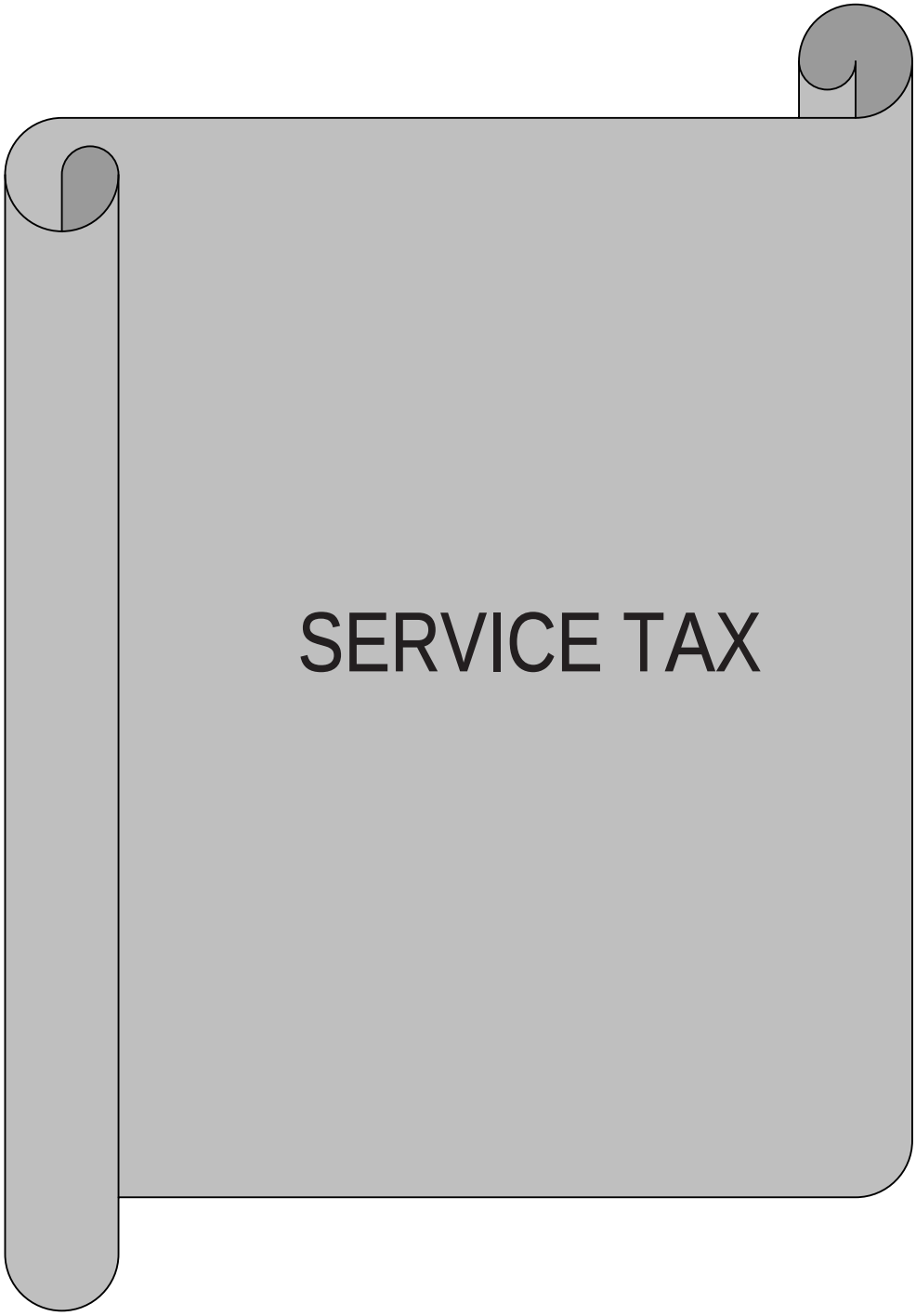
# Contents

## VOLUME III: SERVICE TAX


| SERVICE TAX | | Page No. |
|---|---|---|
| 1. | Basic Concepts | 3-8 |
| 2. | Definition of Service and Its Taxability & 'Declared Service' | 9-35 |
| 3. | Concept of Negative List | 36-53 |
| 4. | Classification of Services | 54-58 |
| 5. | Place of Provision of Service Rules | 59-67 |
| 6. | Point of Taxation | 68-75 |
| 7. | Valuation of Taxable Service | 76-87 |
| 8. | Exemptions and Abatements | 88-114 |
| 9. | Tax Liability under Reverse Charge Mechanism and Joint Charge Mechanism | 115-125 |
| 10. | Statutory Compliances | 126-139 |
| 11. | Service Tax Audit by Department | 140-141 |
| 12. | Demand and Assessment | 142-150 |
| 13. | Appeals | 151-154 |
| 14. | Penalty and Prosecution | 155-159 |
| 15. | Other Miscellaneous Provisions | 160-164 |
| 16. | Appendix | |
| | Appendix-1 : Possible Common Errors in Service Tax | 165-167 |

| | | |
|---|---|---|
| | Appendix-2: Records Maintenance and Others | 168-174 |
| | Appendix-3: Steps to be taken by Service Tax Auditor | 175-178 |
| | Appendix-4: Landmark Judgments in Service Tax | 179-201 |

VOLUMEII: Background Material on General & Other allied laws relevant to Service Tax.


SERVICE TAX

# Basic Concepts

In the developing nations, the contribution of services is ever increasing. Services account for around 65 + %share in Gross Domestic Product (GDP), growing by 6- 7 % annually, contributing to about quarter of employment. Substantial service exports have also been contributing to the Indian economy and to the foreign exchange reserves.

Tax on services was first introduced in the year 1994, through the insertion of Chapter V in the Finance Act, 1994 and levy was confined to three services. Since then, the Act has been amended every year to bring in more services into the tax net and had 119 services in the tax net till June 30, 2012.

The Finance Act, 2012 has, w.e.f. 1st July, 2012, laid down comprehensive approach for levy of service tax on tax services based on what is popularly known as *"Negative List of Services"*. It means, if any activity meets the characteristics of a *"service"*, it is taxable unless specified in the negative list, or otherwise exempted by the mega exemption notification (presently there are63 items in the exemption list). The negative list comprised of 17 specific type/s of services which are listed in the section 66D of the Finance Act. Over the past 4 years the negative list is being sought to be trimmed to enlarge the tax base and augment tax collection.

## Constitutional Validity and Concepts

The Government derives its power to levy taxes from the Constitution of India. The Constitution, in its Schedule VII, has enumerated the matters on which the Central Government and the State Government can make laws. Such matters are divided into three categories i.e., List I (Union List), List II (State List) and List III (Concurrent List).

Initially, there was no specific entry in Union List for levying service tax. Service tax was levied by the Central Government by drawing power from entry 97 of the Union list, which is a "residuary entry" in List-I as reproduced below:

> "97 - Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

The 'residuary entry' provides wide powers to the Central Government in respect of taxation of the subjects not mentioned in the Lists given by the Constitution.

However, as a result of deliberations between the States and the Centre and as per the recommendations of the various expert committees, entry 92C was introduced in the VII

Schedule in the Union List vide Constitution (92nd Amendment) Act, 2003 with effect from 07.01.2004.Entry 92C has not yet been notified and service tax is being levied today under the powers granted by Entry 97 of the Union List.

A new Article 268A was inserted in the Constitution which reads as follows:

"268A (1) Taxes on services shall be levied by the Government of India and such tax shall be collected and appropriated by the Government of India, and the State in the manner provided in clause (2).

(2) The proceeds in any financial year of any such tax levied in accordance with the provisions of clause (1) shall be--

(a) Collected by the Government of India and the States;

(b) Appropriated by the Government of India and the States,

In accordance with such principles of collection and appropriation as may be formulated by the Parliament by law."

A consequent amendment to Article 270 of the Constitution was also made to enable Parliament to formulate by law, principles for determining the modalities of levy and collection of the service tax by the Central Government and distribution of the proceeds thereof by the Central Government to the State Government.

With this amendment in the Constitution, the Central Government has become competent to enact a separate legislation on Service Tax.

It may be noted that entry 92C has not yet been made effective by the Parliament. Consequently, service tax is presently collected under the powers of Entry 97 only.

## Whether tax on service is constitutionally valid?

In a number of cases, the constitutional validity of service tax has been questioned and the decisions of the High Court/ Supreme Court have been in favour of revenue. In Tamil Nadu *Kalyana Mandapam Assn Vs UOI ((2004) (167) ELT 3) S.C*., the levy of service tax on mandap keepers and outdoor caterers was upheld by the Supreme Court as a tax on services and not a tax on sale of goods or hire purchase activities. The levy of service tax on professional services of Chartered Accountants, Cost Accountants and Architects was also upheld by the Supreme Court in *All India Federation of Tax Practitioners Vs UOI (2007 (07) STR 625-SC)*.

In *GDA Security Private Ltd., Vs. UOI (2006 (02) STR 542),* it was held by the Madras High Court that the tax on profession was levied in order to allow professionals to carry on a particular profession, trade or calling or employment in a particular state. The aspect of providing a service was held to be different and independent of the aspect of profession and the levy of service tax on security agency was upheld.

This has been the case with the chartered accountants, architects and advertisers also. The questions of constitutionality have been decided in favour of the revenue. The levy of service tax on renting of Immovable property Services was also decided by the Hon'ble High Courts in favour of Government in various cases.

The Supreme Court recently upheld the validity of service tax on financial leasing services including equipment leasing and hire purchase in Association of Leasing & Financial Service Company (2010-TIOL-87-SC) and observed that service tax would be payable as there is a rendition of service in financial transactions.

In addition to the above, the other relevant decisions are discussed below where the courts have upheld the validity:

(i) *Addition Advertising Vs UOI 1998 (98) ELT 14*: Service tax on advertising service is constitutional and non-violation of article 14 and 19(1) of Constitution of India.

(ii) *Indian Institute of Architects Vs UOI 2002 (139) ELT 245:* service tax is a tax levied on services and it is not a tax on professionals. Parliament is competent under entry 97 to levy service tax on architects.

(iii) *Secretary, Federation of bus operators 2001 (134) ELT 618:* tax on service is distinct from tax on profession, trade or calling and does not fall under entry 60 of list II. Different aspects are liable for tax.

(iv) *LV Sankeshwar 2006 (4) STR 257:* Tour operator not to be termed as transferor of right to use vehicles as per article 366(29A) of the Constitution of India. Levy of service tax neither tax on passenger nor goods.

(v) *InfoTech Software Dealers Association (2010 (20) STR 289 (Mad):* wherein an important decision in the context of taxation of software has been delivered. While holding that software (packaged or customized) is goods, the Court has also upheld the validity of levy of service tax on IT software services.

(vi) *Maharashtra Chamber of Housing Industry (2012) TIOL 78 (Mumbai):* wherein it was held that though construction service is rendered in relation to an activity which occurs on land does not render the charging provision as imposing tax on land & buildings. It does not alter the nature or character of levy. There is legislative assessment underlying the imposition of tax which is that during the course of construction related activity a service is rendered by the builder to the buyer.

The possible challenge therefore is only when the fundamental rights of the tax payer are being violated. Further when the entry clearly falls within the competence of the States to legislate there could be a cause for relief. Software, IPR, Pure Hiring, amongst others, are the grey areas which would continue to be disputed.

## Governing provisions

Service tax was introduced in the year 1994 but till date, there is no independent statute for levying service tax. However, following sources provide statutory provisions relating to service tax and can be broadly grouped under the following categories:

(i) Finance Act, 1994: The statutory provisions relating to levy of service tax on services were first promulgated through Chapter V of the Finance Act, 1994. Since then, Chapter V of the Finance Act, 1994 is working as the Act for the service tax levy. Later, in the year 2003, the Finance Act 2003 inserted Chapter VA to deal with advance rulings. A Swachh Bharat Cess of 0.5% was introduced in 2015. With effect from 01st June, 2016, a cess called 'Krishi Kalyan Cess' @ 0.5% was levied on all taxable services on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or any purpose relating thereto.

(ii) Rules on service tax: Section 94 of Chapter V and section 96 -I of Chapter VA of the Finance Act, 1994 grants power to the Central Government for making rules for effective carrying out the provisions of these Chapters. Using these powers, the Central Government has issued

- Services Tax Rules 1994,
- Service Tax (Advance Rulings) Rules, 2003,
- Service Tax (Registration of Special Category of Persons) Rules, 2005,
- Service Tax (Determination of Value) Rules, 2006,
- Service Tax (Publication of Names) Rules 2008
- Service Tax (Provisional attachment of property) Rules 2008

- ❖ Point of Taxation Rules, 2011 and
- ❖ Place of Provision of Service Rules, 2012.

Rules should be read with the statutory provisions contained in the Act. Rules are made for carrying out the provisions of the Act and the rules cannot override the provisions contained in the Act, i.e., the rules can never override the Act and cannot be in conflict with the same.

Sections 93 and 94 of Chapter V, and section 96-I of Chapter VA of the Finance Act, 1994 empower the Central Government to issue notifications to exempt any service from service tax and to make rules to implement service tax provisions. Accordingly, notifications on service tax have been issued by the Central Government from time to time. These notifications usually declare date of enforceability of service tax provisions, and provide rules relating to service tax, make amendments therein, provide or withdraw exemptions from service tax or deal with any other matter which the Central Government may think would facilitate the governance of service tax matters.

The provisions of the Act extend to the whole of the country except the State of Jammu and Kashmir, and vide section 64(3), the levy applies to all "taxable services provided".

Provisions of the Act do not extend to Jammu & Kashmir.

(a) Service provided in Jammu & Kashmir not liable to service tax: Since the provisions of the Finance Act, 1994 do not extend to Jammu & Kashmir, services provided in the State of Jammu and Kashmir are not liable to service tax.

(b) Reason: As per Article 370 of the Constitution, any Act of Parliament applies to Jammu & Kashmir only with concurrence of State Government. Since, no such concurrence has been obtained in respect of Finance Act, 1994; the provisions of service tax law are not applicable in the state of Jammu and Kashmir.

(c) Services provided from Jammu & Kashmir to outside Jammu & Kashmir liable to service tax: Service tax will not be payable if services are provided in Jammu & Kashmir. However, if a person from Jammu & Kashmir provides the service outside Jammu & Kashmir in any other part of India, the service will be liable to service tax, as the location where service is consumed is relevant. Merely because the office of the service provider is situated in Jammu & Kashmir, does not mean that service is provided in Jammu & Kashmir.

Levy of service tax: Levy of service tax extends to whole of India except Jammu and Kashmir.

'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 [Section 65B(27)].

*Indian territorial waters extend upto 12 nautical miles from the Indian land mass.*

## Administration of service tax

The Department of Revenue of the Ministry of Finance exercises control in respect of matters relating to all the direct and indirect taxes through two statutory Boards, namely, the Central Board of Direct Taxes (CBDT) and the Central Board of Excise and Customs (CBEC) constituted by the Central Board of Revenue Act, 1963. The responsibility of administration and collection of service tax has also been vested upon the CBEC ('Board'). The Board administers service tax matters through the Central Excise Zones and each Zone, in turn works through Central Excise Commissionerate falling under its territory. Each zone is headed by a Chief Commissioner of Central Excise, while each Commissionerate is headed by a Commissioner of Central Excise. The Chief Commissioner of Zone exercises supervision and control over the working of the Commissionerates in the Zone and is mainly responsible for monitoring revenue collection, disposal of pendency's, redressal of grievances of trade, etc. He also ensures coordination among the Commissionerates within the Zone.

Considering the increasing workload due to the expanding coverage of service tax, the office of Director General (Service Tax) was formed to coordinate between the CBEC and Central Excise Commissionerate. It also monitors the collection and the assessment of service tax. It compiles the service tax revenue reports received from various Central Excise Commissionerates and monitors the performances of the Commissionerate.

Now, all the Commissioners are headed by "Principal Commissioner" who in turn are headed by Chief Commissioner.

# Definition of Service and Its Taxability & 'Declared Service'

## What is Service?

Prior to Finance Act, 2012, the word "*service*" was not defined under service tax law. The government can deem any activity or transaction to be a service. The Finance Act, 2012, has for the first time introduced the definition of term "*service*" which is very wide and covers not only the activities which are considered as service on common parlance, but also activities beyond the same.

The term "*service*" has been defined in clause (44) of the section 65B of the Act:

*"Service" means*

*(i) any activity*

*(ii) carried out by a person for another*

*(iii) for a consideration and*

*(iv) includes a declared service,*

*However a service shall not include:*

*(a) an activity which constitutes merely:*

- *(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*
- *(ii) such transfer, delivery or supply of any goods which is deemed to be sale within the meaning of clause (29A) of article 366 of the Constitution; or*
- *(iii) a transaction in money or actionable claim;*

*(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*

*(c) fees taken in any court or tribunal established under any law for the time being in force.*

*Explanation 1 For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,*

*(A) the functions performed by the 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) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or*

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

*Explanation 2. — For the purposes of this clause, the expression "transaction in money or actionable claim" shall not include—*

*(i) any activity relating to use of money or its conversion by cash or by any other mode, from one form, currency or denomination, to another form, currency or denomination for which a separate consideration is charged;*

*(ii) any activity carried out, for a consideration, in relation to, or for facilitation of, a transaction in money or actionable claim, including the activity carried out—*

*a) by a lottery distributor or selling agent on behalf of the state government, in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner, in accordance with the provisions of the Lotteries (Regulation) Act, 1998;*

*b) by a foreman of chit fund for conducting or organising a chit in any manner.*

*Explanation 3 For the purposes of this Chapter-*

*(a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*

*(b) An establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.*

*Explanation 4 A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory.*

The definition is vast enough to cover any activity *except* those excluded from the definition.

## Analysis of the terms used in the definition of service

1. Meaning of the term 'Activity': The term 'Activity' is not defined in the Act. In terms of the common understanding it can be an act done, work done, a deed done, an operation carried out, execution of an act, provision of a facility etc. Further, activity can be active or passive since tolerance or forbearance of an act is declared as service under section 66E of the Act.

2. Consideration: Explanation (a) to section 67 of the Act provides an inclusive definition of consideration, i.e., "Consideration" not only includes any amount that is payable for the taxable services provided or to be provided but also includes any reimbursable expenditure or cost incurred by service provider and charged in the course of provision of service except, in such circumstances and subject to conditions prescribed and includes any amount retained by lottery distributor or selling agent from gross sale amount of lottery ticket, in addition to the fee or commission, if any or discount received i.e. Difference in the face value of lottery ticket and the price at which the distributor or selling agent gets such ticket. Since,Consideration is inclusively defined, CBEC through its Education-guide has clarified that, one can refer to the definition in the Indian Contract Act, 1872, which is as follows :

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

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

   Monetary consideration means any consideration received in the form of money. Money means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any such similar instrument but shall not include any currency that is held for its numismatic value.

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

   - Supply of goods and services in return for provision of service

- Refraining or forbearing to do an act in return for provision of service
- Tolerating an act or a situation in return for provision of a service
- Doing or agreeing to do an act in return for provision of service.

Activity for Consideration Implication: Activity carried out without any consideration like donations, gifts or free charities are, therefore, outside the ambit of service. For example, grants given for a research where the researcher is under no obligation to carry out a particular research would not be a consideration for such research. However, an act by a charity for consideration (such as advertising the name of donor/ sponsor) would be a service and taxable unless otherwise exempted.

3. Contract: The concept 'activity for a consideration' involves an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.

   An activity done without such a relationship i.e. without the express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.

   Thus essentially the activity must be carried on by a person to another under a contract (oral or written). A voluntary act carried out by a person to another without any contractual obligations would not constitute service even though consideration exists.

   E.g.: A beggar playing a musical instrument in public places and soliciting donations. This activity of playing musical instrument would not constitute service as there is no contractual obligation to donate the money by the people though some of them donate. Other examples could be waiters in restaurants getting tips.

4. A Person for another Person: On analysis of the definition of 'service', an activity constitutes service if it is carried out by one person to another which signifies that there must be two distinct entities-service provider and service receiver; hence, services provided by a person to self are outside the ambit of taxable service. For instance, services provided by one branch of a company to another or to its head office or vice-versa are not services provided by one person to another.

   Section 65B (37) of the Act defines "Person" to include,—

   (i) an individual,

(ii) a Hindu undivided family,

(iii) a company,

(iv) a society,

(v) a limited liability partnership,

(vi) a firm,

(vii) an association of persons or body of individuals, whether incorporated or not,

(viii) Government,

(ix) a local authority, or

(x) every artificial juridical person, not falling within any of the preceding sub-clauses

Exceptions:

General rule - Only services provided by a person to another are taxable. Explanation 3 to Section 65B(44) makes out two exceptions to the general rule:-

(a) an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons.

(b) an unincorporated association or body of persons and members thereof are also treated as distinct persons.

Hence, such persons shall be deemed to be separate persons and thus, services provided by these persons would be taxable.

For example, services provided by a club to its members and services provided by the branch office of a multinational company to the headquarters of the multi-national company located outside India would be taxable provided other conditions relating to taxability of service are satisfied.

Note: The Constitutional challenge may be possible. In a case of Jharkhand High Court [Ranchi Club Ltd. Vs Chief Commissioner of Central Excise & Service Tax] 2012 (26) S.T.R. 401 (Jhar.) it was held that rendering of service by the petitioner-club to its members is not taxable service under the Finance Act, 1994 as services cannot be provided to self.

Similarly in case of Sports Club of Gujarat vs. UOI (2013-TIOL-528-HC-AHM-ST) the High Court held services to members of club or cooperative housing society is not service by one to

another not chargeable to service tax. Both the cases relied upon are presently pending before Supreme Court where the department has filed appeal.

## Exclusions from definition of service

It may be termed as word "IMAGE" which stands for:

Immovable Property

Moveable Property

Actionable Claims

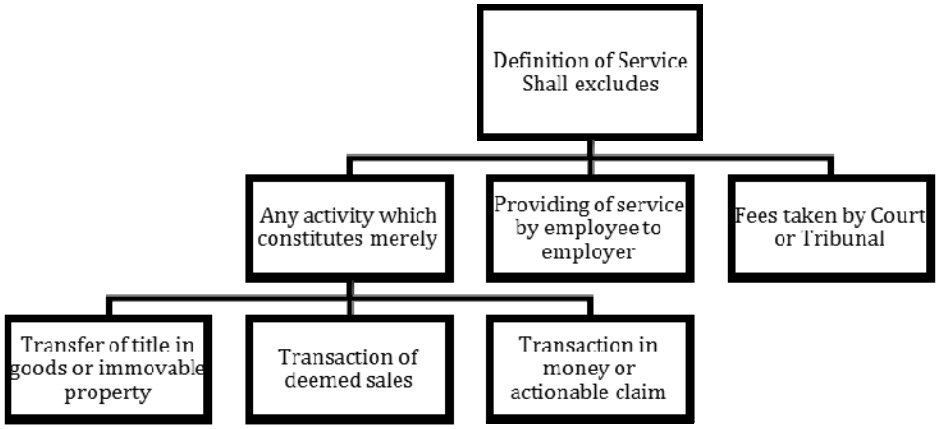
Goods

Employer and Employee Relationship

Fee taken by any Court or Tribunal established under any law and

Transaction of deemed sales is not covered in IMAGE

Definition of Service
shallexclude




## Exclusion–I:

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

Mere transfer of title in goods or immovable property by way of sale, gift or in any other manner for a consideration does not constitute service. 'Transfer of title' signifies change in ownership and not mere transfer of possession or custody. This can be by way of sale, gift or in any other manner. The exclusion is restricted only to the extent of the transfer of title in goods only. A transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be outrightly excluded from the definition of service.

## Meaning of goods and immovable property

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 [Section 65B(25)].

Relevant decisions: In Plaza Maintenance & Services Ltd (2011-TIOL-47-CESTAT-MAD) and M/s. Chitrali Properties Pvt Ltd Vs CCE, Pune – III (2013-TIOL-236-CESTAT-Mum), Econ Hinjewadi Infrastructure Pvt Ltd Vs. CCE, Pune – III (2012-TIOL-1688-CESTAT-Mum), held that no service tax can be levied on supply of electricity and water which are goods and cannot be treated as services.

Immovable property has not been defined in the Act. Therefore the definition of immovable property in the General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.

## Exclusion–II:

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

These transactions involve both transfer of title in goods as well as services. In case of transactions which are deemed sales for the levy of VAT under article 366(29A) of the Constitution, the supply of goods portion involved in these transactions are excluded from the definition of service. Therefore the value attributable to the transfer of goods in such transactions is not liable to service tax. In other cases, when transactions are discernible, then each aspect i.e. transfer of title in goods as well as provision of services are assessed separately for VAT and Service tax respectively. If these transactions are not discernible then there would be levy of either VAT or Service tax on the entire value by applying the dominant nature test as laid down by Supreme Court in the case of *BSNL vs. UOI, 2006 (2) S.T.R.161(S.C.).*

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

(a) transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration

(b) transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract

(c) delivery of goods on hire-purchase or any system of payment by instalments

(d) transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration

(e) supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration

(f) supply, by way of, or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption, or any drink (whether or not intoxicating), where such supply or service is for cash, deferred payment or other valuable consideration.

## Exclusion–III:

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

Transaction in money would cover deposits or withdrawals from a bank account, pay orders, drafts, conversion of ₹1000 note into ₹ 10 notes to the extent of ₹ 1000. This does not cover chit funds, investment of funds with another, debt collection services where commissions/ service charges are charged. Further Explanation 2 to the definition of 'service' clarifies that mere transactions in money are outside the ambit of service and any activity related to transaction in money for which separate charges are collected would constitute service though the transaction in money per se outside the ambit of service.

Money means legal tender, cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveller cheque, money order, postal or electronic remittance or any such similar instrument but shall not include any currency that is held for its numismatic value [Section 65B(33)].

Example: Foreign exchange conversion is a transaction in money but the service charges charged by dealer for conversion are not a transaction in money and fall within the ambit of service.

Whether the following transactions come under 'transaction only in money'?

| S. No. | Nature of transactions | Comments |
|---|---|---|
| 1. | A business chit fund | In business chit fund, since certain commission received from members is retained by the promoters as consideration for providing services in relation to the chit fund, it is not a transaction only in money. The consideration received for such services is, therefore, chargeable to service tax. Further, Explanation 2 to the definition of service states organizing a chit as a taxable service. |
| 2. | Making of a draft or a pay order by a bank is a transaction | The money received for the face value of such instrument would not be consideration for a service since to the extent of face value of the instrument it is only a transaction in money.<br>Since the bank charges a commission for preparation of a bank draft or a pay order, it is not a transaction only in money.<br>A draft or a pay order made by bank the service provided would be only to the extent of commission charged for the bank draft or pay order. |
| 3. | An investment | Investment of funds by a person with another for which the return on such investment is returned or repatriated to the investors without retaining any portion of the return on such investment of funds is a transaction only in money. Thus a partner being admitted in a partnership against his share will be a transaction in money. However, if a commission is charged, or a portion of the return is retained as service charges, then such commission or portion of return is out of the purview of transaction only in money and hence taxable. Also, if a service is received in lieu of an investment, it would cease to be a transaction only in money to the extent the investment represents the consideration for the service received. |
| 4. | Debt collection services or credit control services | Such services provided for consideration are taxable, therefore such activities do not come under transaction only in money. |

| | | |
|---|---|---|
| 5. | Sale, purchase, acquisition or assignment of a secured debt like a mortgage | If a service fee or processing fee or any other charge is collected in the course of transfer or assignment of a debt then the same would be chargeable to service tax. |
| 6. | Remittance of foreign currency in India from overseas | Remittance of foreign currency in India from overseas is a transaction in money.<br>However, If a service fee or exchange fee or any other charge is collected in the course of remittance or exchange, then the same would be chargeable to service tax. |

Actionable claim means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property, or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the civil courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent [Section 65B (1)].

Illustrations of actionable claims are -

--Unsecured debts

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

## Exclusion–IV:

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

Employee services in the course of employment: All the services provided by employee to employer in the course of employment are not liable to service tax. These would include even payments made for premature termination of employment. On the other hand any payment made by the employer to employee for the purpose of not joining in a similar job elsewhere at the time of leaving the employment would not be a payment for the service in the course of employment. Therefore, this would be a service liable to service tax. Directors who are whole time are normally “employees” and file their income under head salaries. They would also be eligible for this exclusion.

Whether the following be regarded as services in course of employment

| S.No. | Nature of services | Whether regarded as services in course of employment |
|---|---|---|
| 1. | Services provided on contract basis by a person to another | No. Services provided on contract basis i.e. principal-to-principal basis are not services provided in the course of employment. |
| 2. | Services provided by a casual worker to employer who gives wages on daily basis to the worker. | Yes. These are services provided by the worker in the course of employment. |
| 3. | In case the casual workers are employed by a contractor, like a building contractor or security agency services, who deploys them for execution of a contract or for provision of security services to a client. | Yes. Services provided by the worker to the contractors are in the course of employment. However, services provided by the contractor to his client by deploying such workers would not be a service provided by the workers to the client in the course of employment. The consideration received by the contractor would therefore be taxable if other conditions of taxability are present. |

Gondwana Club Vs C.Cus & CE, Nagpur (2016-TIOL-661-CESTAT-MUM): held contractual privileges of an employer-employee relationship are outside the purview of service tax - Activity of the appellant to provide accommodation to staff members does not come within the definition of Renting of immovable property service: This could be relevant to period till 1.7.2012.

## Exclusion–VI:

## Fees taken in any Court or tribunal established under any law for the time being in force.

The services provided by Court or Tribunal which is established under any law for the time being in force shall remain out of the Service tax net.

## Declared Services [Section 66E]

Declared Services are defined under Section 65B (22) of the Finance Act, 1994 to mean any activity carried out by a person for another person for consideration and declared as such under Section 66E of the Finance Act, 1994.

## Need for Declared Service

The definition of service in the first instant is very wide to cover any transaction done for a consideration. However, there do exist a few activities which would overlap with the other levies of State with a marginal difference, and are thereby subject to question of the constitutional validity of the levy under service tax. To set at rest any doubt about the validity of a transaction to be considered as service, the authority has intended to declare such activities to be a service. To give an instance, the first declared service "renting of immovable property service" was challenged as to competence of the Union to levy tax on a property, which is a subject for state governance. Similarly most of the declared services were challenged. For all events and purposes, these transactions shall be deemed to be service since declaration to such an extent is made. The following ten activities have been specified in Section 66E:

## 1. Renting of Immovable Property

*(a) What is renting of immovable property?*

Renting means allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property [Section 65B(41)].

*(b) Whether renting for all purposes is covered by the entry?*

The entry is wide enough to cover renting of immovable property for all purposes whether residential or commercial purposes. Thus renting for all purposes is a service. However, the immovable properties which have been specifically covered by the negative list or which are specifically exempt would not be taxable. For example, services by way of renting of residential dwelling for use as a residence is covered under the negative list of services, therefore renting of residential dwelling for the residential purpose is not a taxable service. In case a residential house is let out for use as office, it is not covered under the negative list, and is therefore, taxable. Further an immovable property other than residential dwelling (like a hotel/inn) even if let out for dwelling purposes is not covered under this negative list entry, and is, therefore, taxable subject to other exemption notifications.

Taxability of a few renting transactions

| S.No. | Renting transaction | Taxability |
|---|---|---|
| 1. | Permitting use of immoveable property for placing vending/ dispensing machines | Chargeable to service tax as permitting usage of space is covered in the definition of renting |
| 2. | Allowing erection of a communication tower on a building for consideration | |
| 3. | Permitting usage of a property for conduct of a marriage or any other social function | |
| 4. | Renting of land or building for entertainment or sports | Chargeable to service tax as there is no specific exemption. |
| 5. | Renting of theatres by owners to film distributors (including under a profit- sharing arrangement) | Chargeable to service tax as the arrangement amounts to renting of immovable property. |
| 6. | Hotels/restaurants/convention centers letting out their halls, rooms etc. for social, official or business or cultural functions | Covered within the scope of renting of immovable property and would be taxable if other elements of taxability are present. |

## 2. Construction Services

This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority. Service tax leviability on construction services under various situations is as follows:

(i) where any amount (need not be the whole consideration) is received by the service provider at any time before the issuance of completion certificate, it is covered under the declared service and therefore chargeable to service tax.

(ii) In cases where the entire consideration is received by the service provider after obtaining completion certificate, the same shall not be a service and is considered as sale of immovable property.

*(a) Service tax implications in case of construction activities on land given for development:*

In case of these constructions, the land owners generally agree to give rights to builder to undertake construction activities in their land. As a consideration to these development rights, they would be given a portion of the built up area by the builder. The builder receives consideration for his activity of construction on land in two ways

(a) Land development rights from land owners for construction of the built up area transferred to them.

(b) Cash from other customers.

The builder is required to pay service tax on the entire construction activity, including even the built up area transferred to landowners in consideration for development rights.

This view is confirmed by Mumbai High Court in the case of Maharashtra Chamber of Housing Industry and Others vs. UOI [2012-TIOL-78-HC-Mum-ST].

*(b) Service tax implications in case of development rights given by society/individual flat owners to builder for reconstruction:*

In these cases, the development rights are given by society/individual flat owners to builder for construction of new apartments with same or different carpet area to existing owners and the builder would construct additional flats also for sale to others. Builder receives consideration as development rights from existing flat owners/society and in cash from additional flat buyers. Therefore, both kinds of consideration are liable to service tax.

*(c) Service tax implications under Built- Operate-Transfer (BOT) projects;*

In case of BOT projects, first the Government would transfer the right to use/ development rights to the concessionaire for a specified period for construction of building or furtherance of business or commerce. Consideration for this would be in the nature of upfront lease amount; the service is of the nature of renting of immovable property service provided by Government and is taxable.

Secondly, the Concessionaire undertakes the construction of building/ infrastructural facility for furtherance of business or commerce would not be treated as service provider since the construction undertaken is on his own account and remains the owner during the Concession period. Therefore the construction activity undertaken by Concessionaire is not liable to service tax.

However, while undertaking such construction by the concessionaire, if any independent contractor is engaged in providing any service relating to such construction (engineering, supervision, designing etc.), then such service provided by the independent contractor is taxable.

*(d) Consideration received in the form of fixed deposits:*

There may be a colorable device wherein consideration for provision of construction service is disguised as fixed deposit which is unlikely to be returned. In such cases, there may be a significant amount of interest earned by the builder before obtaining completion certificate. It is clarified by the Department that even such interest earned would form part of the value of the taxable service. However, if it is obviously a case of "dubious tax planning" then Court may take an adverse view.

## 3. Temporary Transfer or Permitting the Use or Enjoyment of Any Intellectual Property Right

(a) Intellectual property right has not been defined in the Act. The phrase has to be understood as in normal trade parlance as per which intellectual property rights include the following:

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

When compared to position under previous law, what are taxable under previous law are those IPRs which are statutorily recognized as IPRs in India. Therefore certain intangible's like integrated circuits, undisclosed information which are hitherto not taxable under the previous law as they are not statutorily recognized as IPRs are now taxable under the negative list regime.

There is no condition that the intellectual property right must be registered in India. Temporary transfer of a patent registered outside India would also be covered in this entry. However, it will become taxable only if the place of provision of service of temporary transfer of intellectual property right is in taxable territory.

(b) Permanent transfer is not subjected to service tax:

What is taxable is only temporary transfer of IPR in India. Therefore, any permanent transfer, i.e. by way of sale or otherwise of IPR, would not be liable to service tax as this would amount to transfer of title in goods or immovable property which is excluded from the definition of service but would be liable to VAT/ CST.

(c) Certain Copyrights exempted:

Notification 25/2012-ST, dated 20-6-2012, exempts the temporary transfer or permitting the use or enjoyment of a copyright covered under clause (a) of sub section (1) of section 13 of the Indian Copyright Act, 1957 relating to original literary, dramatic, musical or artistic work or cinematographic films for exhibition in a cinema hall or cinema theatre.

Thus temporary transfer of copyrights in cinematographic films for exhibition in a cinema hall or cinema theatre are exempted which was earlier taxable.

Decision: In AGS Entertainment Pvt Ltd vs UOI (2013-TIOL-521-HC-MAD-ST) while upholding Constitutional validity of the levy of service tax on the temporary transfer or use or enjoyment of copyright. The HC observed that service tax is levied on temporary transfer or enjoyment of goods and not on permanent transfer.

## 4. Development, Design, Programming, Customization, Adaptation, Upgradation, Enhancement, Implementation of the Information Technology Software

(a) What is information technology software?

The term 'information technology software' has been defined in section 65B(28) of the Act as 'any representation of instructions, data, sound or image, including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment'.

(b) Sale of pre-packaged or canned software:

Sale of pre-packaged or canned software which is put on a media are goods in view of the Supreme Court Judgment in the case of Tata Consultancy Services vs. State of AP, 2002(178) ELT22 (SC). Therefore sale of these would be in the nature of sale of goods which falls under the exclusion list in the definition of 'service'. Therefore these are not taxable.

However, if a pre-packaged or canned software is not sold but is transferred under a license to use such software, the terms and conditions of the license to use such software would have to be seen to come to the conclusion as to whether the license to use packaged software involves transfer of 'right to use' such software in the sense the phrase has been used in sub-clause (d) of article 366(29A) of the Constitution.

(c) Site development of software:

On site development of software is covered under the category of development of information technology software and hence, taxable. The timing of the transfer of Iintellectual property may be an important criterion to determine whether the same is liable for VAT or ST for the development activity.

(d) Providing advice, consultancy and assistance on matters relating to information technology software:

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

(e) Contracts given for customized development of software:

In case of contracts given for customized development of software, the same are covered under declared list of services. This transaction is in the nature of composite transaction as this would involve an element of service by way of design and development of software and also an element of transfer of title in goods in as much as the intellectual property in CD is transferred to the client. The timing of the transfer of IP may be an important criterion to determine whether the same is liable for VAT or ST.

As per the Education guide issued by the Department, the dominant intention of the contract is service and therefore the whole contract value is subjected to service tax.

Notification No. 11/2016 dated 1st March 2016 has exempted service in relation to Information Technology Software leviable to service tax when such Information Technology Software is recorded on a media (as defined under the Central Excise Tariff Act, 1985) on which it is required, under the provisions of the Legal Metrology Act, 2009, to declare on package the retail sale price, from whole of the service tax subject to the condition that-

(i) the value of the package of such media domestically produced or imported, for the purposes of levy of the duty of central excise or the additional duty of customs leviable under section 3(1) of the Customs Tariff Act, 1975, if imported, has been determined under section 4A of the Central Excise Act, 1944 and

(ii) (a) the appropriate duties of excise on such value have been paid by the manufacturer, duplicator or the person holding the copyright to such software, as the case may be, in respect of such media manufactured in India; or
(b) the appropriate duties of customs including the additional duty of customs on such value, have been paid by the importer in respect of such media which has been imported into India;
(iii) a declaration made by the service provider on the invoice relating to such service that no amount in excess of the retail sale price declared on such media has been recovered from the customer.

## 5. Agreeing to an Obligation to Refrain From an Act or To Tolerate an Act or Situation, or To Do an Act

(a) This entry states that the following three activities carried out by a person for a consideration would be services.

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

(b) Obligation to refrain: As per Webster's dictionary, the word 'refrain' means to keep one's self from action or interference.

E.g.: Non-competing fee for not carrying out a particular business or practice a particular profession.

(c) Obligation to tolerate an act or situation:

(i) According to Law Lexicon dictionary, the word 'tolerate' means to allow the existence or occurrence of anything. Generally, the word 'tolerate' indicates some sort of suffering/sacrifice. Therefore, the act or situation which is being tolerated would not be favorable or beneficial to the person tolerating such act or situation.

(ii) Generally, this entry would cover the activity of accepting the occurrence or existence of an act or a particular thing, which is imposed by a condition or circumstances in a contract, agreement or any other document which is legally enforceable by law.

E.g.:

1. Cancellation charges for DD collected by banks.

2. Compensation paid for breach of any condition in business agreements.

3. Cancellation charges collected by the Builder from a prospective buyer for cancellation of his booking for the apartment.

(d) Obligation to do an act: This means to perform or to do something as prescribed in an agreement, contract for a consideration.

## 6. Transfer of Goods By Way of Hiring, Leasing, Licensing or Any Such Manner without Transfer of Right to Use Such Goods

(a) Significance of the phrase 'transfer of right to use the goods'

Hiring, leasing, licensing of goods would be a declared service only in case where there is no transfer of right to use such goods. In case where there is a transfer of right to use the goods is involved, the same is a deemed sale under article 366(29A) of the Constitution and is liable for VAT. In such a case, there would be no service tax implication. Therefore it is important to ascertain in every hiring transaction, whether transfer of right to use the goods is involved or not.

(b) Meaning and scope of 'transfer of right to use the goods'

(i) Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. Transfer of right to use goods involves transfer of possession and effective control over the goods.

(ii) To ascertain whether a transaction involves transfer of right to use the goods or not, the following principles are laid down by Supreme Court in the case of BSNL vs. UOI [2006] 3 STT 245.

- The goods must be available for delivery
- There must be consensus ad idem as to the identity of the goods
- The transferee should have the legal right to use the goods consequently all legal consequences of such use including any permissions or licenses required there-for should be available to transferee.
- For the period during which the transferee has such legal right, it has to be for the exclusion of the transferor. This condition is necessary as the legislative intent does not cover mere license to use the goods.
- Having transferred the right to use the goods during the period for which it is transferred, the owner cannot again transfer the same right to others.

(c) Transfer of possession of goods is not the determining factor:

(i) It has been held in various judicial forums that mere delivery of goods/transfer of possession does not imply that the transfer is a transfer of right to use goods. To decide whether there is a transfer of right to use or not, the agreement has to be read as a whole. The provisions of the contract have to be construed in the context of the service accorded to be rendered.

(ii) The transfer of right to use the goods has to be perceived in the context of the nature, manner and the extent of engagement thereof. The retention of physical possession by the transferor cannot be decisive.

(iii) Therefore, there needs to be a transfer of possession as well as control for CST/ VAT to be applicable.

(d) Some practical cases to understand 'right to use the goods':

(i) Shuttering is given on hire to a construction company for a specified period for use in the construction of buildings for a consideration. There is transfer of effective control and possession. VAT is payable and, consequently, there are no service tax implications. {Aggarwal Brothers v. State of Haryana [1999] 113 STC 317(SC)}

(ii) X allotted a project work to a contractor. To facilitate the execution of work with the use of sophisticated machinery, X has supplied the machinery to the contractors to use the machinery in execution of his work. X has received certain charges for the same.

There is no transfer of right to use the goods though possession in goods is transferred but control still rests with X only because the machinery is permitted for use by the contractors only for the contracts with X. The contractors cannot use the same for works other than those with X. {*State of A.P. v. Rashtriya Ispat Nigam Ltd. [2002] 126 STC 114 (SC)}*

In this case service tax could be attracted.

(iii) X company is engaged in supplying machinery on hire basis to an oil company for use in extraction of oil. During the period of contract, the machinery would be operated by the technical personnel of X Company. During the period of contract, X company cannot hire out the same to any other person.

There is a transfer of right to use the goods in this case even though the possession in goods are retained with X company. This is because, during the period of contract and in terms of the contract, the oil company demonstrates an

oblivious domain and control over the machinery supplied. During the period of the contract, X company was not authorized either to transfer or hire the machinery to the others. Company does not militate against the element of exclusiveness in the use thereof for the services and benefit of the oil company. {HLS Asia Ltd vs. State of Assam [2007]8 VST 314}

This transaction is also liable for service tax.

## 7. Activities in relation to delivery of goods on hire purchase or any system of payment by instalments

(a) What is taxable under this service is not the delivery of goods on hire- purchase or any system of payment by instalment as this is deemed sale under article 366(29A) of the Constitution of India. Only the activities or services provided in relation to such delivery of goods are covered in this declared list entry.

(b) What is delivery of goods on hire- purchase or any system of payment by instalments?

The main difference between mere hiring of goods and delivery of goods by hire-purchase system is that the hirer has no option to purchase the goods hired and the risks and rewards incidental to ownership of goods remain with the owner and are not transferred to the hirer.

According to Section 2 of the Hire Purchase Act, 1972, delivery of goods by hire-purchase or any other system of payment by installments would involve the following ingredients:

- Goods are let out on hire and under which the hirer has the option to purchase them in accordance with the terms of the agreement.
- Possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical installments.
- The property in goods is to pass to such person on payment of the last of such instalments.
- Such person has a right to terminate the agreement at any time before the property passes.

(c) Therefore, the hiring of goods would not be subject to service tax where there is transfer of possession of goods as well as risks and rewards of ownership by the lesser to lessee. Normally under operating leases, there won't be any transfer of risks and

rewards of ownership though there may or may not be transfer of possession. Therefore, operating leases are not covered under hire purchase system. But operating leases where the possession is transferred are also covered under the deemed sale under the category of 'transfer of right to use the goods.' Therefore, they would not be liable to service tax.

(d) Consideration in relation to delivery of goods under hire purchase are as follows:

- Interest
- Lease management fee
- Processing fee
- Documentation charges
- Administrative fee

All the above charges are subjected to service tax. However, lease amount representing interest is taxable only to the extent of 10% only as 90% is exempted under Notification No. 26/2012-ST dated 20/06/2012.

## 8. Service portion in execution of a works contract

Works Contract has been defined under section 65B(54) 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.

(a) Thus, all those contracts which involve an element of sale of goods apart from services which are leviable to sales tax, would come under the meaning of 'Works Contract. It is to be noted that satisfaction of levy by charging section in VAT laws is sufficient for this purpose even though the levy of VAT may be exempted by way of a notification.

(b) Typically, every works contract involves an element of sale of goods as well as services. To the extent related to sale of goods portion in works contract, sales tax is leviable in terms of article 366(29A) of the Constitution of India. Thus, this entry is created with a view to bringing in clarity that service portion in works contract would be subject to service tax.

(c) Since this entry covers only those contracts which involve transfer of goods as well as services in the course of execution of work, contracts for labour supply are pure service contracts where the whole amount is charged for service tax and the same are not covered under this entry.

(d) Examples of works contract:

(i) *Maintenance or repair contracts*: Maintenance or repair contracts would fall within the ambit of works contract if transfer of property in goods is involved, while undertaking the repair works. In such cases, service tax is payable only on the service portion.

(ii) *Construction of a pipeline or conduit*: Pipelines or conduits are structures on land. Contracts for such construction are works contract as they involve transfer of property in goods also.

(iii) *Commissioning or installation of plants or machinery, equipment or structures*: These contracts are treated as works contract if transfer of property in goods is also involved in the execution of the same.

(iv) Contracts for painting of building, repair of building, renovation of a building, wall tiling and flooring would also be covered in works contract if materials are involved.

(v) Construction of building under a joint development agreement for land lord.

(e) On most of the occasions, it may not be practicable to arrive at the exact value of service portion involved in execution of works contract. Even in practicable cases, it involves the tedious exercise of maintenance of records and documents. Where there are proper bifurcations available based on previous years actual figures or cost centre based accounting following the Cost Accounting Standards, the same would be preferable in proving the valid value of sale being adopted. Therefore, for administrative convenience of assessee and revenue, payment of service tax on value of service in terms of Rule 2A of the Service Tax (Determination of Value) Rules, 2006 are provided. These are discussed in detail in the chapter on valuation.

(f) Relevant decisions: In C.C.Ex. Cus, Kerala Vs L&T Ltd (2015-TIOL-187-SC-ST) Supreme Court has ruled that service tax cannot be levied on indivisible works contracts prior to introduction, on 1st June, 2007.

(g) K Raheja decision 2006 (3) STR 337 (SC), has held that even an agreement to sell an immovable property would be treated as a 'works contract' as long as amounts are received from the prospective buyer prior to the completion of the construction, as this

transaction would also be a 'works contract' coupled with a transaction involving sale of immovable property. In light of L&T decision, amounts received after entering into the contract with buyers would be treated as works contract in VAT and service tax.

(h) Alokik Township Corporation vs CCE & ST, Jaipur (2014) Tax Corp (ST) 18633 (CESTAT-NEW DELHI) where the appellant had entered into a contract with JD for development of lands and demand was under construction of complex service till 1.6.2007 and under works contract service thereafter. Held that the development of land for township is not covered by the definition of construction of complex service as given in Section 65 (105) (zzzh) read with Section 65 (39a) and 65 (91a) or by the definition of Works Contract Service in Section 65 (105) (zzzza) w.e.f. 01/06/2007. This decision was under earlier service tax law (prior to 1.7.12).

(i) Southern Properties & Promoters Vs C. C. Ex., Coimbatore (2015 (40) S.T.R. 892 (Mad.) In context of levy of ST on LL share, it was held if there is no monetary consideration in the transaction, then Section 65 provides for various methods for valuation. It is for the appellant to establish that his plea that the value of land should be taken into consideration is a matter for the Tribunal to decide on merits at the time of hearing. This decision could be impaired in view of specific admission made by the appellant before the adjudicating authority that services rendered would fall under Section 65(105)(zzzh)-construction of complex service.

(j) In N Bala Baskar Vs CST (2016-TIOL-824-HC-MAD-ST) held that land owner has no locus standi to challenge CBEC Circular dated 10.02.2012. Exchange of undivided land with builder for constructed area amounts to Service. Land Owner is not on different footing than other buyers.

Whether the following contracts would be treated as works contracts?

| S.No. | Nature of contracts | Whether covered under works contract? |
|---|---|---|
| 1. | Labour contracts in relation to a building or structure | 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. |
| 2. | Contracts for repair or maintenance of motor vehicles | 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. |
| 3. | Contracts for construction of a pipe line or conduit | Yes, as pipeline or conduits are structures on land, contracts for construction of such structure would be covered under works contract. |
| 4. | Contracts for erection commissioning or installation of plant, machinery, equipment or structures, whether prefabricated or otherwise | Such contracts would be treated as works contracts if transfer of property in goods is involved in such a contract. |
| 5. | Contracts for painting of a building, repair of a building, renovation of a building, wall tiling, flooring | Yes, if such contracts involve provision of materials as well. |

## 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

(a) This entry covers the service portion in all those activities wherein food or any article of human consumption or any drink (whether or not intoxicating) is supplied. The following is the list of such activities.

- Supply of food or drinks in a restaurant.
- Supply of food or drinks in a Mandap Keeper, Convention centre.
- Supply of food or drinks by an outdoor caterer.

(b) 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. Therefore, such supply portion cannot be a service and is specifically excluded from the definition of 'service' under section 65B (44) of the Act. Possible constitutional challenges as the amendment appear to be going beyond the Constitutional amendment.

(c) Restaurants not having air conditioning facility would not be required to pay service tax vide Exemption Notification No. 25/2012- ST dated 20.06.2012.

(d) Exemption has been granted in respect of services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948 (63 of 1948), having the facility of air-conditioning or central air-heating at any time during the year" vide Notification No. 14/2013-ST dated 22.10.2013.

(e) Goods which are sold on MRP basis (fixed under the Legal Metrology Act) in restaurant will have to be excluded from total amount for the determination of value of service portion.

Services provided in relation to serving of food or beverages by a restaurant, eating joint or mess, having the facility of air conditioning or central air heating in any part of the establishment, at any time during the year (hereinafter referred as 'specified restaurant') attracts service tax. In a complex, if there are more than one restaurant, which are clearly demarcated and separately named but food is sourced from a common kitchen, only the service provided in the specified restaurant is liable to service tax and service provided in a non-air-conditioned or non-centrally air- heated restaurant will not be liable to service tax. In such cases, service provided in the non-air-conditioned / non-centrally air-heated restaurant will be treated as exempted service and credit entitlement will be as per the CENVAT Credit Rules. Circular No.173/8/2013 – ST dated 07.10.2013

(f) If services are provided by a specified restaurant of a hotel in other areas e.g. swimming pool or an open area attached to the restaurant, it will also be liable to service tax. Circular No.173/8/2013 – ST dated 07.10.2013

Relevant Decisions:

Though VAT is levied on supply of food or drink, the recent decisions have upheld levy of service tax on supply of food or drink. The Bombay High Court in Indian Hotels and Restaurant Association Vs UOI (2014-TIOL-498-HC-Mumbai-ST) held that parliament is competent to impose Service Tax on restaurants and hotels.

In case of Indian Coffee Workers Co-Operative Society Ltd vs C.C.Ex. & ST, Allahabad [2014-TIOL-499-HC-All-ST] it was held that appeal against demand of service tax on the ground that the appellant has been paying VAT on sale of Foods and Drinks was not viable. The charge of tax in the cases of VAT is distinct from the charge of tax for service tax. Thus the Demand of service tax was upheld.

If the entire amount from guests is offered to VAT as a supply of food, levy of the service tax on the same amount would be amounting to double taxation. The court in K. Damodarasamy Naidu v. State of Tamil Nadu [2000 (117) STC 1 (SC)] held that price provided for food could not be split up between charges for food or charges for services for the purpose of taxation i.e. the service of meals to visitors in the appellant's restaurant was not liable to sales tax and this was so whether the charges were imposed for the meals as a whole or according to the dishes separately ordered.

## 10. Assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof

Assignment by the Government of the right to use the radio-frequency spectrum and subsequent transfers thereof is being declared as a service under section66E of the Finance Act, 1994 so as to make it clear that assignment of right to use the spectrum is a service leviable to Service Tax and not sale of intangible goods.

Accordingly, assignment of spectrum by Government and subsequent transfers by the assessee both are liable for service tax.

### Pointers for practice

- The professional here should have a fair idea as to the provisions prevailing under the VAT law of the concerned State as the more appropriate option can be selected from a given set of alternatives. This would involve the study of deductions available for labour as per the VAT law, composition benefits, deduction for materials transferred under service tax law, conditions to be met in order to claim deductions etc.

- The professional would have to re-visit the agreements the client has with his customers so that the essence of the same could be understood. This is critical in order to determine the liability or the absence of one under service tax.

It may also be important to examine the taxation of the services/ goods as well as the customers' liability for central excise. The fact that once tax is paid it does not absolve one from liability under another tax law.

# Concept of Negative List

## Negative List

Post July 1, 2012, there was change in the way services were taxed. Taxation is now based on what is popularly known as *"Negative List of Services"*. This is a comprehensive method of taxation normally adopted by advanced/developed countries. This method does not differentiate between the organized and unorganized sector and covers all the service providers.

The charging section-section 66B of the Finance Act, 1994, inter alia, provides that service tax shall be levied on all services, except the services specified in the negative list. Accordingly, section 66D of the Act has specified the list of services consisting of 15 heads of services which is termed as 'Negative List'. In a comprehensive tax regime, this 'Negative List' is of paramount importance because every activity not covered under this list is chargeable to service tax.

## Analyses of the Negative List of Services

### 1. Services Provided by Government or Local Authority

Services provided by Government or local authority is in the negative list and accordingly, not liable for service tax. However, the following services, even if provided by the Government or local authority, are taxable:-

(a) Service by the department of Posts provided to a person other than Government by way of

- Speed post
- Express parcel post
- life insurance
- Agency services includes distribution of mutual funds, bonds, passport applications, collection of telephone and electricity bills, which are provided by the Department of Posts to non-Government entities carried out on payment of commission on non-government business;

(b) Services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport provided by Government or local authority are taxable.

(c) Transport of goods or passengers; services of transport of passengers and goods have been specifically dealt with in clause (o) and (p).Transport of passengers by Government or local authority is generally taxable. However, following services of transportation of passengers,(whether provided by Government or otherwise) with or without accompanied belongings are not taxable:—

**A. Transport of passengers**

(i) Transport of passengers by a stage carriage (omitted vide FA 16). Therefore, made taxable. Mega exemption includes stage carriers which are not air conditioned.

(ii) Transport of passengers by railways in a class other than—

- first class; or
- an air conditioned coach

(iii) Transport of passengers by metro, monorail or tramway:

(iv) Transport of passengers by inland waterways.

(v) Transport of passengers by public transport, other than predominantly for tourism purpose, in a vessel between places located in India:

(vi) Metered cabs or auto rickshaws

**B. Transportation of goods**

(i) Services by way of transportation of goods by road except the services of—

(A) a goods transportation agency; or

(B) a courier agency.

(ii) Services by way of transportation of goods by inland waterways

(d) Support services, other than those covered by clauses (a) to (c) above, to business entities. However, with effect from 1st April, 2016, the term 'support services' was replaced with the term 'any service' and accordingly, all services provided to business entities by Government or local authority is made liable for service tax.

The following exemptions are available: (Notification: 25/2012 ST)

1. Services provided by Government or a local authority to another Government or local authority:

2. Services provided by Government or a local authority by way of issuance of passport, visa, driving license, birth certificate or death certificate;

3. Services provided by Government or a local authority where the gross amount charged for such services does not exceed ₹ 5000/-

4. Services provided by Government or a local authority by way of tolerating non-performance of a contract for which consideration in the form of fines or liquidated damages is payable to the Government or the local authority under such contract

5. Services provided by Government or a local authority by way of (a) registration required under any law for the time being in force; (b) testing, calibration, safety check or certification relating to protection or safety of workers, consumers or public at large, required under any law for the time being in force;

6. Services provided by Government or a local authority by way of assignment of right to use natural resources to an individual farmer for the purposes of agriculture;

7. Services by Government, a local authority or a governmental authority by way of any activity in relation to any function entrusted to a Panchayat under article 243G of the Constitution;

8. Services provided by Government or a local authority by way of assignment of right to use any natural resource where such right to use was assigned by the Government or the local authority before the 1st April, 2016:

9. Services provided by Government or a local authority by way of allowing a business entity to operate as a telecom service provider or use radiofrequency spectrum during the financial year 2015-16 on payment of license fee or spectrum user charges, as the case may be;

10. Services provided by Government by way of deputing officers after office hours or on holidays for inspection or container stuffing or such other duties in relation to import export cargo on payment of Merchant Overtime charges (MOT).

CBEC has clarified:

1. No Service Tax on taxes, cesses or duties as these are not consideration for any services rendered.

2. Fines and penalty chargeable by Government or a local authority imposed for violation of a statute, bye-laws, rules or regulations are not leviable to Service Tax.

3. It is clarified that any activity undertaken by Government or a local authority against a consideration constitutes a service and the amount charged for performing such activities is liable to Service Tax. It is immaterial whether such activities are undertaken as a statutory or mandatory requirement under the law and irrespective of whether the amount charged for such service is laid down in a statute or not. As long as the payment is made (or fee charged) for getting a service in return (i.e., as a quid pro quo for the service received), it has to be regarded as a consideration for that service and taxable irrespective of by whatever name such payment is called. It is also clarified that Service Tax is leviable on any payment, in lieu of any permission or license granted by the Government or a local authority

*What is the meaning of Government?*

Section 65B(26A) defines "Government" as 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 statue 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.

*What is meant by Local Authority?*

'Local authority' is defined in section in 65B(31) of Finance Act 1994, as amended, and means the following:

- A Panchayat as referred to in clause (d) of Article 243 of the Constitution,
- A Municipality as referred to in clause (e) of Article 243P of the Constitution,

- A Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund,
- A Cantonment Board as defined in Section 3 of the Cantonments Act, 2006,
- A regional council or a district council constituted under the Sixth Schedule to the Constitution,
- A development board constituted under Article 371 of the Constitution, or
- A regional council constituted under Article 371A of the Constitution.

## 2. Services Provided by Reserve Bank of India

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

*Note: Any services PROVIDED TO the Reserve Bank of India and NOT in the negative list would be taxable unless otherwise covered in any other entry in the negative list or in any exemption.*

## 3. Services by a Foreign Diplomatic Mission Located in India

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

## 4. Services Relating to Agriculture or Agriculture Produce

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

- *Agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;*
- *Activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry a*re included in the definition of agriculture.

Plantation crops like rubber, tea or coffee would also be covered under agricultural produce.

The processes contemplated in the definition of agricultural produce are those as are 'usually done by the cultivator or producer'. Thus agricultural products like cereals, pulses, copra and jaggery where certain amount of processing on these products is done by a person other than a cultivator or producer may not get covered in the ambit of 'agricultural produce'.

- *supply of farm labour;*

  The service provider who is providing the desired farm labour to the service receiver is not liable to pay service tax on the said services.

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

- Renting of agro machinery or vacant land with or without a structure incidental to its use;

- Loading, unloading, packing, storage or warehousing of agricultural produce;

- Agricultural extension services;

- Services provided by any Agricultural Produce Marketing Committee or Board or services provided by commission agent for sale or purchase of agricultural produce;

*What is the meaning of 'agriculture'?*

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

*What is agricultural produce?*

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

*For example:* Potato chips or tomato ketchup are manufactured through processes which alter the essential characteristic of farm produce (potatoes and tomatoes in this case); therefore, it does not qualify as agricultural produce.

## 5. Trading of Goods

Transfer of title of goods is one of the essential conditions for a transaction to come under the ambit of trading of goods. However, the services supporting or ancillary to the trading of goods would not come under the above item of Negative List.

*What is covered?*

- Futures contracts would be covered as these are contracts which involve transfer of title in goods on a future date at a pre-determined price.
- In commodity futures, actual delivery of goods does not normally take place and the purchaser under a futures contract normally offsets all obligations or closes out by selling an equal quantity of goods of the same description under another contract for delivery on the same date. There are, therefore, two contracts of sale / purchase involved which would fall in the category of trading of goods.

*What is not covered?*

- Activities of a commission agent or a clearing and forwarding agent who sells goods on behalf of another for a commission would not be included in trading of goods.
- Auxiliary services relating to future contracts or commodity futures would not be covered in the negative list entry relating to trading of goods.

*Whether service tax is applicable when there is a right to use the goods given by X to Y in exchange for a consideration?*

No, as it is a transfer of right to use goods. This is specifically liable to VAT. There is no service involved in the same, unless the same is temporary and without passing on the effective control and possession.

*Whether the lump sum single contract for sale of goods followed by installation is covered in negative list?*

When it is a single contract, a view is possible that the installation charges collected could be treated as a part of the composite contract, the dominant nature of which is to make a sale of goods. However, the entry of "service portion of works contract" in declared services would cover such transactions.

## 6. Processes amounting to Manufacture or Production of Goods

The phrase *'processes amounting to manufacture or production of* goods' has been defined in section 65B(40) of the Finance Act 1994, as amended, a process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 (1 of 1944) or the Medicinal or Toilet Preparations (Excise Duties) Act,1955 or any process amounting to manufacture of 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.

This entry, therefore, covers manufacturing activity carried out on contract or job-work basis provided duties of excise are leviable on such processes under the Central Excise Act, 1944 or any of the State Acts and includes processes on which duties of excise are leviable under the Medicinal or Toilet Preparations (Excise Duties) Act, 1955.

Decisions on manufacture not liable to service tax: In CCE Vs New Era Handling Agency (2015-TIOL-150-SC-ST-LB) as per Fertilizer (Control) Order, 1985, packaging of fertilizers before marketing is statutory requirement. The activity of packaging would, therefore, form integral part of manufacturing in terms of s.2 (f)(i) of CEA , 1944 and cannot be viewed as a service.

CST, Delhi Vs GMK Concrete Mixing Pvt Ltd (2015-TIOL-05-SC-ST-LB) supply of Ready Mix Concrete is not a taxable service.

*Whether the process undertaken by a job worker in relation to manufacture of alcoholic liquor for human consumption is covered in negative list?*

No, process undertaken for manufacture of alcoholic liquor for human consumption is specifically excluded from negative list entry and liable to service tax.

*Whether processing of goods resulting in manufacture of goods that are exempted or nil duty is covered?*

The manufacture of excisable goods is covered in negative list irrespective of whether leviable to a rate of duty or exempted from such duty by exemption notification. It would also cover the excisable goods, to which "Nil" rate of duty is applicable.

*Whether the process undertaken by a job worker not amounting to manufacture but used by principal in manufacturing of goods subject to 'Nil' rate of duty is covered in negative list?*

Service tax would be levied on processes, not amounting to manufacture or production of goods carried out by a person for another for consideration. But there is an exemption under notification no.25/2012-ST dated 20.06 .2012 for the intermediate production process as job work, where appropriate duty is paid by manufacturer. Appropriate rate of duty would not include 'Nil' rate of duty or duty wholly exempt. It could be liable.

*Whether the coverage in negative list is available in case where the manufactured excisable goods resulting from process are returned to another processor and not to the principal manufacturer?*

The returning of the goods to the principal manufacturer is constructive when the same are sent to another processor as per the direction of the principal. Therefore, the benefit would be available.

## 7. Selling of space for advertisements in print media

Finance Act 2014 has broadened the tax base in Service tax, Sale of space or time slot for advertisements in broadcast media, namely radio or television, extended to cover such sales on other segments like online and mobile advertising, etc. Sale of space for advertisements in print media, however, would still remain excluded from Service tax.

*When is Sale of "Space and Time" taxable?*

| Taxable | Non-taxable |
|---|---|
| Sale of space or time for advertisement to be broadcast on radio or television. | Sale of space for advertisement in print media. |
| Sale of space for advertisement in bill boards, public places, buildings, conveyances, cell phones, automated teller machines, internet. | |
| Aerial advertising<br>Business Directory<br>Yellow Pages<br>Trade Catalogues which are primarily meant for commercial purposes. | |

*Whether sale of space or time sold to advertisement agency on lump sum basis would be covered by the negative list entry?*

Any sale of space or time for advertisement purpose in print media is covered under the negative list entry. There is no condition in the definition that the sale of space or time should be directly made to the advertiser. Bulk selling of space or time to advertisement agency for a specified period which in turn sells it to different advertisers on piecemeal basis would also be covered by the negative list entry and exempted from service tax.

*An advertiser approaches advertisement agency to undertake advertisement activities for its company for the entire year for a contractual amount. Scope of work includes advertisement consultancy, choosing of different advertising medium, preparation of advertisement and display on mediums, purchase of space or time for display of advertisement. Could this be covered in negative list entry?*

Composite contract is given to an advertisement agency for handling entire advertisement activity for the year on lump sum basis. This would be a case of bundled services, taxability of which has to be determined in terms of the principles laid down in section 66F of the Finance Act 1994 as amended. Here the dominant nature of the transaction needs to be determined in order to check if it could be chargeable to service tax. Here the following two services are bundled, namely, taxable service of advertising agency services in relation to design, conceptualisation, preparation of advertisement, and non-taxable service of display in public spaces. In the opinion of this paper writer, the dominant nature would be the services which are being offered by advertising agency related to creativity including designing, planning, preparation and display of the advertisement would be only the incidental activity. Therefore the contract would be liable to service tax.

*Would services provided by advertisement agencies relating to preparation of advertisements be covered in the negative list entry relating to sale of space for advertisements in print media?*

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

*How would Service Tax liability be determined when an advertisement agency raises separate bill towards its commission and sale of space charges?*

Charges received by advertisement agency towards its commission are not covered by the

negative list entry. Consideration received towards sale of space or time slots for advertisements in print media would not be liable to service tax if contracted and amount invoiced separately.

*Whether the sale of space in a private circulation magazine is taxable?*

Sale of space or time in print media (includes books and newspaper) except business directories, yellow pages and trade catalogues is covered by the negative list entry. Accordingly, sale of space in private circulation magazine is not liable to service tax.

*What would be the taxability of space allowed in buses and public transport system to run display of advertisement?*

This will be liable to service tax as per discussion in previous question.

*Whether advertisement in a movie is covered under the entry "sale of space or time for advertisement"?*

Advertisement in a movie is a sale of space or time for advertisement. As such, it is not covered by the above entry and hence liable to service tax.

*Whether advertisement service rendered to Government departments is exempted from service tax?*

There is no exemption on the advertisement services provided to government department. It is liable to service tax.

*Whether canvassing advertisements (other than in print-media) for publishing on a commission basis is liable to service tax?*

Canvassing advertisements on commission basis is not covered by the negative list and is liable to service tax.

*Whether the agency commission paid by print media to advertising agency is taxable?*

Sale of space or time in print media is not liable to service tax. However, commission or discount received by the advertisement agency is not in the nature of sale of space or time. It is liable to service tax.

## 8. Access to a Road or a Bridge on Payment of Toll Charges

*What are the services which are covered?*

The negative list entry covers access to a road or a bridge on payment of toll charges. The access to National Highways or State Highways is covered in this entry.

*Whether services provided in relation to collecting toll charges are liable to service tax?*

Where a toll collecting agency is engaged for collecting the above mentioned toll charges then the collecting agency would be liable to pay service tax on its charges.

## 9. Betting, Gambling or Lottery

"Betting or Gambling' has been defined in section 65B(15) of the Finance Act, 1994 as amended, as *'putting on stake something of value, particularly money, with consciousness of risk and hope of gain on the outcome of a game or a contest, whose result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring'*. The State Government may levy a betting tax on such activities.

Explanation specifically states that the expression "betting, gambling or lottery" shall not include the activity of a lottery distributor or selling agent in relation to promotion, marketing, organising, selling of lottery or facilitating in organising lottery of any kind, in any other manner. Therefore, the lottery distributor or selling agent is made liable to pay service tax.

*Whether payment for admission to horse race as a spectator is covered under this entry?*

This entry seeks to cover the amount which is involved in the betting. Therefore, the amount collected by the Club from the viewer is not covered, since it does not pertain to betting.

*Suppose 'Mr. X' bets an amount of ₹5,000/- on a horse in a race event. The race club has only paid betting tax to the State Government on ₹3,000/- and ₹1,000/- is charged for the entry into the race and balance transferred to a common pool account from which the prize amount is awarded. Is the entire amount covered by this entry?*

This entry reads as *"services by way of betting, gambling or lottery"*. Mr. X with the consciousness of risk and hope has bet an amount of ₹5,000/- and therefore in the opinion of the paper writer, the entire amount is covered by the subject entry irrespective on what amount the betting tax is paid to the state government.

*Mr. Y, member of the Horse racing Club has sponsored certain amount for a particular race in the club. Is the amount paid by Mr. Y covered under this entry?*

No, the amount paid by the member is not with the 'consciousness of risk and hope of gain and the outcome of game' which is primary requisite to be covered under this entry. Since, the amount sponsored by Mr. Y does not have this attribute, it falls into the definition of service and hence service tax is applicable.

*Whether any support services rendered by the Club and certain amount collected from the members would be covered by this entry?*

Any amount received by club for rendering support services does not have the attribute of consciousness of risk and hope of gain on the outcome of game and is therefore, liable to service tax.

*Whether auxiliary services used to provide betting/gambling services are liable to service tax?*

Auxiliary services that are used for organizing or promoting betting or gambling events, which are not betting *per se* or a part thereof, are not covered in the negative list. They could be liable to service tax.

## 10. Transmission or Distribution of Electricity

An 'electricity transmission or distribution utility' has also been defined in section 65B(23) of the act to mean the following:

- the Central Electricity Authority
- a State Electricity Board
- the Central Transmission Utility (CTU)
- a State Transmission Utility (STU) notified under the Electricity Act, 2003 (36 of 2003)
- a distribution or transmission licensee licensed under the said Act
- any other entity entrusted with such function by the Central or State Government

*Whether the 'generation' of electricity for a consideration is chargeable to service tax?*

Electricity is specified "goods" in the First Schedule of Central Excise Tariff Act, 1985. It has been held in the case of *CMS(I) Operations & Maintenance Co. P. Ltd. v. CCE, Pondicherry - 2007 (7) S.T.R. 369 (Tri.-Chennai)*, that generation of electricity amounts to process of manufacture. Therefore, it would not be liable to service tax.

*Whether the charges collected by a developer for distribution of electricity within a residential complex are covered in this entry?*

Charges collected by a developer of a housing society for distribution of electricity within a residential complex are not covered in the Negative List. However it may not be liable as it is sale of goods.

## 11. Services by way of Renting of Residential Dwelling for use as Residence

*'Renting'* has been defined in section 65B(41) as *''allowing, permitting or granting access, entry, occupation, use or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property"*.

### *Snap shot on taxability/ non-taxability of Renting Transactions:*

| If | Then |
|---|---|
| A residential house taken on rent is used only or predominantly for commercial or non-residential use. | The renting transaction is not covered in this negative list entry. |
| A house is given on rent and the same is used as a hotel or a lodge | The renting transaction is not covered in this negative list entry because the person taking it on rent is using it for a commercial purpose. |
| Rooms in a hotel or a lodge are let out whether or not for temporary stay | The renting transaction is not covered in this negative list entry because a hotel or a lodge is not a residential dwelling. |
| Furnished flats given on rent for temporary stay | These are in the nature of lodges or guest houses and hence not treatable as a residential dwelling |

***Would renting of a residential dwelling partly used as a residence and partly for non-residential purpose like an office be covered under this entry?***

Renting of a residential dwelling which is for use partly as a residence and partly for nonresidential purpose like an Office would be a case of bundled services. Taxability of such bundled services has to be determined in terms of the principles laid down in section 66F of the Finance Act 1994, as amended. The taxability would be based on the predominant service.

## 12. Financial Sector

The services of loans, advances or deposits are in the list in so far as the consideration is represented by way of interest or discount. Any charges or amounts collected over and above the interest or discount amounts would represent taxable consideration. Some examples:

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

The Invoice discounting is covered only to the extent consideration, represented by way of discount. Any charges or amounts collected over and above the interest or discount amounts would represent taxable consideration. Services provided by banks or authorized dealers of foreign exchange by way of sale of foreign exchange to general public are merely not transaction in money and not covered in Negative List.

## 13. Service Relating to Transportation of Passengers

The following services relating to transportation of passengers, with or without accompanied belongings, have been specified in the negative list:

- railways in a class other than (i) first class; or (ii) an AC coach;
- metro, monorail or tramway;
- inland waterways;
- public transport, other than predominantly for tourism purpose, in a vessel between places located in India; and
- metered cabs or auto rickshaws.

The various other equivalent modes of transport not specified herein could be a cause of dispute as the above list is not complete within each segment.

*Are services by way of giving on hire of motor vehicles to state transport undertakings covered in this negative list entry?*

Services by way of giving on hire of motor vehicles to state transport undertakings are not covered in the negative list. However, such services provided by way of hire of motor vehicle meant to carry more than 12 passengers to a State transport undertaking are covered under Sl.no. 22 of Mega Exemption Notification (25/2012 ST) and, accordingly, exempt from tax.

*Would services by non-AC contract carriages which get permission or temporary permits to ply as stage carriages be taxable?*

Specific exemption in Mega Exemption Notification No: 25/2012 (Sl.No: 23(b)) is available to services pertaining to transport of passengers by a non- AC contract carriage, other than radio taxi, for transportation of passengers, excluding tourism, conducted tours, charter or hire.

*Is transport of passengers by a stage carriage in negative list?*

It was in negative list till 01/06/2016. Thereafter, it was transferred to mega Exemption Notification as Sl.No: 23(bb) and the exemption was limited only to *stage carriage other than air conditioned stage carriage.* As a result, transportation of passengers by air conditioned stage carriages is taxable from 01/06/2016

## 14. Service Relating to Transportation of Goods

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

- by road except the services of (i) a goods transportation agency; or (ii) a courier agency;
- by inland waterways. (Services provided as agents for transportation by inland waterways are not covered in the negative list.)
- *Are GTA services excluded?*

All services provided by goods transport agencies are excluded from the negative list. However, there are separate exemptions *vide Notification No. 25/ 2012 dated 20th June, 2012,* available to the services provided by the goods transport agency. These are services by way of transportation of:

- *agricultural produce;*

- *goods where gross amount charged on a consignment transported in a single goods carriage does not exceed one thousand five hundred rupees; or*
- *goods where gross amount charged for transportation of all such goods for a single consignee in the goods carriage does not exceed rupees seven hundred fifty; or*
- *milk, salt and food grain including flours, pulses and rice;*
- *chemical fertilizer and oilcakes and organic manure*
- *newspaper or magazines registered with the Registrar of Newspapers;*
- *relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; or*
- *defence or military equipments;*
- *cotton, ginned or baled.*

The provisions relating to reverse charge that service tax is liable to be paid by the consigner or consignee in specified cases, are applicable as earlier, even after the introduction of negative list.

*Whether all kinds of transportation of goods are covered in negative list?*

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

*Is transportation service provided by the truck owner and truck operator to end user directly liable to service tax?*

Service provided by truck owner directly to end user is covered by the negative list entry and is not liable to service tax.

Relevant decision: In CCE Vs United Shippers Ltd (2015-TIOL-172-SC-ST-LB) the question of levying service tax on the transportation by barges from the mother vessel to the jetty onshore would not arise at all since the said activity is part of the import transaction leviable to import duty.

## 15. Funeral, Burial, Crematorium or Mortuary Services Including Transportation of the Deceased

This entry exempts services in relation to cremation etc. of deceased.

# Classification of Services

This topic gives the mechanism, manner and approach for classification of services. Generally under any tax laws, classification merits importance for the purpose of identifying the rate of duty/tax. Under the service tax provisions, the classification is essential to identify the taxability itself. Classification of service under service tax essentially would determine the taxability and specific exemptions/ abatements available if any. It would also determine the effective date of service.

Classification of the service involved under service tax is one of the most important steps in ensuring legal compliance. Classification of services poses certain challenges unlike classification of goods as services are intangible. Professionals handling service tax matters often face problems here as the service sector involves specialists who specialize in certain select fields (technocrats, scientists, engineers) and who are not attuned to the requirements under service tax and the possible ramifications of non-compliance. Sometimes, the service provider may even be uneducated (e.g. he is a goods transport agency, sub-contractor in the construction industry, pandal or shamiana contractor). Very often, when it comes to classifying a service, difficulties are faced in understanding the exact nature of services being provided by the service providers as the explanations given can only be understood by another technically qualified individual rather than a professional who is well-versed only in matters pertaining to taxation. The understanding of the trade is crucial in this regard.

## Relevance of the Concept of Classification

An assessee under Central Excise would know the importance of classification and the influence it would have on his duty liability. Similarly the importance of classification under service tax is not to be underestimated as it is important to determine the taxability and examine specific exemptions/abatements available if any. It would also determine the effective date of service.

There have been numerous instances where assessees differ with the departmental authorities on the issue of classification of services they provide.

Under service tax, correct classification is the single most critical factor the assessee should take care of. This is for the reason that various categories of services have been brought under the tax net over a period of time beginning with the year 1994 rather than in one shot. Thus when the assessee considers the various alternative categories for classifying his

services, he may be confronted with a scenario where two or more services are liable from different dates. This would substantially increase the risk factor of non-compliance arising from improper classification of the service.

The legal maxim which states – "Nothing is to be read into a definition and nothing should be omitted to be read." has to be kept in mind while determining the classification of services. For the purpose of classification, one would have to follow section 65A of Chapter V of Finance Act. As per this section, the classification of the service has to be determined keeping in mind the sub-clauses of section 65(105). That is, in order to classify the services provided, the assessee is supposed to have a fair knowledge of the categories that are taxed under the aforesaid section and he should be able to identify the possible categories that could apply in his case and select the one that is most appropriate. The view of the revenue is normally available in the Circulars and if within that boundary of law, the service provider would be safe and is advised to follow the same.

## Classification under Negative List Approach

Under negative list regime, classification is not paramount as was the case earlier. However, it would be still relevant in determining exemptions/abatements if any. Further, it is required for making of payment of tax by assessee.

### Principles of interpretation of specified descriptions of services or bundled services [Section 66F]

In the proposed negative list regime, section 66F naming Bundle services are inserted to provide principles of classification of services. As per provisions of this Section:

1. Unless otherwise specified, reference to a service (hereinafter referred to as main service) shall not include reference to a service which is used for providing main service.

   An example could be hiring of road roller in a project of road laying for Government. The hiring of road roller along with the operator would be liable for ST though road laying is in the negative list.

   However, if part of the road laying was sub contracted it would be exempt.

2. Where a service is capable of differential treatment for any purpose based on its description, the most specific description shall be preferred over a more general description.

An example could be services of trouble shooting of equipment supplied by a customer who is a manufacturer abroad for which the manufacturer gets a local engineer to do the job. The local engineer has a contract only with the manufacturer. However, the trouble shooting is done in India for the customers of the manufacturer. In this case, though the basic service is one of repairs and maintenance, the service provided is business support services.

3. Subject to provisions of sub-section (2), the taxability of a bundled service shall be determined in the following manner, -

   (a) If various elements of such service are naturally bundled in the ordinary course of business, it shall be treated as provision of single service which gives such bundle its essential character;

   An example could be a hospital using medicines, bandages for conducting an operation. This would be health care service as the goods are consumed in provision of the service. Similarly, hotel accommodation including breakfast as part of tariff could be a naturally bundled service.

   (b) If various elements of such service are not naturally bundled in the ordinary course of business, it shall be treated as provision of single service which results in the highest liability of service tax.

   This may require some interpretation by the judiciary as the intention is not clear.

*Explanation* – For the purposes of sub-section (3), the expression "bundled service" means a bundle of provisions of various services wherein an element of provision of one service is combined with an element or elements of provision of any other service or services.

## Would it be advisable to have clear break-up of different components in the contract and invoicing?

In case of composite contracts (goods & services provided together), bifurcation of the two elements would avoid issues pertaining to the classification of services. It may be ensured that the methodology of bifurcation are reasonable and if possible to follow the costing principles.

In case of composite contract where different services are provided as long as the rate applicable on all of them is same it may not matter. However, where for some of the services abatement option is available then it could be important. The clear break- up of each service from the time of the offer till the time of billing may avoid the possibility of attracting the highest rate rule. Again following cost accounting standards, if accounts are being maintained it could support the break- up.

## Possible ramifications where the assessee gets the classification wrong

Where the assessee gets the classification of service wrong, the result could be as follows –

- Losing out on the exemptions which could have been claimed if the classification had been done correctly, as a result of which the assessee pays more than what is required to be paid.
- Loss of business due to rivals/competitors being more cost-effective
- Wrongly claiming exemption that one is not entitled to claim in the normal course as a result of which one is saddled with additional liability along with interest and penalties which cannot be collected from clients/customers
- Paying service tax when one is not required to pay as a result of wrongly classifying his service under a category which was not appropriate leading to huge debts. In such a case, one may also lose the tax wrongly paid when the refund period of 1 year is over.
- Not paying service tax when one was actually liable to pay the same as a result of the new taxation provision.
- Attracting unwarranted liability on Import of Services or not claiming the benefit of export of services due to improper classification under Place of Provision of Service Rules
- Availing any beneficial clarification given by circulars and
- Taking advantage of any notifications issued retrospectively for particular service.

## Pointers for practice

- The professional handling service tax matters would be required to go through the various records maintained by the assessee before arriving at a final decision regarding classification. This would ensure that the classification is done on the basis of documentary evidence rather than only on the basis of interviews. However, in the absence of documents the same maybe made clear:
- The professional would have to be careful in case of composite services. Here, the agreement available or the method of invoicing or charging need not in itself determine whether the service is a single service or multiple services. Here, the real nature and

the substance of the transaction should be the guiding factor rather than form of the transaction, for the purposes of classification. He/she should, therefore, try to find out the category of service which gives the essential character and then adopt that category for classification

- Periodical review of the classification may also be undertaken by the professional to ascertain whether the concerned services can be classified under other headings which have been introduced at a later date and which provide a more specific description of the concerned service. This possibility cannot be ruled out though it may be remote. The shelf-life of the opinion is to be made clear to the client.

- In case of any doubt in the classification, the same is preferably to be intimated to the department and their confirmation sought. This would also allow for amendment in future when the matter becomes clear.

# Place of Provision of Service Rules

## Position prior to 1st July, 2012

A. *Import of service is taxable under Section 66A of the Finance Act, 1944* : A taxable service is considered to be imported, if:

- The provider of taxable service is from outside India, and
- The receiver of service has his permanent address/ usual place of business in India.
- The service provided is construed as import under Import Rules. (Services are divided into three categories namely *services provided in relation to immovable property, services partly performed in India, and outside India and based on recipient location*)

This is applicable even though the service is received/ consumed by the Indian outside India. This provision was not applicable in case of individuals who have received such service other than for the purpose of use in business or commerce.

B. *Export of services:* Following conditions are to be specified:

- Such service is delivered outside India and used outside India, and
- The payment received for providing such service should be in convertible foreign exchange.

Services were divided into three categories namely *services provided in relation to immovable property, services partly performed in India, and outside India and based on location of the recipient*

The provisions of Sec. 66A were valid up to 30.06.2012 and are not applicable thereafter. Instead, Sec. 66C has been introduced, empowering the Central Government to make rules for determining the place of provision of service.

## Position after 1st July, 2012

In terms of section 66C of the Finance Act, 1994 as amended, the ***'Place of Provision of Service Rules, 2012'*** (the POP SR) have been issued vide *Notification No. 28/2012-ST dated 20.06.2012*, and with this, the earlier Export of Service Rules, 2005 and the Taxation of Services (Provided From Outside India and Received in India) Rules, 2006, have been repealed. The POP SR specifies the manner of determination of the place where a service shall be deemed to be provided in terms of sub-section (1) of Section 66C read with clause (hhh) of sub-section (2) of Section 94 (hhh) of the Finance Act, 1994, as amended.

As per Section 66B of the Finance Act, 1994, as amended provides *inter alia* that a service is taxable only when it is provided or agreed to be provided in the taxable territory and thereby brings into play the Place of Provision of Services Rules. The POP SR is based on the fundamental concept that as indirect tax, service tax is a consumption based tax which is taxable in the jurisdiction of its place of consumption. *Taxable territory* is defined to include India excluding Jammu & Kashmir (J&K), whereas non-taxable territory is defined as the territory other than taxable territory.

Additionally, service providers operating within India from multiple locations, without having centralized registration would find them useful in determining the precise taxable jurisdiction applicable to their operations. To determine whether the place of provision of service is in the taxable territory, we need to ask the following questions sequentially, applying these rules:-

1. Which rule applies to my service specifically? In case more than one rule applies equally, which of these come later in the order given in the rules?

2. What is the place of provision in terms of the above rule?

3. Is the place of provision in taxable territory? If yes, tax would be payable. If not, tax would not be payable.

4. Are we 'located' in the taxable territory? If yes, we would pay the tax.

## Analysis of the Rules

Under the new enactment, the incidence of taxation is very much dependent on the determination of the location of the service provider and service receiver. In that, one has to enquire sequentially:

A. the premises for which registration, whether centralized or otherwise, has been obtained by the service provider and receiver;

B. Where the service provider or receiver is not covered by 'A' above :

(i) the location of his business establishment; or

(ii) where services are provided or received at a place other than the business establishment i.e., a fixed establishment elsewhere, the location of such establishment;

(iii) where services are provided or received at more than one establishment, whether business or fixed, the establishment most directly concerned with the provision or use of the service; and

(iv) in the absence of such places, the usual place of residence of the service provider or receiver.

It is important to note that in the case of a service receiver, the place relevant for determining the location is the place where the service is *'used'* or *'consumed'*. For proper understanding of the terms *'business establishment'*, *'fixed establishment'*, *'establishment most directly concerned with the supply',* one has to refer to the departmental 'guidance note' where such terms have been explained at length.

For the purpose of the POP SR, Rule 2, thereof defines some important terms like *'continuous journey'*, *'intermediary'*, *'leg of journey'*, *'location of the service provider'*, *'location of the service receiver'*, *'means of transport'*, *'banking company'*, *'non-banking financial company'*, *'online information and database access or retrieval services'*, *'telecommunication service'* etc. Of all the definitions, the definitions of *'location of the service provider'* and *'location of the service receiver'* are most important and bring in the concept of *'usual place of residence in case of a body corporate', 'business establishment', 'fixed establishment'* and *'establishment most directly concerned with the provision of service'*.

There was a change in the definition of 'intermediary' w.e.f. 01.10.2014 in Rule 9 of POPSR.

It is the provider of service who is normally liable to pay the tax, except where he is stationed outside the taxable territory and the place of provision is in the taxable territory. However, if the provider of service is stationed outside the taxable territory, it is the receiver of service in the taxable territory who will be liable.

According to Rule 3 of the POP SR, the general rule is that the place of provision of a service shall be the location of the recipient of service. However to determine whether an activity can fall into Rule 3, rules 12 to 4 in reverse order are to be examined. The rules are tabulated below:

The Place of Provision of Services Rules are summarized as under:

| Rule | Situations | Place of provision of Service |
|---|---|---|
| 3 | Main Rule - Location of service receiver | The place of provision of a service shall be the location of service receiver.<br>However, if the location of the service receiver is not available in the ordinary course of business, the location of the service provider shall be the place of provision.<br>Implications :<br>(i) The main rule would apply when none of the later rules apply<br>(ii) Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.<br>(iii) Where the location of receiver of a service is outside the taxable territory, no service tax will be payable on the said service. |
| 4 | Performance based services: | |
| (a) | Services provided in respect of goods that are required to be made physically available by the service receiver to the service provider<br>Proviso – when services are provided from a remote location by way of electronic means or when the goods have temporarily been imported into India for repairs and | Location at which services are actually performed by service provider.<br>Rule 4(a) of the POP Rules is not applicable on repair of goods imported temporarily into India and then exported after repairs without being put to any use in the taxable territory.<br>It may be noted that this exclusion does not apply to goods that arrive in the taxable territory in the usual course of business and are subject to repair while such goods remain in the taxable territory, e.g., any repair provided in the taxable territory to containers arriving in India in the course of international trade in goods will |

| Rule | Situations | Place of provision of Service |
|---|---|---|
| | then exported back, still it will be regarded as a service performed in non-taxable territory and consequently not liable to service tax subject to other Rules | be governed by Rule 4 of the POP Rules.<br>Location at which the goods are situated at the time of provision of service. |
| (b) | Services provided, in the physical presence of an individual, represented either as the service receiver or a person acting on behalf of the receiver | Location at which services are actually performed by service provider. |
| 5 | Immovable property based services | Location of the immovable property located or intended to be located. |
| 6 | Event-based services | Location where the event is actually held. |
| 7 | Multiple location based services | Location of taxable territory where the greatest proportion of service is provided. |
| 8 | Where service provider and receiver are located in the taxable territory | Location of the service receiver |
| 9 | For specified services<br>• Services provided by a Banking Company, Financial Institution, Non-Banking Financial Company<br>• Online information and database access or retrieval services<br>• Intermediary services | Location of the service provider<br>Intermediary definition reads as under:<br>"intermediary" means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the 'main' service) or *a supply of goods,* between two or more persons, but does not include a person who provides the main service or supplies the goods on his account.( Rule 2(f) of the POP Rule, 2012)<br>As per the amended definition of an intermediary, an intermediary of goods, such as a commission agent or |

| Rule | Situations | Place of provision of Service |
|---|---|---|
| | • Services consisting of hiring of means of transport, other than<br>(i) aircrafts, and<br>(ii) vessels except yachts upto a period of one month | consignment agent shall be covered under Rule 9(c) of the POP Rules instead of Rule 3 of the POP Rules |
| 10 | Goods Transport Services | Place of destination of goods.<br>However, for goods transport agency providing road transportation by road, the place of provision of service shall be the location of the person liable to pay tax. |
| 11 | Passenger Transport Services | Place where the passenger embarks on the conveyance for a continuous journey |
| 12 | Services provided on board a conveyance | First scheduled point of departure of that conveyance for the journey |
| 13 | The Central Government can notify any description of service or circumstances in which the place of provision shall be the place of effective use and enjoyment of a service. (Rule 13). | |
| 14 | Where the provision of a service is, determinable in terms of more than one rule, it shall be determined in accordance with the rule that occurs later among the rules that merit equal consideration. (Rule 14). In other words, later the better principle applicable. | |

## Clarification

Place of provision of service in relation to remittances from abroad-

CBEC vide *Circular No. 180/06/2014–ST dated 14th October, 2014*has issued following clarifications in relation to remittances from abroad:

| Issues | Clarification |
|---|---|
| Whether service tax is payable on remittance | No service tax is payable *per se* on the amount of foreign currency remitted to India |

| | |
|---|---|
| received in India from abroad? | from overseas. As the remittance comprises money, it does not in itself constitute any service in terms of the definition of 'service' vide Section 65B (44) of the Finance Act, 1994. |
| Whether the service of an agent or the representation service provided by an Indian entity/bank to MTSO in relation to money transfer falls within the category of intermediary service? | Yes. The Indian bank or other entity acting as an agent to MTSO in relation to money transfer facilitates in delivery of remittance to the beneficiary in India i.e. these Indian entities/bank/s facilitate the provision of Money transfer Service by MTSO to a beneficiary in India which is covered within the definition of intermediary as defined in Rule 2 (f) of PPSR. |
| Whether Service tax is leviable on the service provided by an intermediary/agent located in India to MTSOs located outside India? | Vide Rule 9 (c) of PPSR, in the present case, the place of provision of service is the location of service provider i.e. India and accordingly, Service tax is payable on commission or fees charged by such agent/s. |
| Whether Service tax would apply on the amount charged separately, if any, by the Indian bank/entity/agent/sub-agent from the person who receives remittance in the taxable territory, for the service provided by such Indian bank/entity/agent/sub-agent? | Yes. As the service is provided by Indian bank/entity/agent/sub-agent to a person located in taxable territory, the place of provision of such services is in the taxable territory. Accordingly, Service tax is payable on such amount charged separately, if any. |
| Whether Service tax would apply on the services provided by way of currency conversion by a bank /entity located in India to the recipient of remittance in India? | Any activity of money changing comprises an independent taxable activity. Therefore, Service tax applies on currency conversion in such cases in terms of the Service Tax (Determination of Value) Rules. Service provider has an option to pay Service tax at prescribed rates in terms of Rule 6 (7B) of the Service Tax Rules, 1994. |
| Whether services provided by sub-agents to such Indian Bank/entity located in the taxable territory in relation to money transfer is leviable to service tax? | Sub-agents also fall in the category of intermediary. Therefore, Service tax is payable on commission received by sub-agents from Indian bank/entity. |

[*Circular No. 180/06/2014–ST dated 14th October, 2014*]

## Export of services [Rule 6A of the Service Tax Rules, 1994]

(i) **Conditions to be fulfilled for service to be treated as export of service** [Sub-rule (1)]: The provision of any service provided or agreed to be provided shall be treated as export of service when,-

(a) the service provider is located in the taxable territory,

(b) the service receiver is located outside India,

(c) the service is not a service specified in the negative list (Section 66D) of the Act,

(d) the place of provision of the service is outside India;

(e) the payment for such service has been received by the service provider in convertible foreign exchange, and

(f) the service provider and service receiver are not merely establishments of a distinct person in accordance with item (b) of Explanation 3 of clause (44) of section 65B of the Act.

> As per item (b) of Explanation 3 of clause (44) of section 65B, an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.

(ii) **Central Government empowered to grant rebate on inputs/input services used in providing service exported** [Sub-rule (2)]: Where any service is exported [in terms of sub-rule (1) above], the Central Government may, by notification, grant rebate of service tax or duty paid on input services or inputs, as the case may be, used in providing such service and the rebate shall be allowed subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification.

**Safeguards, conditions and limitations for claiming rebate on inputs and input services:** In exercise of this power, the Central Government has issued *Notification No. 39/2012-ST dated 20.06.2012* providing the safeguards, conditions and limitations for claiming rebate on inputs and input services used in providing services exported in terms of Rule 6A of Service Tax Rules to any country other than Nepal and Bhutan:-

Some of the important Conditions and limitations:-

1. Service has been exported in terms of rule 6A.

2. Duty on the inputs/service tax on input services, rebate of which has been claimed, has been paid to the supplier/service provider respectively.

   If the exporter himself is liable to pay for any input services; he should have paid the service tax and cess to the Central Government.

3. No CENVAT credit has been availed of on inputs and input services on which rebate has been claimed.

4. In case any of the aforesaid conditions is not fulfilled, rebate paid, if any, shall be recoverable with interest in accordance with the provisions of section 73 and section 75 of the Finance Act, 1994.

5. Amount of rebate claimed is not less than ₹ 1,000.

The Notification also prescribes the procedure for claiming the rebate on inputs and input services.

# Point of Taxation

## Introduction

- To have the preparatory base for upcoming GST law, the concept of Point of Taxation Rules have been prescribed *vide Notification No.18/2011 – ST dated 1st March, 2011*.

- Point of taxation means the point in time when a service shall be deemed to have been provided. The point of taxation enables us to determine the rate of tax, value of taxable service, rate of exchange and due date for payment of service tax.

## Determination of Date of payment [Rule 2A]

Rule 2A is inserted to define the term "date of payment" as follows:

"The date of payment" would be construed as the earlier of the dates on which the payment is entered in the books of account or is credited to the bank account of the person liable to pay tax:

The date of payment would be the date of credit in the bank account subject to the conditions as follows:-

(a) there is a change in effective rate of tax or when a service is taxed for the first time during the period between such entry in books of account and its credit in the bank account; and

(b) the credit in the bank account is after four working days from the date when there is change in effective rate of tax or a service is taxed for the first time; and

(c) the payment is made by way of an instrument which is credited to a bank account,

- If any rule requires determination of the time or date of payment received, the expression "date of payment" shall be construed to mean such date on which the payment is received;

## Determination of point of taxation-General Rule [Rule 3]

The time when the invoice for the service provided or to be provided is issued.

| S.No. | In case | Point of taxation would be |
|---|---|---|
| 1. | the invoice is issued within the prescribed period of 30 days* from the date of completion of provision of service<br>such period is extended to 45 days for banks and financial institution | (a) Date of invoice<br>or<br>(b) Date of payment<br>*whichever is earlier* |
| 2. | the invoice is not issued within the prescribed period of 30 days* from the date of completion of provision of service.<br>Such period is extended to 45 days for banks and financial institution | (a) Date of completion of service<br>or<br>(b) Date of payment<br>*whichever is earlier* |

- Service tax would be payable irrespective of the method of accounting followed.
- Rule 4(7) of the CENVAT Credit Rules, 2004 has been amended providing that credit of service tax is to be taken on receipt of invoice. However, if the payment is not made to the supplier within three months, then such CENVAT Credit will have to be reversed and will be again allowed only after its payment is made.
- CBEC has clarified the term "Completion of Service" provided under the Service Tax Rules, 1994 and Point of Taxation Rules, 2011 to mean that all the other auxiliary activities such as measurement, quality testing etc. besides the physical part of providing prime service are also to be completed, which enable the service provider to be in a position to issue an invoice. However such auxiliary activities shall not be flimsy or irrelevant grounds for delay in issuance of invoice.
- 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 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.
- Wherever the provider of taxable service receives a payment upto ₹1,000/- in excess of the amount indicated in the invoice, the point of taxation to the extent of such excess amount, at the option of the provider of taxable service, shall be the date of Invoice.

The details of liability of service tax have to be recorded in the books of account by the service provider or any other person who is liable to pay service tax. The accounting entries are mentioned in *Appendix 2*.

## *Illustration*

| S. No. | Date of Completion of Service | Date of Invoice | Date on which payment is received | Point of Taxation |
|---|---|---|---|---|
| 1. | 10.04.2016 | 05.05.2016 | 20.05.2016 | 05.05.2016 |
| 2. | 10.04.2016 | 05.05.2016 | 25.04.2016 | 25.04.2016 |
| 3. | 10.04.2016 | 05.05.2016 | Part payment on 25.04.2016 and balance on 20.05.2016 | 25.04.2016 for the part payment and 05.05.2016 for the balance amount |
| 4. | 10.04.2016 | 05.05.2016 | Part payment on 06.04.2016 and remaining on 09.04.2016 | 06.04.2016 for the part payment and 09.04.2016 for the balance amount |
| 5. | 10.04.2016 | 05.05.2016 | Part payment on 06.04.2016 and remaining on 01.05.2016 | 06.04.2016 for the part payment and 01.05.2016 for the balance amount |
| 6. | 10.04.2016 | 16.05.2016 | 20.05.2016 | 10.04.2016 |
| 7. | 10.04.2016 | 16.05.2016 | Part payment on 05.04.2016 and remaining on 14.05.2016 | 05.04.2016 for the part payment and 10.04.2016 for the balance amount |

## Determination of point of taxation in case of change in effective rate of tax [Rule 4]

Rule 4 deals with determination of Point of Taxation in case of change in effective rate of tax. The term "change in effective rate of tax" is defined under Rule 2(ba) to include a change in the portion of value on which tax is payable in terms of a notification issued under the provisions of Finance Act, 1994 or rules made there under.

## *Illustration*

Rate of service tax applicable on taxable services upto 31st May, 2015 is12.36it has been increased to 14% from 01.06.2015 onwards. The rates of service tax applicable in different situations are as follows:

| Provision of Service | Issuance of Invoice | Receipt of Payment | Point of Taxation | Applicable Rate of Service Tax | POT Rule |
|---|---|---|---|---|---|
| Before change of rate | After change of rate | After change of rate | Date of invoice or payment, whichever is earlier | 14% | 4(a)(i) |
| | Before change of rate | After change of rate | Date of invoice | 12.36% | 4(a)(ii) |
| | After change of rate | Before change of rate | Date of payment | 12.36% | 4(a)(iii) |
| After change of rate | Before change of rate | After change of rate | Date of payment | 14% | 4(b)(i) |
| | Before change of rate | Before change of rate | Date of invoice or payment, whichever is earlier | 12.36% | 4(b)(ii) |
| | After change of rate | Before change of rate | Date of invoice | 14% | 4(b)(iii) |

Section 67A - Date of determination of rate of tax, value of taxable service and rate of exchange

- The rate of service tax, value of taxable service and rate of exchange shall be the rate of service tax, value of taxable service and rate of exchange as applicable when the taxable service has been provided or agreed to be provided
- "The rate of exchange for determination of value of taxable service shall be the applicable rate of exchange as per the generally accepted accounting principles on the date when point of taxation arises

Section 67A is amended w.r.t determination of rate of exchange, and the Government is to

prescribe rules for determination of rate of exchange for calculation of taxable value of services.

## Point of Taxation in cases of new services [Rule 5]

Where a service is taxed for the first time, then, no service tax is payable:

- in case invoice as well as payment are received against such invoice before such service became taxable;
- in case payment is received before such service became taxable & the service provider has issued invoice within 14 days from the date when the service is taxed for the first time. *There is no change in time limit for raising of invoice to 30/45 days in this provision as found in Rule 4A of the STR, 1994.*
- The provisions of erstwhile Rule 5 were applicable to services other than continuous supply of services. The provisions of amended Rule 5 are applicable in respect of all the services.
- This rule applies mutatis mutandis in case of new levy on services. With effect from 01.03.2016, new levy or tax shall be payable on all the cases other than specified above.

Determination of Point of Taxation in case of Continuous supply of service is *Determined as per Rule 3 explained earlier.* [*Rule 6-Omitted by Notification No 4/2012-ST dated 17th March, 2012 w.e.f 01.04.2012]*

## Determination of point of taxation in case of person liable to pay service tax under reverse charge or in case of associated enterprises (Rule 7)

Notwithstanding anything contained in Rule 3, Rule 4, or Rule 8 the point of taxation in respect of the persons required to pay tax as recipients under the rules made in this regard in respect of services notified under sub-section (2) of section 68 of the Finance Act, 1994 shall be the date on which payment is made.

Provided 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.

*Notwithstanding anything contained in the first proviso to Rule 7, if the invoice in respect of a service, for which point of taxation is determinable under Rule 7 has been issued before the*

*1st day of October, 2014 but payment has not been made as on the said day, the point of taxation shall,–*

*(a) if payment is made within a period of six months of the date of invoice, be the date on which payment is made;*

*(b) if payment is not made within a period of six months of the date of invoice, be determined as if rule 7 and this rule do not exist.*

(i) Point of taxation in case of services taxed under reverse charge mechanism: In respect of the persons liable to pay service tax under reverse charge mechanism, the point of taxation shall be the date on which payment is made subject to the condition that the payment is made within a period of three months of the date of invoice.

In case the payment is NOT made within a period of three months of the date of invoice: if the service receiver fails to make the payment within three months from the date of invoice, the point of taxation shall be the date immediately following the three months from the date of invoice..

(ii) Point of taxation in case of import of services by "associated enterprises" In case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be:-

(a) the date of debit in the books of account of the person receiving the service

or

(b) date of making the payment

Whichever is earlier.

## Determination of point of taxation in case of copyrights, etc. [Rule 8]

- In respect of royalties & payments pertaining to copyrights, trademarks, designs or patents, where the whole amount of the consideration for the provision of service is not ascertainable at the time when service was performed and subsequently the use or the benefit of these services by a person other than the provider gives rise to any payment of consideration, the service shall be deemed to have been provided each time when a payment in respect of such use or the benefit is received by the provider or an invoice is issued by the provider, whichever is earlier.

## Determination of point of taxation in other cases [Rule 8A]

- W.e.f. 1st April, 2012, powers are granted to the Central Excise Officer to determine the point of taxation to the best of his judgment in cases where the point of taxation cannot be determined as per POT Rules, 2011 as the date of invoice or the date of payment or both are not available. The Central Excise Officer to give the concerned person an opportunity of being heard before passing such an order in writing.

## Transitional Provisions [Rule 9]

- The provisions of these rules are not applicable in case where provision of services is completed or invoices are issued prior to 1st April, 2011 [Rule 9].

- In case where provision of services is completed or the invoices are issued prior to 30th June, 2011, the Point of Taxation, at the option of taxpayer, shall be the date on which the payment is received or made, as the case may be [Rule 9].

## Rule 10 [Inserted w.e.f. 01.10.14]

- *"Notwithstanding anything contained in the first proviso to rule 7, if the invoice in respect of a service, for which point of taxation is determinable under rule 7 has been issued before the 1st day of October, 2014 but payment has not been made as on the said day, the point of taxation shall,–*

- *(a) if payment is made within a period of six months of the date of invoice, be the date on which payment is made;*

- *(b) if payment is not made within a period of six months of the date of invoice, be determined as if rule 7 and this rule do not exist."*

## Special Provisions for Professionals for Payment of Tax on Receipt Basis Withdrawn

Eight categories of service providers (individuals and partnership firms) which also covered chartered accountants were allowed to pay tax based on receipt. But, w.e.f. 01.04.2012, that facility has been removed and the provisions applicable to all service providers have been made applicable even to such professionals.

However, the benefit available to individuals and firms to determine POT on the basis of date of payment for eight specified services is being extended to all services in a slightly modified form. Now, as per proviso to rule 6 of Service Tax Rules, 1994, individuals and partnership firms (including limited liability partnership) whose aggregate value of taxable services

provided from all the registered premises is ₹50 lacs or less in the previous financial year are granted an option to pay service tax on receipt basis on taxable services upto an amount of ₹50 lacs in the current financial year. Beyond ₹50 lacs, tax has to be paid on billing or receipt of advances, whichever is earlier. Hence, these specified persons can avail exemption from applicability of POT provisions.

# Valuation of Taxable Service

The valuation under service tax is governed by the provisions made under section 67 of the Finance Act, 1994:

- The value of taxable service shall be determined on the basis of one of the following:

  (a) Consideration in money for providing the service.

  (b) For a consideration not wholly or partly consisting of money.

  (c) Consideration in any form other than money.

Date of determination of rate of tax, value of taxable service and rate of exchange is governed by the provisions made under section 67A of the Finance Act, 1994:

The rate of service tax, value of a taxable service and rate of exchange, if any, shall be the rate of service tax or value of a taxable service or rate of exchange, as the case may be, in force or as applicable at the time when the taxable service has been provided or agreed to be provided. The time or the point in time with respect to the rate of service tax shall be as prescribed as per Point of Taxation Rules, 2011.

The consideration in any form other than money shall be determined in a manner as prescribed in Rule 3 of Service Tax (Determination of Value) Rules, 2006 only when value is not ascertainable.

(a) The value of taxable service shall be the gross amount charged for providing similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration.

(b) When value cannot be determined by the method given above, then the service provider shall determine the equivalent money value of such consideration which shall, in no case, be less than the cost of provision of such taxable service.

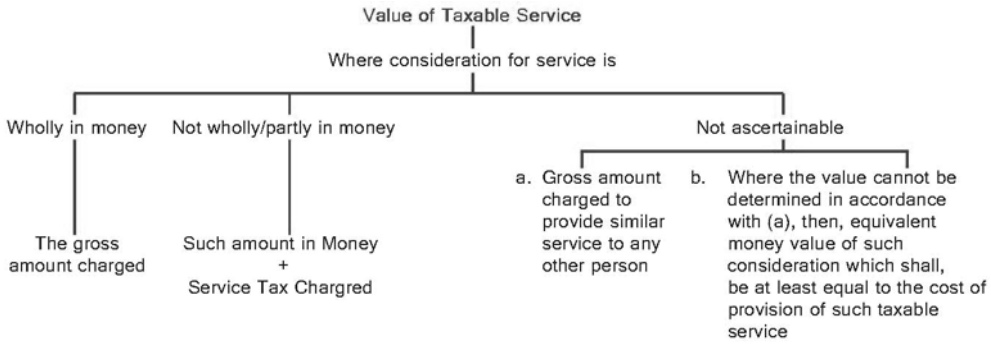
(c) Any expenditure or costs incurred by the service provider in course of providing taxable service shall be treated as consideration for the taxable service provided and shall be included in the value of taxable value; however the expenditure incurred as “Pure Agent” shall not be included.

(d) Specific cases in which the commission, costs, etc. shall be included or excluded are provided under Rule 6 of the Service Tax (Determination of Value) Rules, 2006.

Example could be rights to 72% land provided for 28% built area in a joint development agreement. The value of land could be as under:

- Government guidance value as on date of agreement- ascertainable
- Market value as on date of agreement- ascertainable from regd. valuer certificate
- Value of 1st flat sold to independent buyer not being less than the cost of construction. This option is closest to Circular 151 of 2012. May avoid dispute; many developers choosing this option.
- Value of similar flat as and when transferred – ultra cautious approach.

The above example illustrates how divergent values can be if not clearly stated.




## What is meant by gross amount charged?

(a) The "gross amount charged" includes payment by cheque, credit card, deduction from account and any form of payment by issue of credit notes or debit notes and book adjustment, and any amount credited or debited, as the case may be, to any account, whether called "Suspense Account" or by any other name, in the books of account of a person liable to pay service tax, where the transaction of taxable service is with any associated enterprise.

(b) The gross amount charged can be inclusive of service tax. In such a case, the value shall be such amount as, with the addition of tax payable, is equal to the gross amount charged. (e.g., if gross amount charged, including service tax @ 15% is ₹ 100. Then the value of taxable service shall be ₹ 86.96 and the service tax payable shall be ₹ 13.04.

(c) The gross amount charged for taxable service shall include any amount received towards the taxable service before, during or after provision of such service.

## Key features of Valuation Rules

1. Valuation of Works contract (Rule 2A):

- The value of the service portion of the works contract shall be equivalent to the gross amount charged for the works contract reduced by the value of property in goods transferred in the execution of works contract. If VAT has been paid on the goods so transferred, the value for the purpose of VAT will be considered for the purpose of valuation of service portion of works contract.

- If VAT has not been paid on the actual value of the property in goods transferred in the execution of the works contract, the 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;

- Profit earned by the service provider relatable to supply of labour and services. If the value is not so deducted as above, and not merely as an option, the value shall be specified percentage of the total value as follows:

| S.No. | In case of | Taxable Value - (%) of the total amount charged for the works contract |
|---|---|---|
| 1. | works contracts entered into for execution of original works | 40% |

| | | |
|---|---|---|
| 2. | works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods or<br>maintenance or repair or completion and finishing services such as glazing or plastering or floor and wall tiling or installation of electrical fittings in immovable property, | 70% |

For the purposes of this rule,-

Meaning of original works

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.

Meaning of total amount

| Particulars | | Amount | Amount |
|---|---|---|---|
| Gross amount charged for the works contract | | | Xxxx |
| Add: Value of all goods and services supplied by the service receiver in /in relation to the execution of the works contract (whether or not supplied under the same contract or any other contract) | FMV of such goods & services (determined in accordance with the generally accepted accounting principles) | xxxx | |
| | Less:<br>(i) the amount charged for such goods or services, if any, by service receiver; and | xxxx | |
| | (ii) VAT/sales tax, if any, levied thereon | xxxx | xxxx |
| Total amount | | | xxxx |

As regards to CENVAT Credit, there is no bar on availment of credit of service tax paid on any inputs services or capital goods used for providing the service [as differentiated from inputs like steel and cement] in relation to services involved in such works contract. However, as far as duty paid on goods is concerned, it is specifically restricted to 'inputs' used in or in relation to the said works contract. It would be interesting to note that benefit of CENVAT Credit of Capital Goods would to be available even if the same were used partially for providing exempted services.

*Illustration:* Minakshi Enterprises (ME) has entered into a contract for construction of a building with Suraj Constructions Ltd (SCL). As per the agreement, the amount payable (excluding all taxes) by ME to SCL is ₹ 95, 00,000 in addition to the steel and cement to be supplied by ME for which it charged ₹ 5, 00,000 from SCL. Fair market value of the steel and cement (excluding VAT) is ₹10, 00,000. Compute the 'total amount charged' pertaining to the said works contract for execution of 'original works'.

| S. No. | Particulars | Amount (₹) |
|---|---|---|
| 1. | Gross amount received excluding taxes | 95,00,000 |
| 2. | Fair market value of steel and cement supplied by ME 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) | 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. This proposition has been questioned in the larger bench decision in Bhayana Builders P ltd- 2013 (32) STR 49 (Larger bench).

(2) Determination of value of service in relation to money changing [Rule 2B]: Rule 2B provides the manner of determination of the value of taxable service provided so far as the services so provided pertains to purchase or sale of foreign currency, including money changing. The value of service shall be determined as follows:-

(a) For a currency, when exchanged from, or to, Indian Rupees (INR): For a currency, when exchanged from, or to, Indian Rupees (INR), the value shall be equal to the difference in the buying rate or the selling rate, as the case may be, and the Reserve

Bank of India (RBI) reference rate for that currency at that time*, multiplied by the total units of currency.

*Note: Where the RBI reference rate for a currency is not available

Where the RBI reference rate for a currency is not available, the value shall be 1% of the gross amount of Indian Rupees provided or received, by the person changing the money.

Example I: US$ 1,000 are sold by a customer at the rate of ₹65 per US$.

RBI reference rate for US$ is ₹65.50 for that day.

Value of taxable service = (RBI reference rate for $ – Selling rate for $) × Total units

=₹(65.50 - 65) × 1,000 =₹0.50 × 1,000

The taxable value shall be ₹500.

Example II: INR 70,000 is changed into Great Britain Pound (GBP) and the exchange rate offered is ₹80, thereby giving GBP 1000.

RBI reference rate for that day for GBP is ₹79.

The taxable value shall be ₹1,000.

(b) Where neither of the currencies exchanged is Indian Rupee: Where neither of the currencies exchanged is Indian Rupee, the value shall be equal to 1% of the lesser of the two amounts the person changing the money would have received by converting any of the two currencies into Indian Rupee on that day at the reference rate provided by RBI.

Determination of value of service portion involved in supply of food or any other article of human consumption or any drink in a restaurant or as outdoor catering

Subject to the provisions of section 67, the value of taxable service involved in supply of food and drinks in a restaurant or as outdoor catering is being adjusted such that the industry is able to utilize credit on capital goods, specified inputs (other than Chapter 1 to 22 of Central Excise Tariff Act, 1985, i.e. foods and beverages) and input services.

| Sl. No. | Description | Taxable Percentage of the total amount |
|---|---|---|
| (1) | (2) | (3) |
| 1. | Service portion in an activity wherein goods, being food or any other article of human consumption or any drink(whether or not intoxicating) is supplied in any manner as a part of the activity, at a restaurant | 40 |
| 2. | Service portion in outdoor catering wherein goods, being food or any other article of human consumption or any drink(whether or not intoxicating) is supplied in any manner as a part of such outdoor catering | 60 |

Total amount' referred as mentioned aforesaid.

It is clarified that the provider of taxable service shall not take CENVAT credit of duties or cess paid on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985.

## Impact of Recent Decision

Divergent views have been expressed by different Courts. As per decision of Kerala High Court, the Centre's decision to impose service tax on food and beverages supplied by AC restaurants with licenses to serve alcoholic beverages in 2011-12 Budget is beyond the legislative competence of the Parliament. State Government alone has the competence to enact a law imposing tax on service elements forming part of sale of goods, the Court had ruled. Further, it was held that service tax imposed on services by a hotel, inn, guest house, club or camp-site for providing of accommodation would be trenching on Entry 62 of List II [state list] which taxes luxuries. The High Court also held that if the petitioners have made any payments, they are entitled to seek refund of the same.

This could be an indication how the issue of taxability of supply of food and drink may move forwards. This decision from Kerala High Court would hold well in that jurisdiction and has a persuasive value in other states.

However, a contrary view has been expressed by Bombay High Court in the case of Indian Hotels and Restaurants Association & Anr. Vs. UOI & Ors. [2014-TIOL-498-HC-MUM-ST],

wherein the levy of service tax on the services rendered by restaurants under clause (zzzv) of section (105) of the Finance Act, 1994 was held to be constitutionally valid.

## Manner of determination of value when such value is not ascertainable [Rule 3]:

The value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the manner described below.

Subject to the provisions of section 67, the value of taxable service, where such value is not ascertainable, shall be determined by the service provider in the following manner:-

(a) Value of similar services: The value of taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person subject to fulfillment of the conditions below:

1. Such service is in the ordinary course of trade.

2. The gross amount charged is the sole consideration.

(b) When value of similar services cannot be ascertained: Where the value cannot be determined in accordance with clause (a), the service provider shall determine the equivalent money value of such consideration. However, such value shall, in no case be less than the cost of provision of such taxable service.

Note: In practice, however, it is very difficult for assessee or revenue to determine what is similar and also arrive at the cost of the service.

## Rejection of value by Central Excise Officer and its determination thereon [Rule 4]

(a) Central Excise Officer empowered to verify the value adopted by the service provider: The Central Excise Officer shall have the power to satisfy himself as to the accuracy of any information furnished or document presented for valuation. In other words, where there are adequate reasons warranting verification of the value adopted by the service provider for payment of service tax, rule 4 specifically enables verification of records in such cases.

(b) Rule 3 would not restrict such power: The provisions contained in rule 3 shall not restrict or put to question such power of the Central Excise Officer.

(c) Issue of show cause notice (SCN): A show cause notice (SCN) shall be issued to the service provider, if the Central Excise Officer is satisfied that the value determined by such service provider is not in accordance with the provisions of the Act or these rules.

(d) SCN to specify the amount of service tax: Such show cause notice will specify the amount of service tax ascertained by the Central Excise officer.

(e) Provision of opportunity of being heard and determination of value of taxable service: The Central Excise Officer shall provide a reasonable opportunity of being heard to the service provider. Thereafter, he shall determine the value of such taxable service for the purpose of charging service tax in accordance with the provisions of the Act and these rules.

## Pure Agent Concept [Rule 5]

With the introduction of Service Tax (Determination of Value) Rules 2006, even reimbursements of expenses during the course of providing services are being subjected to service tax. Exclusion has been provided for expenses incurred by the service provider as a pure agent of the service receiver.

"Pure agent" as per explanation (1) to Rule 5(2) of Service Tax (Determination of Value) Rules 2006, means a person who –

(i) Enters into a contractual agreement with the recipient of service to act as his pure agent to incur expenditure or costs in the course of providing taxable service

(ii) Neither intends to hold nor holds any title to the goods or services so procured or provided as pure agent of the recipient of service

(iii) Does not use such goods or services so procured, and

(iv) Receives only the actual amount incurred to procure such goods or services

The conditions to be satisfied in this regard as per Rule 5(2) are as follows –

(i) Service provider to act as a pure agent of the recipient of service while making payment to third party for the goods or services procured

(ii) Service receiver to receive and use the goods or services procured by the service provider on his behalf

(iii) Service receiver to be liable to make payment to the third party

(iv) Service receiver to authorize the service provider to make payment on his behalf

(v) Service receiver to know that the goods and services, for which payment has been made by the service provider, shall be provided by the third party

(vi) The payment made by the service provider on behalf of the recipient of service is to be separately indicated in the invoice issued by the service provider to the recipient of service

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

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

There is an important judgment of *Delhi High Court in the case of Intercontinental Consultants And Technocrats Pvt. Ltd vs. UOI &Anr [2012-TIOL-966- HC-Del-ST]* changing the position of law pertaining to valuation covering reimbursements. There had been a demand of service tax on the reimbursed expenses on the ground that those are essential expenses for providing the taxable services of consulting engineers. The writ petition was filed before the High Court of Delhi with following two prayers along with prayer for quashing of show cause notice:

(a) Quashing Rule 5 of the Service Tax (Determination of Value) Rules, 2006 to the extent it includes the reimbursement of expenses in the value of taxable service for the purpose of charging service tax in entirety.

(b) Declaring the said rule to be unconstitutional and ultra vires Section 66 and 67 of Finance Act, 1994.

After examining the legal position, Hon'ble High Court of Delhi allowed the writ holding that: What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld.

An amendment has made in Section 67 with effect from 14.5.2015 which provides for valuation principles for taxable services, wherein term "consideration" is defined to include reimbursable expenditure charged by Service provider in the course of providing a taxable service except, in such circumstances as may be prescribed by government. (not prescribed till date) Further, Section 67 is also amended to include any amount received/retained by lottery distributor or selling agent in specified circumstances.

## Service specific inclusion/exclusion of certain items from the value of taxable service [Rule 6]

(A) Inclusions: Subject to the provisions of section 67, the value of the taxable services shall include–

(i) the commission or brokerage charged by a broker on the sale or purchase of securities including the commission or brokerage paid by the stock-broker to any sub-broker;

(ii) the adjustments made by the telegraph authority from any deposits made by the subscriber at the time of application for telephone connection or pager or facsimile or telegraph or telex or for leased circuit;

(iii) the amount of premium charged by the insurer from the policy holder;

(iv) the commission received by the air travel agent from the airline;

(v) the commission, fee or any other sum received by an actuary, or intermediary or insurance intermediary or insurance agent from the insurer;

(vi) the reimbursement received by the authorized service station, from manufacturer for carrying out any service of any motor car, light motor vehicle or two wheeled motor vehicle manufactured by such manufacturer;

(vii) the commission or any amount received by the rail travel agent from the Railways or the customer;

(viii) the remuneration or commission, by whatever name called, paid to such agent by the client engaging such agent for the services provided by a clearing and forwarding agent to a client rendering services of clearing and forwarding operations in any manner; and

(ix) the commission, fee or any other sum, by whatever name called, paid to such agent by the insurer appointing such agent in relation to insurance auxiliary services provided by an insurance agent.

(x) The amount realised as demurrage or by any other name whatever called for the provision of a service beyond the period originally contracted or in any other manner relatable to the provision of service.

(B) Exclusions: Subject to the provisions contained in sub-rule (1), the value of any taxable service, as the case may be, does not include–

(i) initial deposit made by the subscriber at the time of application for telephone connection or pager or facsimile (FAX) or telegraph or telex or for leased circuit;

(ii) the airfare collected by air travel agent in respect of service provided by him;

(iii) the rail fare collected by rail travel agent in respect of service provided by him;

(iv) interest on delayed payment of any consideration for the provision of services or sale of property, whether moveable or immoveable and

(v) the taxes levied by any Government (including foreign Governments, where a passenger disembarks) on any passenger travelling by air, if shown separately on the ticket, or the invoice for such ticket, issued to the passenger.

(vi) accidental damages due to unforeseen actions not relatable to the provision of service.

(vii) subsidies and grants disbursed by the Government, not directly affecting the value of service

# Exemptions and Abatements

## Introduction

Under the negative list approach of taxation of services, in order to ascertain the taxability of an activity, one needs to consider the following questions:-

(i) Has the service been provided in the taxable territory by one person to another?

(ii) Is the service not mentioned in the negative list of services under section 66D?

(iii) Is it not a declared service as per section 66E?

If the answers to the aforesaid questions are in affirmative, then the last aspect which needs to be examined is whether the service is exempted by Central Government.

## Exempted services vs. Services included in the negative list

An exempted service is a taxable service which has been exempted by the Central Government by issuing a notification under section 93(1) of the Finance Act, 1994 whereas a negative list service is not taxable at all as it is outside the scope of the charging section-section 66B of the Finance Act, 1994.

Further, any change in the existing exemptions or any new exemption can be granted by the Central Government by issuing a notification in the Official Gazette whereas for amending the negative list of services under section 66D, Finance Act, 1994 has to be amended seeking approval from both houses of the Parliament.

This chapter discusses in detail the exemptions and abatements available in respect of various services under the negative list regime.

## Exemptions

### Mega exemption notification

*Notification No. 25/2012-ST dated 20.06.2012* is the mega exemption notification wherein most of the exemptions have been consolidated at one place for ease of reference. About53 services have been exempted in the Mega Exemption notification. It includes:

1. Services provided to the United Nations or a specified international organization;

2. (i) Health care services by a clinical establishment, an authorized medical practitioner or para-medics;

   (ii) Services provided by way of transportation of a patient in an ambulance, other than those specified in (i) above;

2A. Services provided by cord blood banks by way of preservation of stem cells or any other service in relation to such preservation

2B Services provided by operators of the Common Bio-medical Waste Treatment Facility to a clinical establishment by way of treatment or disposal of bio-medical waste or the processes incidental thereto.

3. Services by a veterinary clinic in relation to health care of animals or birds;

4. Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of charitable activities;

5. Services by a person by way of -

   (a) renting of precincts of a religious place meant for general public; or

   (b) conduct of any religious ceremony;

5A. Services by a specified organization in respect of a religious pilgrimage facilitated by the Ministry of External Affairs of the Government of India, under bilateral arrangement

6. Services provided by-

   (a) an arbitral tribunal to -

      (i) any person other than a business entity; or

      (ii) a business entity with a turnover up to rupees ten lakh in the preceding financial year;

   *(b) a partnership firm of advocates or an individual as an advocate other than a senior advocate, by way of legal services to-*

      *(i) an advocate or partnership firm of advocates providing legal services;*

*(ii) any person other than a business entity; or*

*(iii) a business entity with a turnover up to rupees ten lakh in the preceding financial year; or*

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

7. Omitted;

8. Services provided:-

(a) by an educational institution to its students, faculty and staff;

(b) to an educational institution, by way of,-

(i) Transportation of students, faculty and staff;

(ii) Catering, including any mid-day meals scheme sponsored by the Government;

(iii) Security or cleaning or house-keeping services performed in such educational institution;

(iv) Services relating to admission to, or conduct of examination by such institution;

9A. Any services provided by, -

(i) the National Skill Development Corporation set up by the Government of India;

(ii) a Sector Skill Council approved by the National Skill Development Corporation;

(iii) an assessment agency approved by the Sector Skill Council or the National Skill Development Corporation;

(iv) a training partner approved by the National Skill Development Corporation or the Sector Skill Council in relation to (a) the National Skill Development Programme implemented by the National Skill Development Corporation; or (b) a vocational skill development course under the National Skill Certification and Monetary Reward Scheme; or (c) any other Scheme implemented by the National Skill Development Corporation

*9B. Services provided by the Indian Institutes of Management, as per the guidelines of the Central Government, to their students, by way of the following educational programmes, except Executive Development Programme, -*

*(a) two- year full time residential Post Graduate Programmes in Management for the Post Graduate Diploma in Management, to which admissions are made on the basis of Common Admission Test (CAT), conducted by Indian Institute of Management;*

*(b) fellow programme in Management;*

*(c) five year integrated programme in Management.*

*(Effective from 01.03.2016)*

*9C. Services of assessing bodies empanelled centrally by Directorate General of Training, Ministry of Skill Development and Entrepreneurship by way of assessments under Skill Development Initiative (SDI) Scheme;*

*9D. Services provided by training providers (Project implementation agencies) under Deen Dayal Upadhyaya Grameen Kaushalya Yojana under the Ministry of Rural Development by way of offering skill or vocational training courses certified by National Council For Vocational Training.*

10. Services provided to a recognised sports body by-

(a) an individual as a player, referee, umpire, coach or team manager for participation in a sporting event organized by a recognized sports body;

(b) another recognised sports body;

11. Services by way of sponsorship of sporting events organised,-

(a) by a national sports federation, or its affiliated federations, where the participating teams or individuals represent any district, State, zone or Country;

(b) by Association of Indian Universities, Inter-University Sports Board, School Games Federation of India, All India Sports Council for the Deaf, Paralympic Committee of India or Special Olympics Bharat;

(c) by Central Civil Services Cultural and Sports Board;

(d) as part of national games, by Indian Olympic Association; or

(e) under Panchayat Yuva Kreeda Aur Khel Abhiyaan (PYKKA) Scheme;

12. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -

(a) omitted;

(b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

(c) omitted;

(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) omitted;

*12A. Services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of -*

*(a) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;*

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

*(c) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause (44) of section 65 B of the said Act;*

*under a contract which had been entered into prior to the 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date:*

*provided that nothing contained in this entry shall apply on or after the 1st April, 2020; (Effective from 01.03.2016)*

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) a road, bridge, tunnel, or terminal for road transportation for use by general public;

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

*(ba) a civil structure or any other original works pertaining to the 'In-situ rehabilitation of existing slum dwellers using land as a resource through private participation" under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana, only for existing slum dwellers. (Effective from 01.03.2016)*

*(bb) a civil structure or any other original works pertaining to the 'Beneficiary-led individual house construction / enhancement under the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana; (effective from 01.03.2016)*

(c) a building owned by an entity registered under section 12AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;

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

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

14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

*(a) railways, excluding monorail and metro;*

*Explanation. - The services by way of construction, erection, commissioning or installation of original works pertaining to monorail or metro, where contracts were entered into before 1st March, 2016, on which appropriate stamp duty, was paid, shall remain exempt.*

(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;

*(ca) low cost houses up to a carpet area of 60 square meters per house in a housing project approved by the competent authority under:*

*(i) the "Affordable Housing in Partnership" component of the Housing for All (Urban) Mission/Pradhan Mantri Awas Yojana;*

*(ii) any housing scheme of a State Government.*

(d) post-harvest storage infrastructure for agricultural produce including cold storages for such purposes; or

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

*14A. Services by way of construction, erection, commissioning, or installation of original works pertaining to an airport or port provided under a contract which had been entered into prior to 1st March, 2015 and on which appropriate stamp duty, where applicable, had been paid prior to such date:*

*Provided that Ministry of Civil Aviation or the Ministry of Shipping in the Government of India, as the case may be, certifies that the contract had been entered into before 1st March, 2015:*

*Provided further that nothing contained in this entry shall apply on or after the 1st April, 2020;*

15. Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright,-

(a) covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical or artistic works; or

(b) of cinematographic films for exhibition in a cinema hall or cinema theatre;"

16. Services by an artist by way of a performance in folk or classical art forms of (i) music, or (ii) dance, or (iii) theatre, if the consideration charged for such performance is not more than *one lakh and fifty thousand rupees*:

Provided that the exemption shall not apply to services provided by such artist as a brand ambassador;

17. Services by way of collecting or providing news by an independent journalist, Press Trust of India or United News of India;

18. Services by way of renting of a hotel, inn, guest house, club, campsite or other

commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent;

19. Services provided in relation to serving of food or beverages by a restaurant, eating joint or a mess, other than those having the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year;

19A. Services provided in relation to serving of food or beverages by a canteen maintained in a factory covered under the Factories Act, 1948 (63 of 1948), having the facility of air-conditioning or central air-heating at any time during the year

20. Services by way of transportation by rail or a vessel from one place in India to another of the following goods -

(a) omitted

(b) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap;

(c) defence or military equipment's;

(d) omitted;

(e) omitted;

(f) newspaper or magazines registered under the registrars of newspapers;

(g) railway equipment or materials;

(h) agricultural produce;

(i) milk, salt and food grain including flours, pulses and rice; or

(j) chemical fertilizer, organic manure and oilcakes;

(k) cotton, ginned or baled

21. Services provided by a goods transport agency, by way of transport in a goods carriage of,-

(a) agricultural produce;

(b) goods, where gross amount charged for the transportation of goods on a consignment transported in a single carriage does not exceed one thousand five hundred rupees;

(c) goods, where gross amount charged for transportation of all such goods for a single consignee does not exceed rupees seven hundred fifty;

(d) milk, salt and food grain including flours, pulses and rice;

(e) chemical fertilizer and oilcakes;

(f) newspaper or magazines registered with the Registrar of Newspapers;

(g) relief materials meant for victims of natural or man-made disasters, calamities, accidents or mishap; or

(h) defence or military equipment;

(i) cotton, ginned or baled.

22. Services by way of giving on hire -

(a) to a state transport undertaking, a motor vehicle meant to carry more than twelve passengers; or

(b) to a goods transport agency, a means of transportation of goods;

23. Transport of passengers, with or without accompanied belongings, by -

(a) air, embarking from or terminating at an airport located in the state of Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, or Tripura or at Bagdogra located in West Bengal;

(b) Non-air-conditioned contract carriage other than radio taxi, for transportation of passengers, excluding tourism, conducted tour, charter or hire; or

*(bb) stage carriage other than air-conditioned stage carriage (effective from 01.06.2016)*

24. Omitted

25. Services provided to Government, a local authority or a governmental authority by way of -

(a) water supply, public health, sanitation conservancy, solid waste management or slum improvement and up-gradation; or

(b) repair or maintenance of a vessel;

26. Services of general insurance business provided under the following schemes -

(a) Hut Insurance Scheme;

(b) Cattle Insurance under Swarnajaynti Gram Swarozgar Yojana (earlier known as Integrated Rural Development Programme);

(c) Scheme for Insurance of Tribals;

(d) Janata Personal Accident Policy and Gramin Accident Policy;

(e) Group Personal Accident Policy for Self-Employed Women;

(f) Agricultural Pumpset and Failed Well Insurance;

(g) Premia collected on export credit insurance;

(h) Weather Based Crop Insurance Scheme or the Modified National Agricultural Insurance Scheme, approved by the Government of India and implemented by the Ministry of Agriculture;

(i) Jan Arogya Bima Policy;

(j) National Agricultural Insurance Scheme (Rashtriya Krishi Bima Yojana);

(k) Pilot Scheme on Seed Crop Insurance;

(l) Central Sector Scheme on Cattle Insurance;

(m) Universal Health Insurance Scheme;

(n) Rashtriya Swasthya Bima Yojana; or

(o) Coconut Palm Insurance Scheme;

(p) Pradhan Mantri Suraksha Bima Yojana

*(q) Niramaya" Health Insurance Scheme implemented by Trust constituted under the provisions of the National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 (44 of 1999).*

26A. Services of life insurance business provided under following schemes -

(a) Janashree Bima Yojana (JBY);

(b) Aam Aadmi Bima Yojana (AABY);

(c) Life micro-insurance product as approved by the Insurance Regulatory and Development Authority, having maximum amount of cover of fifty thousand rupees;

(d) Varishtha Pension Bima Yojana;

(e) Pradhan Mantri Jeevan Jyoti Bima Yojana; or

(f) Pradhan Mantri Jan Dhan Yojana.

26B. Services by way of collection of contribution under Atal Pension Yojana (APY).

*26C. Services of life insurance business provided by way of annuity under the National Pension System regulated by Pension Fund Regulatory and Development Authority of India (PFRDA) under the Pension Fund Regulatory And Development Authority Act, 2013 (23 of 2013);*

27. Services provided by an incubatee up to a total turnover of fifty lakh rupees in a financial year subject to the following conditions, namely :-

(a) the total turnover had not exceeded fifty lakh rupees during the preceding financial year; and

(b) a period of three years has not elapsed from the date of entering into an agreement as an incubatee;

28. Service by an unincorporated body or a non-profit entity registered under any law for the time being in force, to its own members by way of reimbursement of charges or share of contribution -

(a) as a trade union;

(b) for the provision of carrying out any activity which is exempt from the levy of service tax; or

(c) up to an amount of five thousand rupees per month per member for sourcing of goods or services from a third person for the common use of its members in a housing society or a residential complex;

29. Services by the following persons in respective capacities -

(a) sub-broker or an authorized person to a stock broker;

(b) authorized person to a member of a commodity exchange;

(c) omitted;

(d) omitted;

(e) omitted;

(f) selling agent or a distributer of SIM cards or recharge coupon vouchers;

*(g) business facilitator or a business correspondent to a banking company with respect to a Basic Savings Bank Deposit Account covered by Pradhan Mantri Jan Dhan Yojana in the banking company's rural area branch, by way of account opening, cash deposits, cash withdrawals, obtaining e-life certificate, Aadhar seeding ;*

*(ga) any person as an intermediary to a business facilitator or a business correspondent with respect to services mentioned in clause (g);*

*(gb) business facilitator or a business correspondent to an insurance company in a rural area; or*

(h) sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt;

30. Carrying out an intermediate production process as job work in relation to -

(a) agriculture, printing or textile processing;

(b) cut and polished diamonds and gemstones; or plain and studded jewellery of gold and other precious metals, falling under Chapter 71 of the Central Excise Tariff Act, 1985 (5 of 1986);

(c) any goods excluding alcoholic liquors for human consumption, on which appropriate duty is payable by the principal manufacturer; or

(d) processes of electroplating, zinc plating, anodizing, heat treatment, powder coating, painting including spray painting or auto black, during the course of manufacture of parts of cycles or sewing machines upto an aggregate value of taxable service of the specified processes of one hundred and fifty lakh rupees in a financial year subject to the condition that such aggregate value had not exceeded one hundred and fifty lakh rupees during the preceding financial year;

31. Services by an organiser to any person in respect of a business exhibition held outside India;

32. omitted;

33. Services by way of slaughtering of animals;

34. Services received from a provider of service located in a non- taxable territory by -

    (a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;

    (b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or

    (c) a person located in a non-taxable territory;

35. Services of public libraries by way of lending of books, publications or any other knowledge - enhancing content or material;

36. Services by Employees' State Insurance Corporation to persons governed under the Employees' Insurance Act, 1948 (34 of 1948);

37. Services by way of transfer of a going concern, as a whole or an independent part thereof;

38. Services by way of public conveniences such as provision of facilities of bathroom, washrooms, lavatories, urinal or toilets;

39. Services by a governmental authority by way of any activity in relation to any function entrusted to a municipality under article 243 W of the Constitution.

40. Services by way of loading, unloading, packing, storage or warehousing of rice, cotton, ginned or baled

41. Services received by the Reserve Bank of India, from outside India in relation to management of foreign exchange reserves;

42. Services provided by a tour operator to a foreign tourist in relation to a tour conducted wholly outside India.

43. Services by operator of Common Effluent Treatment Plant by way of treatment of effluent;

44. Services by way of pre-conditioning, pre-cooling, ripening, waxing, retail packing, labelling of fruits and vegetables which do not change or alter the essential characteristics of the said fruits or vegetables;

45. Services by way of admission to a museum, national park, wildlife sanctuary, tiger reserve or zoo;

46. Service provided by way of exhibition of movie by an exhibitor to the distributor or an association of persons consisting of the exhibitor as one of its members;

47. Services by way of right to admission to,-

(i) exhibition of cinematographic film, circus, dance, or theatrical performance including drama or ballet;

(ii) recognised sporting event;

(iii) award function, concert, pageant, musical performance or any sporting event other than a recognised sporting event, where the consideration for admission is not more than ₹ 500 per person₹

*48. Services provided by Government or a local authority to a business entity with a turnover up to rupees ten lakh in the preceding financial year.*

*(The amendment shall come into effect on 1st April, 2016)*

*49. Services provided by Employees' Provident Fund Organisation (EPFO) to persons governed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952);*

*50. Services provided by Insurance Regulatory and Development Authority of India (IRDA) to insurers under the Insurance Regulatory and Development Authority of India Act, 1999 (41 of 1999);*

*51. Services provided by Securities and Exchange Board of India (SEBI) set up under the Securities and Exchange Board of India Act, 1992 (15 of 1992) by way of protecting the interests of investors in securities and to promote the development of, and to regulate, the securities market;*

*52. Services provided by National Centre for Cold Chain Development under Ministry of Agriculture, Cooperation and Farmer's Welfare by way of cold chain knowledge dissemination;*

*53. Services by way of transportation of goods by an aircraft from a place outside India upto the customs station of clearance in India.*

## Small Service Provider's (SSP) Exemption

Central Government has exempted the taxable services of aggregate value not exceeding ₹10 lakh in any financial year from the whole of the service tax leviable thereon under section 66B of the Finance Act, 1994 in case the aggregate value of taxable services rendered by the service provider from one or more premises, does not exceed ₹ 10 lakh in the preceding financial year.

A. Services in respect of which SSP exemption is not available

(i) Taxable services provided under brand name: SSP exemption is not available to the taxable services provided by a person under a brand name or trade name, whether registered or not, of another person.

(ii) Services taxed under reverse charge mechanism: SSP exemption is not available to such value of taxable services in respect of which service tax is payable on reverse charge mechanism by a person.

B. Availability of the CENVAT credit on inputs, input services and capital goods

(i) CENVAT credit on input services

(a) The provider of taxable service shall not avail the CENVAT credit of service tax paid on any input services used for providing the said taxable service, for which SSP exemption is availed of. The said restriction is applicable to service tax paid under rule 3 and rule 13 of the CENVAT Credit Rules, 2004.

(b) The provider of taxable service shall avail the CENVAT credit only on such input services received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable.

(ii) CENVAT credit on inputs

(a) Service provider shall avail the CENVAT credit only on such inputs received, on or after the date on which the service provider starts paying service tax, and used for the provision of taxable services for which service tax is payable.

(b) A service provider who starts availing SSP exemption shall be required to pay an amount equivalent to the CENVAT credit taken by him, if any, in respect of such inputs lying in stock or in process on the date on which he starts availing the said exemption. Balance credit shall not be utilised in terms of rule 3(4) of the CENVAT Credit Rules, 2004 and shall lapse on the day such service provider starts availing SSP exemption.

(iii) CENVAT credit on capital goods: Service provider shall not avail the CENVAT credit on capital goods received, during the period in which the service provider avails SSP exemption.

C. Other points which merit consideration

(i) Exemption is optional: Service provider has an option not to avail the SSP exemption and pay service tax. Option, once exercised in a financial year, shall not be withdrawn during the remaining part of such financial year.

(ii) Aggregate value of all taxable services provided from all premises to be considered: Where a taxable service provider provides one or more taxable services from one or more premises, the exemption under this notification shall apply to the aggregate value of all such taxable services and from all such premises and not separately for each premises or each services.

D. Aggregate value of taxable services in case of Goods Transport Agency: In case of goods transport agency (GTA), for the purposes of determining the aggregate value not exceeding ₹ 10 lakh, to avail exemption under this notification, the payment received towards the gross amount charged by the GTA under section 67 of the said Finance Act for which the person liable for paying service tax is the consignor or consignee shall not be taken into account.

[*Notification No. 33/2012-S.T. dated 20.06.2012*]

## Definitions

1. Brand name or trade name means a brand name or a trade name, whether registered or not, that is to say, a name or a mark, such as symbol, monogram, logo, label, signature, or invented word or writing which is used in relation to such specified services for the purpose of indicating, or so as to indicate a connection in the course of trade between such specified services and some person using such name or mark with or without any indication of the identity of that person.

2. Aggregate value means 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 under section 66B of the said Finance Act under any other notification.

## Refund of service tax paid on services used in the export of goods

A. Refund of service tax where service tax is paid by exporter himself under reverse charge mechanism: The exemption would be available:

(1) on two services, viz. (i) Transport of goods by road from any container freight station (CFS) or inland container depot (ICD) to port/airport of exports or from the place of removal (i.e. factory) to CFS, ICD, port or airport of exports; (ii) service provided by a foreign commission agent who causes sale of goods abroad;

(2) to exporters of goods who are registered with export promotion councils and are holding import export code number and are also registered with service tax/central excise authorities as they are otherwise required to pay service tax on the above services received, under reverse charge mechanism;

(3) in case of a foreign commission agent, exemption is limited to the service tax calculated on a value of 10% of the FOB value of export goods for which the said service has been used.

B. Rebate of service tax paid on specified services used in the export of goods: With effect from 01.07.2012, a simplified scheme for rebate to the exporters of goods has been prescribed. Under this scheme, the exporters have been provided with an option to claim refund electronically through ICES scheme. Otherwise, they can claim rebate on the basis of documents.

The rebate shall be granted by way of refund of service tax paid on the "specified services".

Note: It may be noted that the rebate on the basis of documents shall not be claimed wherever the difference between the amount of rebate under ICES system and amount of rebate on the basis of documents is less than 20% of the rebate under ICES system.

*The detailed procedure for the refund / rebate claim has been mentioned in the notification.*

*[Notification No. 31/2012 dated 20.06.2012 and Notification No. 42/2012-ST dated 29.06.2012]*

### Exemption to services for use of foreign Diplomatic Mission/consular post in India or family members of diplomatic agents or career consular officers posted therein

Following services are exempt from service tax:-

(i) All taxable services provided by any person to foreign diplomatic missions or consular posts in India for their official use.

(ii) All taxable services provided by any person for personal use or for the use of the family members of diplomatic agents or career consular officers posted therein.

The Notification also prescribes the procedure for availing the said exemption.

*[Notification No. 27/2012-ST dated 20.06.2012]*

## Deduction of property tax allowed from gross amount to arrive at value of taxable service

The taxable service of renting of immovable property is exempt from so much of the service tax leviable thereon as is in excess of the service tax calculated on a value which is equivalent to the gross amount charged for renting of such immovable property less taxes on such property, namely property tax levied and collected by local bodies.

*Interest and penalty paid to the local authority not to be treated as property tax*: However, any amount such as interest, penalty paid to the local authority by the service provider on account of delayed payment of property tax or any other reasons shall not be treated as property tax for the purposes of deduction from the gross amount charged.

*Property tax to be computed on proportionate basis*: Further, wherever the period for which property tax paid is different from the period for which service tax is paid, property tax proportionate to the period for which service tax is paid shall be calculated and the amount so calculated shall be excluded from the gross amount charged for renting of the immovable property for the said period for the purposes of levy of service tax.

*[Notification No. 29/2012 dated 20.06.2012]*

## Exemption to services provided by TBI/ STEP

All taxable services provided or to be provided by Technology Business Incubators (TBI)/Science and Technology Entrepreneurship Parks (STEP) recognized by National

Science and Technology Entrepreneurship Board (NSTEBD) of the Department of Science & Technology have been exempted from the whole of service tax leviable thereon.

## Conditions to be satisfied

(i) The STEP or the TBI, who intends to avail the exemption, shall furnish the requisite information containing the details of the incubator along with the information received from each incubatee to the concerned Assistant/Deputy Commissioner of Central Excise before availing the exemption; and

(ii) The STEP or the TBI shall thereafter furnish the information in the formats mentioned above in the same manner before the 30th day of June of each financial year.

*[Notification No. 32/2012 dated 20.06.2012]*

## Exemption to services received by developer/units of an SEZ

*Notification No. 40/2012-ST dated 20.06.2012 further amended by notification no.12/2013 dated 01.07.2013 provides as follows:-*

The taxable services received and used for the authorized operations by any of the following are eligible for exemption under this notification:-

- a unit located in a Special Economic Zone (hereinafter referred to as SEZ)
- developer of SEZ.

The notification provides refund vs ab-initio exemptions:

(i) Option not to pay service tax ab-initio in case the specified services wholly consumed within the SEZ: Where the services are received in SEZ and used in authorized operations are wholly consumed within SEZ, the person liable to pay service tax has the option not to pay the service tax. Hence, under this option, instead of the Unit or Developer claiming exemption by way of refund, service tax may not be paid ab initio.

(ii) Refund route available where the specified services are not wholly consumed within the SEZ: Where the specified services received and used for authorized operations are partially consumed within the SEZ and partially in DTA unit, i.e. shared services, the exemption shall be provided only by way of refund of service tax paid on the specified services received for the authorized operations in a SEZ. Hence, the option of not paying the service tax ab initio is not available here.

C. Restricted amount of refund in case the specified services are not wholly consumed within the SEZ

Where the specified services received by Unit or Developer, are not wholly consumed within SEZ, i.e., shared between authorized operations in SEZ Unit and Domestic Tariff Area (DTA) Unit, the distribution of credit of service tax paid will be based in the manner as prescribed in rule 7 of CENVAT Credit Rules, 2004. For the purpose of distribution, the turnover of the SEZ Unit or the Developer shall be taken as the turnover of authorized operation during the relevant period.

## Abatement

Notification No. 26/2012-ST dated 20.06.2012 provides abatement (in layman's language may be called as partial exemption) from the gross amount for the following taxable services in the following manner:-

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| 1 | Services in relation to financial leasing including hire purchase | 90 | Nil. |
| 2 | Transport of goods by rail (other than services specified at Sl. No: 2A below) | 70 | CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004 |
| 2A | Transport of goods in containers by rail by any person other than Indian Railways*(to be effective from 1st April, 2016)* | 60 | *CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.* |
| 3 | Transport of passengers, with or without accompanied belongings by rail | 70 | *CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT* |

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| | | | *Credit Rules, 2004. (to be effective from 1st April, 2016)*. |
| 4 | Bundled service by way of supply of food or any other article of human consumption or any drink, in a premises (including hotel, convention center, club, pandal, shamiana or any other place, specially arranged for organizing a function) together with renting of such premises | 30 | CENVAT credit on any goods classifiable under Chapters 1 to 22 of the Central Excise Tariff Act, 1985 used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. |
| 5 | Transport of passengers by air, with or without accompanied belongings in -<br>(i) economy class<br>(ii) Other than economy class | <br>60<br>40 | CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004. |
| 6 | Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes. | 40 | Same as above. |
| 7 | Services of goods transport agency in relation to transportation of goods other than used household goods. (effective 1st April 2016) | 70 | CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken by the service provider under the provisions of the CENVAT Credit Rules, 2004. |
| 7A | Services of goods transport agency in relation to | 60 | CENVAT credit on inputs, capital goods and input |

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| | transportation of used household goods (effective 1st April 2016) | | services, used for providing the taxable service, has not been taken by the service provider under the provisions of the CENVAT Credit Rules, 2004. |
| 8 | Services provided by a foreman of chit fund in relation to chit | 30 | *CENVAT credit on inputs, capital goods and input services, used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004* |
| 9 | Renting of motor cab | 60 | (i) CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.<br>(ii) CENVAT credit on input services has been taken in the following manner:<br>(a) Full CENVAT credit of such input service from a person who is paying service tax on forty percent of the value<br>(b) Upto forty percent CENVAT credit of such input service received from a person who is paying service tax on full value. |

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| | | | (iii) CENVAT credit on input services other than (ii) above has not been taken under the provisions of the CENVAT Credit Rules, 2004. |
| 9A | Transport of passengers, with or without accompanies belonging by<br>(i) a contract carriage other than Motorcab<br>(ii) a radio taxi<br>(iii) a stage carriage | 60 | CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004 |
| 10 | Transport of goods in a vessel | 70 | CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004 |
| 11 | Services by a tour operator in relation to,-<br>(i) a tour, only for the purpose of arranging or booking accommodation for any person. | 90 | *(i) CENVAT credit on inputs, capital goods and input services other than input services of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.*<br>*(ii) The invoice, bill or challan issued indicates that it is towards the charges for such accommodation.*<br>*(iii) This exemption shall not* |

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| | | | *apply in such cases where the invoice, bill or challan issued by the tour operator, in relation to a tour, includes only the service charges for arranging or booking accommodation for any person but does not include the cost of such accommodation.* |
| | (ii) Tours other than (i) above. | 70 | (*(i) CENVAT credit on inputs, capital goods and input services other than input services of a tour operator, used for providing the taxable service, has not been taken under the provisions of the CENVAT Credit Rules, 2004.*<br>*(ii) The bill issued for this purpose indicates that it is inclusive of charges for such a tour and the amount charged in the bill is the gross amount charged for such a tour.* |

| S. No. | Description of taxable service | Percentage of abatement | Conditions |
|---|---|---|---|
| *12.* | Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority | 70 | (i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the CENVAT Credit Rules, 2004.<br>(ii) The value of land is included in the amount charged from the service receiver. |

Notes:

A. For the purpose of exemption underS.No.1. above:-

(i) Amount charged is an amount, forming or representing as interest.

| | | | | |
|---|---|---|---|---|
| Amount charged | = | Installments paid towards repayment of the lease amount | — | Principal amount contained in such installments |

(ii) The exemption shall not apply to an amount other than an amount forming or representing as interest, charged by the service provider such as:-

- lease management fee
- processing fee
- documentation charges
- administrative fee

which shall be added to the amount calculated in terms of (i) above.

B. For the purposes of exemption at S.No. 4, the amount charged shall be computed as follows:-

| Particulars | | | Amount |
|---|---|---|---|
| Gross amount charged | | | Xxxx |
| Add: Value of all goods & services supplied in or in relation to the supply of food or any other article of human consumption or any drink (whether or not intoxicating) and whether or not supplied under the same contract or any other contract | FMV of such goods & services (determined in accordance with generally accepted accounting principles)<br>Less:<br>(i) the amount charged for such goods or services supplied to the service provider, if any; and<br>(ii) VAT/sales tax, if any, levied thereon | xxxx<br><br>xxxx<br><br>xxxx | Xxxx |
| Amount charged | | | Xxxx |

C. For the purposes of exemption at S.No. 12, the amount charged shall be computed as follows:-

| Particulars | | | Amount |
|---|---|---|---|
| Amount charged for the construction service | | | Xxxx |
| Add: Value of all goods & services supplied by the recipient(s) in/in relation to the service, whether or not supplied under the same contract or any other contract | FMV of such goods & services (determined in accordance with the generally accepted accounting principles) | xxxx | |
| | Less:<br>(i) the amount charged for such goods or services, if any; and<br>(ii) VAT/sales tax, if any, levied thereon | xxxx<br><br>xxxx | xxxx |
| Amount charged | | | Xxxx |

G. D. Builders Vs UOI and Anr 2013-TIOL-908-HC-DEL-ST: The explanation that the gross amount charged shall include the value of goods and materials, in computing the abatement given to construction services by various notifications at different points of time was under challenge. While dismissing the writ petitions, the High Court held that if an assessee wants to take benefit of the notification, he must comply and adhere to the terms and conditions stipulated as per the notification. An assessee to claim benefit or advantage as per a notification must meet the preconditions or stipulations stated therein.

## Important definition

1. Tour operator means any person engaged in the business of planning, scheduling, organizing, arranging tours (which may include arrangements for accommodation, sightseeing or other similar services) by any mode of transport, and includes any person engaged in the business of operating tours.

*[Notification No. 26/2012-ST dated 20.06.2012*

# Tax Liability under Reverse Charge Mechanism and Joint Charge Mechanism

## Introduction

The new service tax regime of negative list based taxation of services is effective from 1st of July 2012. Though there are a number of aspects and issues under the same, one of the main issues and concerns is about the expansion of the reverse charge and introduction of the joint charge mechanism.

## What is Reverse Charge?

Under the income tax law, all of us are aware of the TDS provisions which now account for substantial part of the direct tax revenue for the Government. Under service tax also, the revenue have experienced difficulty in collection due to location of the service provider or due to the unorganized nature of some of the businesses in service sector. In such cases, they have chosen to use this mechanism. Every person providing service is required to pay service tax at the prescribed rate, but in certain cases the service recipient is made liable to pay service tax on the services received. Since the person receiving service is paying service tax, the mechanism is called as reverse charge.

This concept is set out in service tax law by virtue of section 68(2) by giving powers to the Central Government to notify services for which reverse charge concept may be made applicable. To support this, the person liable to pay service tax as defined in rule 2(1)(d) of the Service Tax Rules, 1994 also includes the service recipients of such services as persons liable for paying the service tax.

This concept was in place even before the new scheme of negative list- based taxation of services was introduced. However, in addition to the concept of reverse charge, a new concept of joint charge/ partial reverse charge is also introduced. This new provision while adding revenues to the Government coffers leads to avoidable difficulty in compliance for the receivers who are required to register only to take care of this liability. This concept has also enlarged the coverage of service tax as no threshold exemption is available in respect of services covered under Reverse/Joint Charge, meaning thereby that a body corporate engaged in trading of goods is required to obtain service tax registration and to comply with all procedural and other requirements if it has availed services of say rent-a-cab from an individual that too irrespective of value of service received and frequency of services received.

## What is Joint Charge Mechanism?

Under the concept of joint charge, for the same service both the service provider as well as service receiver is made liable for payment of service tax to the extent notified. This liability of one person is independent of the other person's liability. In other words, the failure to comply with the provisions of one person on his part would not impact the compliance requirement of other person or vice versa.

## Reverse Charge Mechanism and Joint Charge Mechanism

- Prior to the Finance Act, 2012, the Service tax law recognized the concept of *"Service Provider"* and *"Service Receiver"*. Generally, tax is to be paid by service provider however, in respect of taxable services notified under Section 68(2) tax is payable by the prescribed person. The services notified under Section 68(2) read with Notification No 30/2012-Service Tax dated 20th June 2012as amended by Notification No. 45/2012-ST, 10/2014-ST, 07/2015-ST, and 18/2016 ST are as follows : -

  (i) provided or agreed to be provided by an insurance agent to any person carrying on the insurance business;

  (ia) provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company;

  (ib) omitted;

  (ic) provided or agreed to be provided by a selling or marketing agent of lottery tickets in relation to a lottery in any manner to a lottery distributor or selling agent of the State Government under the provisions of the Lottery (Regulations) Act, 1998 (17 of 1998);

  (ii) provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road, where the person liable to pay freight is any of the following. They will be liable to pay service tax; in any other case, it will be paid by the GTA:

  (a) any factory registered under or governed by the Factories Act, 1948;

  (b) any society registered under the Societies Registration Act, 1860 or under any other law for the time being in force in any part of India;

  (c) any co-operative society established by or under any law;

(d) any dealer of excisable goods, who is registered under the Central Excise Act, 1944 (1 of 1944) or the rules made there under;

(e) any body corporate established, by or under any law; or

(f) any partnership firm whether registered or not under any law including association of persons;

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

(iv) provided or agreed to be provided by

(A) an arbitral tribunal, or

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

(C) Government or local authority excluding renting of immovable property and services specified in sub-clause (i), (ii) and (iii) of clause (a) of Section 66D of the Finance Act, 1994

to any business entity located in the taxable territory.

(iva) provided or agreed to be provided by a director of a company or a body corporate to the said company or the body corporate; (Amended vide notification 10/2014-ST dated 11.07.14 w.e.f. 11.07.14)

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

(vi) provided or agreed to be provided by a person involving an aggregator in any manner

(vii) 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;

- The extent of service tax payable thereon by the person who provides the service and any other person liable for paying service tax for the taxable services specified above shall be as specified in the following Table, namely :-:

| *S.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* |
|---|---|---|---|
| 1. | in respect of services provided or agreed to be provided by an insurance agent to any person carrying on insurance business | Nil | 100% |
| 1A | In respect of services provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company | Nil | 100% |
| 1B | Omitted | | |
| 1C | *in respect of services provided or agreed to be provided by a selling or marketing agent of lottery tickets in relation to lottery in any manner to a lottery distributor or selling agent of the State Government under the provisions of the Lottery (Regulations) Act, 1998 (17 of 1998)* | Nil | 100% |
| 2. | in respect of services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road | Nil | 100% |
| 3. | in respect of services provided or agreed to be provided by way of sponsorship | Nil | 100% |
| 4. | in respect of services provided or agreed to be provided by an arbitral tribunal | Nil | 100% |
| 5. | in respect of services provided or agreed to be provided by individual advocate or a firm of advocates by way of legal services | Nil | 100% |

| | | | |
|---|---|---|---|
| 5A | *in respect of services provided or agreed to be provided by a firm of advocates or an individual advocate other than a senior advocate by way of legal services* | Nil | 100% |
| 6. | in respect of services provided or agreed to be provided by Government or local authority excluding,- (1) renting of immovable property, and (2) services specified in sub-clauses (i), (ii) and (iii) of clause (a) of section 66D of the Finance Act, 1994 | Nil | 100% |
| 7. | (a) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on abated value to any person who is not engaged in the similar line of business | Nil | 100% |
| | (b) in respect of services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non-abated value to any person who is not engaged in the similar line of business | 50% | 50% |
| 8. | in respect of services provided or agreed to be provided by way of supply of manpower for any purpose or security services | Nil | 100% |
| 9. | in respect of services provided or agreed to be provided in service portion in execution of works contract | 50% | 50% |
| 10. | 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 | Nil | 100% |
| 11. | in respect of any service provided or agreed to be provided by a person involving an aggregator in any manner | Nil | 100% |

The provisions of reverse charge and joint charge, have been tabulated in the table given below along with their date of origin from which they are in reverse charge with effective tax rates to be discharged by service provider or receiver.

| SL. No. | Description of a service | Date of Origin | *Percentage of service tax payable by any person liable for paying service tax other than the service provider* | Service Receiver |
|---|---|---|---|---|
| 1. | Services provided or agreed to be provided by a goods transport agency in respect of transportation of goods by road. | 01.01.2005 | Nil | 100% (4.20% Tax) |
| 2. | Services provided or agreed to be provided by way of sponsorship. | 01.05.2006 | Nil | 100% (14% Tax) |
| 3. | Services provided or agreed to be provided by an arbitral tribunal. | 01.07.2012 | Nil | 100% (14% Tax) |
| 4. | Services provided or agreed to be provided by a firm of advocates or an individual advocate other than a senior advocate by way of legal services (services of senior advocates removed from reverse charge and brought under forward charge w.e.f 01/04/2016) | 01.07.2012 | Nil | 100% (14% Tax) |
| 5. | Services provided or agreed to be provided by a director of a company to the said company. | 07.08.2012 | Nil | 100% (14% Tax) |

| SL. No. | Description of a service | Date of Origin | *Percentage of service tax payable by any person liable for paying service tax other than the service provider* | Service Receiver |
|---|---|---|---|---|
| 6. | Services provided or agreed to be provided by Government or local authority (till 31/03/2016 only support service and w.e.f. 01/04/2016 any service) excluding –<br>(1) *Renting of Immovable Property, and*<br>(2) *Service by Government or a local authority excluding the following service to the extent they are not covered elsewhere-*<br>(i) Services by Department of Post by way of Speed Post, Express Parcel Post, Life Insurance and Agency Services;<br>(ii) Services in relation to aircraft or a vessel, inside or outside the precincts of a port or an airport;<br>(iii) Transportation of goods or passengers. | 01.07.2012 | Nil | 100%<br>(14% Tax) |
| 7. | (a) Services provided or agreed to be provided by | 01.07.2012 | Nil | 100%<br>(5.60% i.e. |

| SL. No. | Description of a service | Date of Origin | *Percentage of service tax payable by any person liable for paying service tax other than the service provider* | Service Receiver |
|---|---|---|---|---|
| | way of renting of a motor vehicle designed to carry passengers on abated value to any person who is not engaged in the similar line of business. (Rent-a-cab service).<br>(b) Services provided or agreed to be provided by way of renting of a motor vehicle designed to carry passengers on non-abated value to any person who is not engaged in the similar line of business. (Rent-a-cab service) | | 50%<br>(7% Tax) | 40% of 14% Tax)<br>50%<br>(7% Tax) |
| 8. | Services provided or agreed to be provided by way of supply of manpower. | 01.07.2012 | Nil | 100% |
| 9. | Services provided or agreed to be provided by way of security services. | 07.08.2012 | Nil | 100% |
| 10. | Services provided or agreed to be provided in service portion on execution of works contract in relation to -<br>Only on labour charges: 100%<br>Original work on total amount: | 01.07.2012 | 50%<br>(7% Tax)<br>(2.8% Tax) | 50%<br>(7% Tax)<br>(2.8% Tax) |

| SL. No. | Description of a service | Date of Origin | *Percentage of service tax payable by any person liable for paying service tax other than the service provider* | Service Receiver |
|---|---|---|---|---|
| | 40%<br>Repairs and Maintenance of any goods or in any other case on total amount: 70% | | (4.9% Tax) | (4.9% Tax) |
| 11. | 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. | 19.04.2006 | Nil | 100%<br>(14% Tax) |
| 12. | Services provided or agreed to be provided by an insurance agent to any person carrying on insurance business. | 16.07.2001 (General Insurance) /16.08.2002 (Life Insurance) | Nil | 100%<br>(14% Tax) |
| 13 | Services provided or agreed to be provided by a director of a body corporate to the said body corporate. | 07/08/2012 | Nil | 100%<br>(14% Tax) |
| 14 | Services provided or agreed to be provided by a recovery agent to a banking company or a financial institution or a non-banking financial company | 11th July 2014 | Nil | 100%<br>(14% Tax) |
| 15 | Services provided or agreed to be provided by aggregator | 1st March, 2015 | Nil | 100%<br>(14% Tax) |

| SL. No. | Description of a service | Date of Origin | *Percentage of service tax payable by any person liable for paying service tax other than the service provider* | Service Receiver |
|---|---|---|---|---|
| 16. | in respect of services provided or agreed to be provided by a selling or marketing agent of lottery tickets in relation to lottery in any manner to a lottery distributor or selling agent of the State Government under the provisions of the Lottery (Regulations) Act, 1998 (17 of 1998) | 1st April, 2015 | Nil | 100% (14% Tax) |

## General Points

1. The recipient of service is not eligible for small scale exemption of ₹10 lakh.

2. The recipient of service has to pay his part of tax, even if the specified service provider is eligible for small service providers' exemption.

3. The recipient of service shall not discharge service tax liability through CENVAT Credit.

4. The point of taxation for recipient is date of payment if bill/invoice is paid within 3 months from its date; otherwise liability arises from the first day that occurs immediately after a period of three months from the date of invoice.

5. The recipient of service and provider of service can adopt different valuation system for payment of service tax on works contract services.

6. The recipient has to discharge service tax under reverse charge under specific taxable services category as applicable.

## Examples

1. XYZ Security (Proprietorship) has provided security services to ABC Ltd. In that case, ABC Ltd is liable to pay 100% of the Service Tax amount under reverse charge mechanism.

2. Mr. X has provided rent-a-cab services to Mr. A. In that case, Mr. A is not liable to pay service tax under reverse charge because reverse charge is not applicable if services are provided to an individual.

3. Mr. X has provided rent-a-cab services to XYZ Ltd. In that case, if XYZ Ltd is also engaged in rent-a-cab business, reverse charge is not applicable; otherwise XYZ Ltd is liable to pay service tax under reverse charge.

4. Mr. X (Insurance Broker) has received brokerage from Insurance Company. In that case, Insurance Company is not liable to pay service tax under reverse charge. Instead Mr. X is required to charge service tax. Reverse Charge is applicable only when services are provided by insurance agent.

5. ABC Ltd has awarded contract to Mr. X for construction of building. As per the terms of payment ABC Ltd. will pay ₹ 1,000/- per man day. In that case, ABC Ltd has outsourced construction activity to Mr. A and accordingly this transaction is not covered under 'Manpower Supply Service'. In this case, if ABC Ltd has appointed Mr. X for supply of manpower for the purpose of construction, and ABC Ltd has operational control over manpower supplied. The transaction is covered under reverse charge mechanism being supply of manpower.

# Statutory Compliances

## Registration

- Every person providing a taxable service and liable to pay service tax is required to register with the Central Excise/ Service Tax department.

- Application for registration is required to be made in Form ST-1 to the jurisdictional superintendent of Central Excise within 30 days of levy of service tax on such service or, in case of an existing taxable service, within 30 days of the commencement of provision of such service. A person providing more than one taxable service from a single premise is required to take only one single registration. He should indicate all taxable services provided by him in Form ST-1.

  For Example: XYZ Ltd engaged in trading of goods however w.e.f. 1st June, 2016 has started providing consulting engineer services. Assuming that XYZ Ltd has not availed the benefit of SSP, it is required to file ST-1 within 30 days from 1stJune, 2016 i.e. upto 1st July, 2016.

- Also, the following two categories of persons have been identified as 'Special Category of Persons for taking registration:

  (i) Input Service Distributor

  (ii) Any provider of taxable service whose 'aggregate value of taxable service' in a financial year exceeds nine lakh rupees.

- *Centralised Registration*: Where an assessee (i) as service provider is providing a taxable service from more than one premises or offices; or (ii) as service receiver is receiving a taxable service in more than one premises or offices and has centralized billing or accounting systems in respect of such service and such centralized billing or accounting systems are located in one or more premises or offices, then at his option, he may register such premises or offices where such centralized billing or accounting systems are located. In such cases, the registration is granted by the Commissioner of Central Excise having the jurisdiction over the premises or offices from where centralized billing or accounting is done.

For Example: ABC Ltd has its Head Office at New Delhi, wherein centralized accounting of its 10 premises spread all over India is done. Now ABC Ltd has the option either to avail Centralized Registration at New Delhi office or it can go in for separate registration of all its units. In case, ABC Ltd opts for later option, it can also apply for registration as Input Service Distributor at Delhi Office.

- Present Procedure for registration

  - ✓ Application for registration is to be made online (website www.aces.gov.in in Form ST -1 to the Superintendent of Central Excise).

  - ✓ The form shall be filed online with all the required details and submitted online itself.

  - ✓ A print of the form submitted online shall be taken and along with the documents as specified, shall be submitted to the department at the concerned Commissionerate.

  - ✓ The registration certificate would be granted by the department, in Form ST-2, within seven days of filing of an application, complete and properly filled up. In case registration certificate is not issued within seven days, the registration is deemed to have been granted. Further, w.e.f. 1st March, 2015 vide Order No, 1/2015-ST; CBEC has reduced time period to grant registration certificate in case of single premises registration from seven days to two days.

  - ✓ A single registration is sufficient even when an assessee is providing more than one taxable services. However, he has to mention all the services being provided by him in the application. Also, w.e.f. 1st July, 2012 the term service has been defined and the various categories as adopted in selective approach of service tax have been omitted. As a result of this, all new registrations were to be taken under the head *"Other than in the Negative List"*. However, *Notification No. 48/2012 dated 30.11.2012* restored all the accounting codes due to which new registrations and old registrations that were amended after 01.07.2012 have to be amended once again since service specific registration has now been made mandatory.

  - ✓ Where there is a change in any information or detail furnished by an assessee in Form ST-1 at the time of obtaining registration or where he intends to furnish any additional information or detail, such change or information or details shall be intimated, in writing, by the assessee, to the jurisdictional AC/ DC of Central Excise, as the case may be, within a period of 30 days of such change. This could be done online as well.

- ✓ In case of transfer of business, transferee to obtain a fresh certificate of registration.
- ✓ Registration certificate to be immediately surrendered online to Superintendent of Central Excise by assessee who ceases to provide taxable service.
- ✓ Superintendent to cancel the registration certificate after ensuring that the assessee has paid all dues to the Central Government.
- ✓ Documents required for registration :
    - o Self-certified copy of PAN, (where allotment is pending, copy of the application for PAN may be given)
    - o Copy of MOA/AOA in case of Companies
    - o Copy of Board Resolution in case of Companies
    - o Copy of Lease deed/Rental agreement of the premises
    - o A brief technical write up on the services provided
    - o Partnership deed in case of Partnership firm
    - o Photograph and proof of identity of the person filing the application namely PAN card, Passport, Voter Identity card, Aadhar Card, Driving license, or any other Photo-identity card issued by the Central Government, State Government or Public Sector Undertaking.
    - o Details of the main Bank Account.
    - o E-mail and mobile number mandatory
    - o Self-attested copy of address proof of partner/proprietor/director or authorized signatory

## Penalty for Delay in Registration

Any person, who is liable to pay service tax or required to take registration, fails to take registration in accordance with the provisions of section 69 or rules made under this Chapter shall be liable to a penalty which may extend to ₹ 10, 000;

## Documents Required for Registration

*CBEC* has specified the documents required to be submitted along with ST-1 application under Rule 4(1) of The Service Tax Rules, 1994:

(a) Copy of PAN Card

(b) Proof of residence

(c) Constitution of the applicant

(d) Power of attorney in respect of authorised person

The said documents are required to be submitted to the service tax department within 15 days from the date of online filing of ST-1 & the time limit of 7/2 days, as the case may be, for issuance of Service Tax registration certificate as prescribed in Rule 4(5) of The Service Tax Rules, 1994 would be applicable from the date of submission of the complete application including above documents.

There is no need for a signed copy of the Registration Certificate as proof of registration. Registration Certificate downloaded from the ACES web site would be accepted as proof of registration dispensing with the need for a signed copy.

## Issue of Invoice and Records

- Prior to 1st April, 2012, every taxable service provider was required to issue a document (i.e. invoice, bill or challan) within 14 days from either the date of completion of provision of service or receipt of any service charges (whichever is earlier). W.e.f. 1st April, 2012, this time limit has been increased to 30 days ordinarily and 45 days in case of banks and financial institutions including NBFCs.
- Such document should be serially numbered and should contain:
  - ✓ The name, address and registration number of the service provider.
  - ✓ The name and address of the service receiver.
  - ✓ Date of raising of invoice.
  - ✓ Description and value of taxable service provided or agreed to be provided...
  - ✓ Breakup of the amount charged towards the service.
  - ✓ Details as to exemption being claimed with reference to the concerned notification.
- In case, any payment towards value of service is not received and such taxable service is provided continuously for successive periods of time and the value of such taxable service is determined or payable periodically, taxable service provider was required to

issue an invoice/ bill/ challan within a period not later than 14 days from end of such period. The time limit has been extended to 30 days [extended to 45 days in case of a banking company or financial institution including NBFC) vide Notification No.3/2012-ST dated 17th March, 2012.

- Besides issuing invoice or bill or challan containing prescribed particulars, Rule-4A(1) requires Goods Transport Agency (other than GTAs whose services are wholly exempted in relation to transport of goods by road) to issue serially numbered consignment note containing:

  (i) name of consignor and consignee;

  (ii) registration number of goods carriage in which goods are transported;

  (iii) details of goods transported;

  (iv) details of place of origin and destination;

  (v) person liable for paying service tax whether consignor, consignee or GTA.

- Rule 4A(2) requires, every 'input service distributor to issue serially numbered invoice or bill or challan duly signed by him or person authorized by him containing following details:

  (i) Name, address, registration number, serial number and date of invoice or bill or challan of input service provider;

  (ii) Name & address of input service distributor;

  (iii) Name and address of recipient of credit;

  (iv) Amount of credit distributed.

- W.e.f 1st April, 2012, no invoice is required to be issued where the service provider receives an amount upto₹1,000/- in excess of the amount indicated in the invoice and such service provider has determined the point of taxation as per the Point of Taxation Rules, 2011.

- Record in service tax is to be kept as per Rule – 5(1) of the service tax rules, 1994. Following Records can be kept in the computerized format as follows:

  (i) all the records prepared or maintained by the assessee for accounting of transactions in regard to:

- providing of any service, whether taxable or exempted;
- receipt or procurement of input services and payment for such input services;
- receipt, purchase, manufacture, storage, sale, or delivery, as the case may be, in regard of inputs and capital goods;
- other activities, such as manufacture and sale of goods, if any.

(ii) all other financial records maintained by him in the normal course of business

- Rule 4C has been introduced w.e.f. 1st March, 2015 to provide authentication of challans, invoice etc. issued under Rule 4A and 4B by way of Digital Signature Certificate.
- Rule 5(4) has been introduced w.e.f. 1st March, 2015 to allow preservation of records related to Service Tax in the digital form duly authenticated by digital signature.
- At the time of filing the first return, assessee should furnish the list as given above in duplicate to Superintendent of Central Excise. However, this is not practical after returns are required to be submitted electronically. This letter can be submitted to range and acknowledgement of receipt taken on the same. Alternatively, send by registered post AD.

## Payment of Service Tax

- Service tax has been payable on receipt basis i.e., on the receipt of payment from customer or on the receipt of advance, whichever is earlier. However, w.e.f. 01.04.2011, Point of Taxation of Service has been shifted from receipt basis to issuance of invoice or receipt of payment, whichever is earlier.
- In terms of rule 6 of the Rules read with section 68 of the Act, the service tax is required to be *paid on monthly basis by all service taxpayers, other than One Person Company whose aggregate value of taxable services provided from one or more premises is fifty lakhs rupees or less in the previous financial year or an individuals or proprietary /partnership concerns or HUF, who are required to pay service tax on quarterly basis.*
- Service tax liability for a particular month or quarter is to be deposited by the 5th day of the month following the month or quarter for which service tax is paid. However, for the month/quarter ending March, the payment is required to be made by the 31st March itself by all taxpayers.

  In case, service tax is to be paid through e-payment, then it can be deposited on 6th of next month/ quarter as the case may be. W.e.f. 1st October, 2014 vide Notification No. 09/2014-ST, e-payment has been made mandatory for every assessee. Relaxation of e-

payment may be allowed by the Deputy Commissioner/Assistant Commissioner on case to case basis.

- If the assessee deposits the amount of tax liable to be paid by cheque, then the date of presentation of the cheque to the designated bank would be treated as the date of payment of service tax.

- The amount shall be paid into the designated bank account using the form GAR 7 which is to be filled up. The amounts are to be rounded off to the nearest rupee. Separate accounting codes have been notified service wise for service tax, interest, penalties etc.

- In case of an input service where the service tax is paid under reverse charge by the recipient of the service, the point of taxation shall be the date immediately following the period of three months where payment is not made within a period of three months of the date of invoice w.e.f 01.10.2014, in terms of Notification No 13/2014 dated 11.07.2014. In case of an input service where the service tax is paid on reverse charge by the recipient of the service, invoice has been issued before 01.10.2014 but payment has not been made on the said day, the point of taxation shall if payment is made within a period of six months of the date of invoice, be the date on which payment is made and if payment is not made within a period of six months of the date of invoice, be the date of invoice.

- In case excess payment of service tax has been made due to arithmetical error for a particular month/ quarter, the same can be adjusted in the next period.

- When payment is received in advance for service to be provided but subsequently the services are not actually provided and the consideration and service tax for the same is refunded back to the service recipient, then service tax paid on such advance received is eligible for adjustment against other liabilities of service tax for subsequent period. W.e.f. 1st April, 2011 Rule 6(3) of Service Tax Rules 1994 was amended, whereby excess service tax paid by the service provider in respect of services not so provided or where excess payment is made on account of renegotiation of Invoice due to deficient provision of service, or any term of contract either wholly or partially, such excess payment is allowed to be adjusted against his service tax liability for subsequent period subject to conditions below:

  (i) Assessee has refunded the payment or part thereof, along with service tax thereon to the receiver of service; or

  (ii) Assessee has issued a credit note for value of service not so provided.

- Application to be made to Central Excise Officer (CEO) to make provisional assessment

of tax, when assessee is unable to correctly estimate actual tax payable. The assessee is required to file a statement in form ST-3A at the time of filing return, giving details of difference between service tax deposited and service tax liable to be paid for each month/quarter.

- With the introduction of Point of Taxation Rules, 2011 assessee should be careful while determining their service tax liability, since liability would arise on raising of invoice only or receipt of advance, as the case may be.
- W.e.f. 1st April, 2012, Rule 2(cd) is inserted in Service Tax Rules, 1994 so as to provide that "partnership firm" includes a "limited liability partnership".

Third proviso to Rule 6(1) has been inserted whereby individuals, One- Person Companies and partnership firms (including limited liability partnership) whose aggregate value of taxable services provided from all the registered premises is ₹50 lacs or less in the previous financial year are granted an option to pay service tax on receipt basis on taxable services upto an amount of ₹50 lacs in the current financial year. Beyond ₹50 lacs, tax has to be paid on billing or receiving (including advances), whichever is earlier.

Sub Rule 7 of Rule 6 states that the person liable for paying the service tax in relation to the services of booking of tickets for travel by air provided by an air travel agent, shall have the option, to pay an amount calculated at the rate of [0.7%] of the basic fare in the case of domestic bookings, and at the rate of [1.4%] of the basic fare in the case of international bookings, of passage for travel by air, during any calendar month or quarter, as the case may be, towards the discharge of his service tax liability instead of paying service tax at the rate specified in section 66B of Chapter V of the Act and the option, once exercised, shall apply uniformly in respect of all the bookings of passage for travel by air made by him and shall not be changed during a financial year under any circumstances.

*Explanation*. - For the purposes of this sub-rule, the expression "basic fare" means that part of the air fare on which commission is normally paid to the air travel agent by the airline.

Sub-Rule (7A) of Rule 6 states that an insurer carrying on life insurance business shall have the option to pay tax:

(i) on the gross premium charged from a policy holder reduced by the amount allocated for investment, or savings on behalf of policy holder, if such amount is intimated to the policy holder at the time of providing the service;

(ia) In case of single premium annuity policies other than (i) above, 1.4%.of the single premium charged from the policy holder.

(ii) in all other cases, 3.5 % of the premium charged from policy holder in the first year and 1.75 % of the premium charged from policy holder in the subsequent years;

towards the discharge of his service tax liability instead of paying service tax at the rate specified in section 66B of Chapter V of the said Act:

Provided that such option shall not be available in cases where the entire premium paid by the policy holder is only towards risk cover in life insurance.

Sub Rule (7B) of Rule 6 states that the person liable to pay service tax in relation to purchase or sale of foreign currency, including money changing, shall have the option to pay an amount calculated at the following rate towards discharge of his service tax liability instead of paying service tax at the rate specified in section 66B of Chapter V of the Act, namely:-

(a) 0.14 % of the gross amount of currency exchanged for an amount upto rupees 100,000, subject to the minimum amount of rupees 35;

(b) rupees 140 and 0.07 % of the gross amount of currency exchanged for an amount of rupees exceeding rupees 100,000 and upto rupees 10, 00,000; and

(c) rupees 770 and 0.014 % of the gross amount of currency exchanged for an amount of rupees exceeding 10,00,000, subject to maximum amount of rupees 7000 :

Provided that the person providing the service shall exercise such option for a financial year and such option shall not be withdrawn during the remaining part of that financial year.

Sub Rule (7C) of Rule 6 states that the distributor or selling agent, liable to pay service tax for the taxable service of promotion, marketing, organising or in any other manner assisting in organising lottery, shall have the option to pay an amount at the rate specified in column (2) of the Table given below, subject to the conditions specified in the corresponding entry in column (3) of the said Table, instead of paying service tax at the rate specified in section 66B of Chapter V of the said Act :

TABLE

| Sl. No. | Rate | Condition |
|---|---|---|
| 1 | ₹ [8200] on every ₹ 10 Lakh (or part of ₹ 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw | If the lottery or lottery scheme is one where the guaranteed prize payout is more than 80% |

| | | |
|---|---|---|
| 2 | ₹ [12800] on every ₹ 10 Lakh (or part of ₹ 10 Lakh) of aggregate face value of lottery tickets printed by the organising State for a draw | If the lottery or lottery scheme is one where the guaranteed prize payout is less than 80% |

Provided that in case of online lottery, the aggregate face value of lottery tickets for the purpose of this sub-rule shall be taken as the aggregate value of tickets sold, and service tax shall be calculated in the manner specified in the said Table:

Provided further that the distributor or selling agent shall exercise such option within a period of one month of the beginning of each financial year and such option shall not be withdrawn during the remaining part of the financial year:

Provided also that the distributor or selling agent shall exercise such option for financial year 2010-11, within a period of one month of the publication of this sub-rule in the Official Gazette or, in the case of new service provider, within one month of providing of [such service] and such option shall not be withdrawn during the remaining part of that financial year.

*Explanation*. - For the purpose of this sub-rule -

(i) "distributor or selling agent" shall have the meaning assigned to them in clause (c) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010 and shall include distributor or selling agent authorized by the lottery organising State.

(ii) "draw" shall have the meaning assigned to it in clause (d) of the Rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iii) "online lottery" shall have the meaning assigned to it in clause (e) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.

(iv) "organising state" shall have the meaning assigned to it in clause (f) of the rule 2 of the Lottery (Regulation) Rules, 2010 notified by the Government of India in the Ministry of Home Affairs published in the Gazette of India, Part-II, Section 3, Sub-section (i) vide number G.S.R. 278(E) dated 1st April, 2010.]

## Determination of rate of exchange

Rule 11 of Service Tax Rules states that the rate of exchange for determination of value of taxable service shall be the applicable rate of exchange, as per the generally accepted accounting principles on the date when point of taxation arises in terms of the Point of Taxation Rules, 2011.

## Power to issue supplementary instructions

Rule 12 of Service Tax Rules states that the Board or the Chief Commissioners of Central Excise may issue instructions for any incidental or supplemental matters for the implementation of the provisions of the Act.

## Liability when Transaction is with Associated Enterprises

- Where the transaction of taxable service is with any associated enterprise, the gross amount charged is equal to any amount credited or debited, as the case may be, to any account, whether called "Suspense account" or by any other name, in the books of account of a person liable to pay service tax.
- Service tax is payable when the amount is considered as expenditure in accounts, even if the amount is not credited to the account of the associated enterprises, but credited to a suspense account or any other account and even if payment is not received.
- In case of "associated enterprises", where the person providing the service is located outside India, the point of taxation shall be the date of debit in the books of account of the person receiving the service or date of making the payment whichever is earlier.

## Credit of Service Tax paid on Input Service Under Reverse Charge

- In respect of input service where whole of service tax is liable to be paid by the recipient of service, credit shall be allowed after the service tax is paid w.e.f. 11.07.2014 vide notification no 21/2014-CE (NT) dated 11.07.2014. Earlier, the credit in such cases was allowed only after the day on which payment was made of the value of input service and the service tax.
- In respect of an input service where the service recipient is liable to pay a part of service tax (under partial reverse charge), the CENVAT credit in respect of such input service shall still be allowed on or after the date 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.However w.e.f. 1st April, 2015 CENVAT Credit is allowed on the basis of payment of Service Tax without linking it with payment of service.

## Service Tax Payment – Interest

- For **delay in payment of service tax** which is due and payable, simple interest is charged as per provisions of Section 75.

- With effect from 1st October, 2014, to encourage prompt payment of service tax, Central Government has introduced interest rates which vary with the extent of delay. New rates of interest are as follows:-

| Extent of Delay | Simple Rate of Interest p.a. |
|---|---|
| Upto six months | 18% |
| More than six months and 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 |

Central Government vide *Notification No.13/2016-ST dated 1st March 2016* had, with effect from 14.05.2016 changed the rate of interest payable for the delayed payment of service tax. The new rate of interest penalizes willful defaulters with higher rate of interest than other defaulters. The new rate of interest is given below:

| Serial No | Situation | Rate of simple interest |
|---|---|---|
| 1 | Collection of any amount as service tax but failing to pay the amount so collected to the credit of the Central Government on or before the date on which such payment becomes due | 24% |
| 2 | Other than in situations covered under serial No 1 above | 15% |

Note:

As specified in the proviso to section 75, three % concession on the applicable rate of interest will continue to be available to the small service providers i.e. assessee having the turnover not exceeding ₹ 60 lakhs during the preceding F/Y or during any of the financial years covered by the notice.

- Interest would be charged from the date when service tax is due till the date of payment. In case cheque is presented, the date of presentation of cheque would be considered provided cheque is realized.

## Service Tax Payment – Penalty

- Moreover as per Sec 76 of the Act, a person who is liable to pay service tax, but fails to pay the same, shall in addition to service tax and interest, pay a penalty of not exceeding 10% of the amount of such service tax.
- Amount of penalty can be further reduced if service tax and interest is paid within a period of 30 days of-
  - (i) the date of service of notice under sub-section (1) of section 73. No penalty shall be payable and proceedings in respect of such service tax and interest shall be deemed to have been concluded;
  - (ii) the date of receipt of the order of the Central Excise Officer determining the amount of service tax under sub-section (2) of section 73. The penalty payable shall be 25% of the penalty imposed in that order, only if such reduced penalty is also paid within such period.
- Where the amount of penalty is increased by the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be, the time within which the reduced penalty is payable i.e. 30 days, in relation to such increased amount of penalty shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal or the court, as the case may be.

## Filing of Periodical Returns

- Every assessee is required to file online service tax return on a half yearly basis at ACES website in Form ST-3. For the periods from April to September and October to March, it must be filed by the 25th October and 25th April respectively.
- An 'Input Service Distributor' is also required to file return in form ST-3.
- An assessee can revise the service tax return within 90 days from the date of filing of return to correct any error, omission or mistake.
- Late fees in case of delay in filing of return:
  - If return is filed after due date then assessee is required to deposit late fees u/s 70(1) of the Act, depending upon the period of delay. According to the provisions of

rule 7C of Service Tax Rules, 1994 depending upon the period of delay, late fee is payable as under:

| Delay in filing of return after due date | Late fees |
|---|---|
| First 15 days | ₹500/- |
| More than 15 days but less than 30 days | ₹1000/- |
| More than 30 days | ₹1000/- + 100 per day beyond 30 days |

- The late fee can be upto a maximum of ₹20,000/-.

For Example, in case return was filed delayed by 35 days; service provider is liable to pay ₹ 1500/- (₹ 1,000+ ₹ 100*5) as late fees.

Where the gross amount of service tax payable is Nil, the Central Excise officer may, on being satisfied that there is sufficient reason for not filing the return, reduce or waive the late fee.

## Filing of Annual Return

Central Government vide *Notification No.19/2016-ST dated 1st March 2016* has amended Rule 7 of Service Tax Rules, 1994 to provide that from Financial Year 2016-17 onwards, annual return is also to be filed by the 30th November of the succeeding financial year. Central Government can notify the categories of assesses who are not required to file annual return.

Annual return can be revised within one month. Late fees for delayed filing of annual return will be at the rate of ₹ 100 per day for the period of delay subject to a maximum of ₹ 20,000.

## Power to make rules

Section 94 which deals with Central Government Powers to make Rules is being amended vide Finance Act 2014 to obtain rule making powers (a) to impose upon assessees, inter alia, the duty of furnishing information, keeping records and making returns and specify the manner in which they shall be verified; (b) for withdrawal of facilities or imposition of restrictions (including restrictions on utilization of CENVAT credit) on service provider or exporter, to check evasion of duty or misuse of CENVAT credit; and (c) to issue instructions in supplemental or incidental matters.

# Service Tax Audit by Department

The following points are to be kept in mind while handling Service Tax Audit by Department:

A. The following areas could be checked and documented:

1. All records prepared and maintained for recording and accounting transactions, such as for the receipt of inputs, input services, capital goods as well as output services provided could be verified. In addition, the underlying documentation by way of suppliers of inputs and capital goods and input services invoices, could be documented.

2. The records which are maintained for statutory compliances and internal control could be sufficient in this regards.

3. In case of service providers, the copies of agreements with customers, as well as with foreign parties could be verified to ensure correct classification, and exact liability from providing services.

4. The agreements as well as foreign exchange payments made to non-residents and foreign establishments from India by the entity in order to determine if there is a possibility of service tax liability for the service recipient in India.

5. One main issue that could arise is that of establishing nexus of input services to the taxable services provided by the assessee. If such connection cannot be established, the CENVAT credits eligibility could be at stake. It may need to be reversed along with applicable interest.

6. The presence or absence of the exempted services along with taxable services could also be an issue since the CENVAT credits are not allowed on the exempted activities under Rule 6 of CENVAT Credit Rules, 2004.

7. The audited financial statements, directors' reports, cost audit report, income tax audit reports, and the notes to accounts to get an idea as to the financial position and background of enterprise.

B. Certain other points to bear in mind:

1. Assessee cannot refuse to produce books and records, as this could lead to penal action going beyond limitation period citing suppression.

2. The advance intimation of the same should be given by the department. The written confirmation of timeline of audit as well to be given.

3. The responsible team to be in office to answer to queries of audit team.

4. The access to books and records only during office hours. No books allowed to be removed from premises. If they seek to take records, it should be done under a written request.

5. Documents need to be furnished only for audit period.

6. The delivery of books and records to them should be acknowledged by departmental officers.

7. When auditor fails to understand the answer to query given, he may be asked to give his views in writing.

8. No assessment can be made during audit and no summons can be issued at all during audit.

9. The assessee can make his views known, before the audit objections are raised.

10. The audit team can only make factual observations and not conclusion on points of law.

11. Trade formulas and secrets to be given only on written request from auditors.

## Conclusion

When number of records are continuously asked by audit team, it is better to get an internal review of records done so that the assessee knows where he/ she stands as far as compliances are concerned.

Relevant decisions: The Hon'ble Calcutta High Court in the case of SKP Securities Ltd. vs. DD (RA-IDT) &Ors. [2013-TIOL-38-HC-KOL-ST] has held that no audit of private assessee can be undertaken by CAG. Sub-section (2) of Section 94 also does not empower the Central Government to frame rules for audit of the accounts of an assessee by any audit team under the Comptroller and Auditor General of India. There can be no doubt that statutory rules, framed in exercise of power conferred by statute cannot introduce something not contemplated in the statute, from which it derives its rule making power.

Travelite (India) Vs. Union of India &Ors. [W.P. (C) 3774/2013, C.M. No. 7065/2013] 2014-TIOL-1304-HC-DEL-ST on the Service Tax Audit issue it is held that: Rule 5A(2)[equivalent to Rule 22 of CE Rules] of the Service tax Rules is ultra vires the provisions of the Finance Act and the rule had been struck down.

# Demand and Assessment

## Assessment

A. Service tax assessment like income tax is basically self – assessment. Every person liable to pay tax shall himself assess the tax due on services provided by him. The ST – 3 return filed by the assessee contains a self-assessment memorandum.

B. As per section 73 of Chapter V of Finance Act, 1994, as amended, where the service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer handling service tax can serve a Show Cause Notice on the person chargeable with service tax as to why he should not pay the amount specified in the notice.

Section 73 sub-section (4B) prescribes time limits for completion of adjudication:

(a) within 6 months from the date of notice where it is possible to do so, in respect of cases falling under sub-section (1);

(b) within 1 year from the date of notice, where it is possible to do so, in respect of other cases.

C. SCN can be issued within 30 months from the relevant date however in case if such short payment/ non-levy/ refund was by reason of fraud or collusion or willful mis-statement or suppression of facts or contravention of the provisions with the intent to evade payment of service tax the time limit would be five years. The period for issuing demand notice in normal circumstances is being proposed to be increased to 30 months. The position for period of Limitation for non-fraud cases – Service Tax, Excise & Customs now stands as follows:

| Tax/ duty | Relevant Section | Prescribed time period for Issuing SCN | |
|---|---|---|---|
| | | Till 13.05.2016 | From 14.05.2016 |
| Service Tax | Sec. 73 of Finance Act, 1994 | 18 months | 30 months |
| Excise Duty | Sec. 11A of Central Excise Act, 1944 | 1 year | 2 years |
| Custom | Sec. 28 of Customs Act, 1962 | 1 year | 2 years |

D. After considering the representation from the concerned person, Central Excise Officer can determine the amount of tax payable, and then the person chargeable to service tax shall pay the amount.

E. Central Excise Officers have been empowered to adjudicate in following

- Demand of service tax and its recovery – Section 73
- Rectification of mistake by amending own order – Section 74
- Adjudication of penalty – Section 83 A
- Refund of service tax and interest – Section 11B

F. If an assessee voluntarily pays the duty on his own, officer shall not issue any show cause notice of the said amount. However, if he is of the opinion that there is short payment is respect of the amount, he can issue notice for the payment of balance amount. The time limit for the issue of Show Cause Notice would be counted from the date of receipt of information.

G. Provisions relating to Settlement Commission are being brought in the Service Tax. This should encourage quick settlement of disputes and save the business from the worries of prosecution in certain situations.

H. Further, as per section 99, no service tax shall be levied or collected in respect of taxable services provided by the Indian Railways during the period prior to the 1st July, 2012. There shall be no refund of service tax paid for taxable services provided by Indian railway during period prior to 1st October 2012.

## How to handle a Show Cause Notice (SCN)

Following points are important to note while handling any show cause notice:

(i) There is a possibility that the date of notice and date of receipt of notice could be different. For instance, the SCN may be dated 30.5.2016 and received only on 15.6.2016. While acknowledging the SCN, always remember to put date and time over the acknowledgement copy. [Retain the proof of receipt].

(ii) Don't avoid receiving SCN. If a SCN is being served, there is no point in avoiding receiving it. It has to be received and then contested/ replied.

(iii) If the service of notice is time barred, it could be suitably replied with substantiating evidence.

(iv) If the SCN is making a demand beyond 30 months, it would have to be proved in the SCN that there was suppression etc. on assessee's part so that department can invoke the provision of five years. SCN has to prove suppression. The onus of compliance has substantially shifted to the tax payer now.

(v) In case assessees are expecting that there could be service tax payables, it would be advisable to pay service tax before SCN is issued. SCN cannot be issued for the amounts that are already paid.

(vi) Whenever SCN is intended to enhance the liability of assessee or reduce the amount of refund, an opportunity of being heard is necessary and it cannot be denied by the revenue department.

(vii) One can challenge the validity and legality of SCN served on oneself on the basis of facts, time or even jurisdiction.

(viii) SCN is to be issued for a particular period. If a demand is raised, admitted and paid, SCN would still be required to be served for subsequent period. If the same is issued for which notice was already issued, then for subsequent periods, a statement containing details of service tax payable can be served. The service of statement shall be deemed to be service of notice.

(ix) Department cannot go beyond the issues mentioned in SCN and cannot adjudicate an issue which is not a subject matter of SCN.

(x) While efforts must be made to reply within the stipulated period, it would be advisable to seek extension of time if required and necessary or adjournment sought which is normally granted.

(xi) Try to pro*vide* reply or explanation to all points covered in SCN and wherever necessary, substantiate the reply with documentary evidences.

(xii) Comprehensive & detailed reply may be submitted along with earlier decided case laws.

(xiii) A list of evidences on which you are relying must also be submitted.

(xiv) Even where you have submitted a detailed and convincing reply to SCN, you should seek the opportunity of personal hearing and seek to alter or amend or modify your reply to show cause at any stage during adjudication proceedings.

(xv) Orders issued against show cause notice are appealable.

It is felt that the above points if borne in mind by the assessees shall help them in appropriately replying to the show cause notice issued by the Department.

*What is the procedure for reply to Show Cause notice issued under Section 73 of the Finance Act, 1994 and Rule 14 of CENVAT Credit Rules, 2004?*

On account of non-levy of tax or short levy or short payment or erroneous refund, or where the CENVAT credit has been taken erroneously; the Central Excise Officer/Proper Officer may issue a show cause notice. The procedure for replying to such show cause notice is detailed here under:

(i) The proper officer may issue Show Cause Notice. Once it is received, make a note of the date of receipt and the proof of the same should also be retained. The postal cover under which the same was received can be filed.

(ii) The contents of the SCN may be pursued and if the objection is genuine and SCN is received within 30 months, the amount may be debited and the adjudicating officer intimated with the compliance. In the event the SCN seeks to levy penalty, a request for dropping penalty may be made mentioning therein, the *bona fide* nature of the error.

(iii) In some cases, it could be possible that the circumstances mentioned in point No. 2 do not exist. In such a case the assessee may choose to communicate in writing to the department providing them with the factual situation and the legal issues, which require to be taken into account. In the event the SCN is not clear, the assessee is well within his rights to ask the issuing officer for clarification as to the grounds of the charges and under which provisions of the law the demand/ reversal is sought to be made.

(iv) The assessee may, if the contents are not-clear and there appears to be confusion in understanding pro*vide* the reasons why said demand is not taxable. He should at such times include all material facts and legal interpretations on which he feels that the demand is not justified. The competence of the officer issuing the SCN may also be examined. At this juncture he would have to decide whether the assistance of a counsel is required or not.

(v) A legal opinion may be obtained on the liability, if substantial.

(vi) He/ She or the counsel should in their reply pro*vide* any clarifications issued by the department in regard to the matter, any decisions of the Tribunal, High Court or Supreme Court which may support his contention in addition to the facts of the present SCN. The reply should explicitly ask for hearing, if matter can be better explained along with physical demonstration.

(vii) This reply should normally be filed within 30days of the issue of the SCN or extended

time, if applied for. The reply should be filed and an acknowledgement obtained in person or by RPAD (Registered Post Acknowledgement Due)

(viii) In some of the cases there may be a necessity to cross examine the officer who has recorded the statement or the officer who has conducted the audit or officers who have visited the assessee to confirm some facts. This is required when facts have been twisted in the notice. This practice of cross examination in genuine cases would also be a great leveler in the excesses practiced by some overzealous officers.

(ix) In the event of any material facts being known prior to the adjudication, or any case laws which are relevant for the same, it may again be communicated as stated above.

## Demand

The Demand is governed by Section 73, the provisions of which can be summarized in the following table:

| | |
|---|---|
| Initiation of proceedings under Section 73 | Whenever there is a short levy/short payment or non-levy or non-payment, proceedings can be undertaken. |
| Show cause Notice | It is mandatory for the Department to issue a show cause notice. |
| Follow-Up Demand | Section 73(1A) saves botheration of retyping the same charges (and save paper) when a follow-up demand is given for a period subsequent to the previous notice(s) on same grounds. It is provided that the Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short-levied or short-paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices. |
| Notice not sustainable under Sec 73(2A) | Sub-section (2A) to section 73 provides that in a case where any appellate authority or tribunal or court concludes that the notice issued is not sustainable for the reason that the charge of fraud, collusion, willful |

| | |
|---|---|
| | misstatement, suppression or contravention of any provision has not been established, the Central Excise Officer shall determine the service tax payable by such person for the period of thirty months, as if the notice was issued for the offences for which limitation of thirty months applies. |
| What is the time limit for communication of show cause notice | (a) In cases involving fraud, collusion, willful misstatement or suppression of facts or contravention of any provisions with intent to evade payment of duty – notice should be served within 5 years from relevant date.<br>(b) In other cases – notice should be serviced within 30 months.<br>(c) Where the service of notice is stayed by court order, the period of such stay would be excluded in computing this time limit. |
| From which date the time limit would be computed | The date from which the time limit would be computed is defined as 'Relevant date'. It means -<br>(a) In case of short levy/ non-levy or short payment/ non-payment, the date on which the six monthly return is filed. If it is not filed, the date on which it was required to be filed.<br>(*b*) If there is no such time limit, date of payment of duty.<br>(*c*) In cases of provisional assessment, the date of adjustment of duty after final assessment.<br>(*d*) In case of erroneous refund, the date of such refund. |
| Payment to drop proceedings | In the course of audit, investigation or verification of the records, if some short payment is found, then the assessee has the option to pay 1% penalty subject to maximum of 25%. Once an intimation is given, the notice need not be issued. This option is not available w.e.f. 14th May, 2015.<br>In case, penalty is imposed under Section 76, more beneficial provisions have been introduced w.e.f. 14th |

| | |
|---|---|
| | May, 2015 to provide conclusion of proceedings in case service tax and interest is paid within 30 days of the date of service of notice. |
| Voluntary payment | In case the service provider pays the service tax along with the interest and informs the department about such payment in writing, no notice would be served under this provision. No penalties are also imposable and notice for penalty also cannot be served. |
| Recording of assessee's representation | Sub-section 2 to Section 73 makes it mandatory for the officer to consider the representation of the assessee. The officer has to comply with the principles of natural justice. |
| Form of order | It is mandatory for the officer to pass a speaking order. Speaking order is one which gives the reasons for the decision. A simple letter asking for payment of duty is not an order. |
| Payment on passing of the order | The service provider can either pay the tax determined or on the other hand has right to challenge the order by going for further appeal, where he may get a stay of demanded amounts. |

The present statutory provisions relating to demand, interest and penalties under service tax can be summarized as under:

| Section | Equivalent Cent. Exc. | Statutory provisions |
|---|---|---|
| Section 73 | Section 11A (under excise time limit for issuance of notice is two years) | Recovery of taxes not levied or not paid or short levied or short-paid within 30 months. This is the principal section for invoking all demands by the Department. |
| Proviso to Section 73 | Proviso to Section 11A | Above- mentioned 30 months would be extended to 5 yrs., if there involves fraud, collusion, willful misstatement or suppression of fact with intent to evade the payment of tax |

| Section | Equivalent Cent. Exc. | Statutory provisions |
|---|---|---|
| | | are involved. |
| Section 73(1A) | Section 11A(1A) | The Central Excise Officer may serve, subsequent to any notice or notices served under that sub-section, a statement, containing the details of service tax not levied or paid or short levied or short paid or erroneously refunded for the subsequent period, on the person chargeable to service tax, then, service of such statement shall be deemed to be service of notice on such person, subject to the condition that the grounds relied upon for the subsequent period are same as are mentioned in the earlier notices. |
| Section 73(1B) | | Notwithstanding anything contained in sub-section (1), in a case where the amount of service tax payable has been self-assessed in the return furnished under sub-section (1) of section 70, but not paid either in full or in part, the same shall be recovered along with interest thereon in any of the modes specified in section 87, without service of notice under sub-section (1). |
| Section 73(2) | Section 11A(2) | The Central Excise Officer shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined. |
| Section 73(4A)- Omitted by the Finance Act, 2015 | Section 11A(6) | This is inserted by the Finance Act, 2011, setting out that where in course of audit or investigation or verification, it is found there is short levy/non-levy/short paid/not paid service tax or erroneous refund but transactions are in records, the service tax paid fully or partly, along with interest and penalty at 1% of such tax, for each month where default continues, upto 25% of tax amount before notice is issued and the Central Excise (CE)Officer has been informed in writing of the same. Notice would not be served u/s73(1) and |

| Section | Equivalent Cent. Exc. | Statutory provisions |
|---|---|---|
| | | such proceedings in respect of such amount shall be concluded. Any additional amounts could be collected as determined payable by the CE officer. This section has been omitted by the Finance Act, 2015. |
| Section 73(3) | Section 11A(2B) | No notice to be served when the service tax is paid before issue of SCN in cases not involving fraud, collusion etc. This is not applicable for service tax that became payable before 14.05.2003. |
| Section 75 | Section 11AB | Every person who fails to credit the tax or any part to the Government shall pay simple interest. |
| Section 78 | Section 11AC | Penalty in case of fraud, suppression, willful misstatement etc. |
| Section 78A | Rule 26 of Central Excise Rules, 2002 | Penalty for offences by director, officers of the company where company has committed any contraventions, namely:-<br>(a) evasion of service tax.<br>(b) wrong availment and utilization of Cenvat credit.<br>(c) issuance of invoice without providing service<br>(d) Collects but fails to pay service tax. |
| Section 73A | Section 11D | Service tax collected from the service receiver to be deposited with the Central Government |
| Rule 14CCR 2004 | Same Rule applies | CENVAT Credit taken wrongly or utilised wrongly or erroneously refunded then the provisions of Section 73 & 75 would apply. |

Section 73 has been amended providing time limits for completion of adjudication already existing in Central Excise which are to be followed, as far as possible.

(a) within six months from the date of notice where it is possible to do so, in respect of cases falling under sub-section(1)

(b) within one year from the date of notice, where it is possible to do so, in respect of other cases

# Appeals

As per section 85 of the Finance Act, 1994, as amended, if the order is passed by authority subordinate to Commissioner, appeal can be filed with the Commissioner (Appeals) within 2 months from the date of receipt of order of adjudicating authority. Commissioner (Appeals) can condone delay up to 1 month.

## Handling of Service Tax Appeals before Commissioner (Appeals)

*Procedure for filing appeal to the Commissioner* (*Appeals*)

A. An appeal lies with the Commissioner (Appeals) against an order or decision of any Central Excise Officer lower in rank than a Commissioner. Appeals against the orders passed by the Superintendent or the Assistant Commissioner or Deputy/ Joint Commissioner and Additional Commissioner would lie with the Commissioner (Appeals).

B. Only the parties aggrieved by the order can file an appeal.

C. The appeal must be filed in Form ST-4 in duplicate. The appeal must be paragraph-wise with statement of facts and the grounds of appeal. The case law relied upon should be stated in the grounds of appeal.

D. Form ST-4 should be signed and verified in accordance with Rule 4 of Central Excise Appeals Rules, 2001. The appeal should be signed by the following Persons:

   (a) *in the case of an Individual,* by the individual himself or where the individual is absent from India, by the individual concerned or by any person duly authorised by him in this behalf; and where the individual is a minor or is mentally incapacitated from attending to his affairs, by his guardian or by any other person competent to act on his behalf.

   (b) *in the case of a Hindu Undivided Family*, by the Karta and, where the Karta is absent from India or is mentally incapacitated from attending to his affairs, by any other adult member of such family;

   (c) *in the case of a Company or Local Authority,* by the principal officer thereof;

   (d) *in the case of a Firm,* by any partner thereof, not being a minor;

(e) *in the case of any Other Association*, by any member of the association or the principal officer thereof; and

(f) *in the case of any other Person,* by that person or any person competent to act on his behalf.

E. Form ST-4 which is filed in duplicate should be accompanied by a certified copy of the decision or order appealed against. It is not necessary to enclose the original order along with form ST-4. It is the practice in certain Commissionerates to insist on the copy of the order certified by the department or notarized. In such cases, the order can be certified by the range authorities. This practice, however, is not warranted by the Rules.

F. The appeal papers maybe typed in foolscap paper (green bond paper) in double line spacing on one side of the paper only.

G. The appeal should be filed within two months (earlier three months) from the date of communication of the decision or order of the lower authority. The Commissioner (Appeals) has the power to condone delay for a further period of one month. Beyond this period, no relief can be granted by the Commissioner (Appeals) or even Tribunal. If the appeal is sent by registered post, it should be ensured that the appeal is received by the office of the Commissioner (Appeals) well within the two months' period from the date of receipt of the order.

H. The appeal should also be signed by the authorized representative. If the assessee is being represented by an Advocate, a Vakalat Nama must be filed accompanied by applicable court fee stamp. If the assessee is represented by an authorized representative, then also an authorization should be executed in his favour on a non-judicial stamp paper on the value as applicable. Assessee may ascertain the stamp value to be used in their respective states.

There is no fee for filing the appeal. However court fee stamp has to be affixed on the appeal. One appeal is sufficient, if there is one original order by the adjudicating authority.

I. The appeal must be accompanied by a petition under section 35F to dispense with pre-deposit of duty or penalty. However Finance Act 2014 has substituted section 35F with 35FF to prescribe a mandatory fixed pre-deposit, stated as under:

| Appellate Authority | Percentage of duty demanded or penalty imposed or both * |
|---|---|
| Appeal before the Commissioner( Appeal) or the Tribunal at First stage | 7.5% |
| Appeal before Tribunal at second stage | 10% |

*subject to a ceiling of ₹ 10 crores.

It is pertinent to mention that all pending appeals/ stay application would be governed by the statutory provisions prevailing at the time of filing such Stay Applications/ Appeals.

J. The Commissioner (Appeals) has no powers to remand the matter and has to decide the case himself/ herself.

## Other Points Related to Appeals

1. Final appeal of the above order lies with CESTAT under Section 86 of the Act within three months.

2. As per Section 86 of the Act, if adjudication order is passed by commissioner, appeal is to be filed to CESTAT within 3 months from the date of receipt of order. Section 86 has been amended whereby the time limit for filing appeal with Appellate Tribunal by Revenue has been increased to 4 months from 3 months.

3. The Department can also appeal to the tribunal against the order passed by Commissioner (Appeals) or Commissioner within the prescribed period of four months.

   In case of Appeal to tribunal, the other party being the respondent has to file memorandum of cross objections within 45 days of receiving such notice.

4. As far as Appeals to High Court and Supreme Court are concerned, provisions of the Central Excise Act, 1944 would apply. The appeal to High Court can be made against the order of the Appellate Tribunal, once the High Court is satisfied that the case involves a substantial question of law. The appeal shall be within 180 days from the date on which the order appealed against is received by the assessee.

5. The appeal against the order of the High Court may be filled with the Supreme Court once the High Court certifies the case to be one that is fit for appeal to Supreme Court. This may be done on its own motion or on an application by the assessee once its

judgment is delivered. The decision of the Supreme Court shall be final and binding on the parties concerned.

6. The periods for filing appeals in service tax are being aligned with Central Excise. These are captured by relevant amendments in sections 85 and 86 of the Act.

7. Central Excise provisions relating to revision mechanism (section 35EE of Central Excise Act, 1944) are being made applicable to service tax by amending section 83 of the Act.

8. Section 86(6A) is amended to provide that every application made before the Appellate Tribunal in an appeal for rectification of mistake or for any other purpose or for restoration of an appeal or an application only shall be accompanied by a fee of five hundred rupees. However, earlier the appeal for grant of stay was also to be accompanied by a fee of five hundred rupees.

# Penalty and Prosecution

## Penalty and Prosecution

### Penalty u/s 77

A. Penalty, which may extend to ₹10,000 for:

- Failure to take registration in accordance with the provisions of Section 69 or rules made under
- Failure to keep, maintain or retain records books of account and other documents as required
- Failure to pay tax electronically by the person required to pay tax electronically
- Failure to issue correct invoice with complete details or account for the invoice in his books of accounts

B. For contravention of any other provisions of the Act where no separate penalty is provided in this Chapter, shall be liable to a penalty which may extend to ₹10000.

C. Penalty up to ₹10,000 or ₹200 per day during which failure continues, whichever is higher, starting with the first day after the due date, till the date of actual compliance :

- Failure to furnish information called for by an officer;
- Failure to produce documents called for by a Central Excise Officer;
- Failure to appear before the Central Excise Officer, when issued with a summons for appearance to give evidence or to produce a document in an inquiry;

### Penalty u/s 78

A. Service tax that has not been levied or paid or been short-levied or short-paid or erroneously refunded by reason of:

(a) Fraud

(b) Collusion

(c) Willful misstatement

(d) Suppression of facts

(e) Contravention of any of the provisions of chapter V of Finance Act, 1994 or of the rules made there under with intent to evade payment of service tax

B. Penalty equal to the amount of Service tax not levied or paid or short-levied or short paid or erroneously refunded.

C. Penalty shall be 100% of Service Tax amount involved in such cases. However, in respect of the cases where the details relating to such transactions are recorded in specified record for the period 8th April 2011 to 14th May 2015, the penalty shall be 50% of the service tax so determined.

Specified Records mean "records including computerized data as are required to be maintained by an assessee in accordance with any law for the time being in force or where there is no such requirement; the invoices recorded by the assessee in the books of accounts shall be considered as specified records."

D. If service tax, interest and penalty is paid within 30 days of service of show cause notice, penalty would be reduced to 15% of service tax.

E. Further, if the service tax, interest and penalty are paid within 30 days of communication of order of Central Excise Officer, penalty would be further reduced to 25% of service tax.

F. If any amount was paid earlier to the communication of the order of the Central Excise Officer or Appellate Authority, the amount which was so paid would be adjusted against the total amount which is due from such a person.

G. If the service tax which is payable is increased or decreased in appeal by the CESTAT or Court, then the penalty shall also be reduced or increased accordingly.

H. Where the amount of service tax or penalty is modified by the Commissioner (Appeals), the Appellate Tribunal, or the court, as the case may be, the time within which the interest and the reduced penalty is payable i.e. 30 days in relation to such increased amount of service tax shall be counted from the date of the order of the Commissioner (Appeals), the Appellate Tribunal, or the court, as the case may be.

If the penalty under this section is payable then the penalty under section 76 is not applicable.

Penalty u/s 78A, Penalty for offences by directors, etc. of the company

Where a company has committed any of the following contraventions, then any director, manager, secretary or other officer of such company, who at the time of such contravention was in charge of, and was responsible to, the company for conduct of business of such company and was knowingly concerned with such contravention, shall be liable to a penalty which may extend to ₹1, 00,000/-:

(a) evasion of service tax; or

(b) issuance of invoice, bill or, as the case may be, a challan without provision of taxable service in violation of the rules made under the provisions of this Chapter; or

(c) availment and utilisation of credit of taxes or duty without actual receipt of taxable service or excisable goods either fully or partially in violation of the rules made under the provisions of this Chapter; or

(d) failure to pay any amount collected as service tax to the credit of the Central Government beyond a period of six months from the date on which such payment becomes due. Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, and the proceedings with respect to a notice issued under sub-section (1) of section 73 or the proviso to sub-section (1) of section 73 is concluded in accordance with the provisions of clause (i) of the first proviso to section 76 or clause (i) of the second proviso to section 78, as the case may be, the proceedings pending against any person under this section shall also be deemed to have been concluded

## Penal Provisions & Prosecution

A. Penalty under Section 76 & 78 cannot be imposed simultaneously i.e., if penalty is imposed u/s 76, no penalty is to be paid u/s 78 and *vice-a-versa*.

B. The provisions relating to prosecution are re-introduced for offences pertaining to knowingly evading payment of service tax, wrong availment of input credit, failure to supply information as required by law, failure to deposit service tax beyond period of six months from the due date.

C. The imprisonment ranges from 6 months to 3 years. However sanction would have to be granted at the level of chief commissioner.

D. If the assessee collects any service tax but fails to pay the same within a period of six months then the imprisonment may extend to 7 years where the amount exceeds ₹ 200lacs.

## Sec 78B–Transition Provision

1) Where in any case,—

(a) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and no notice has been served under sub-section (1) of section 73 or under the proviso thereto, before 14th May 2015 (the date on which the Finance Bill, 2015 received the assent of the President) or

(b) service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded and a notice has been served under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73, before 14th May 2015,then, in respect of such cases, the provisions of section 76 or section 78, as the case may be, as amended by the Finance Act, 2015 shall be applicable.

(2) In cases where show cause notice has been issued under sub-section (1) of section 73 or under the proviso thereto, but no order has been passed under sub-section (2) of section 73 before 14th May 2015, the period of thirty days for the purpose of closure of proceedings on the payment of service tax and interest under clause (i) of the proviso to sub-section (1) of section 76 or on the payment of service tax, interest and penalty under clause (i) of the second proviso to sub-section (1) of section 78, shall be counted from 14th May 2015.

## Sec 90. – Cognizance of Offences

If the assessee collects any amount as service tax but fails to pay the same within a period of six months where amount exceeds ₹ 200 lakh rupees, then the offence shall be cognizable.

## Sec 91. – Power to arrest

1. If the Principal Commissioner of Central Excise or Commissioner of Central Excise has reason to believe that any person has collected but failed to pay service tax exceeding ₹ 200 lakhs he may, by general or special order, authorise any officer of Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person :

2. Where a person is arrested for any cognizable offence, every officer authorized to arrest a person shall, inform such person of the grounds of arrest and produce him before a magistrate within twenty-four hours.

3. All arrests under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 relating to arrests.

Cleartrip Pvt. Ltd. Mumbai & Others Vs. Union of India, 2016-TIOL-863-HC-MUM-ST: The High Court held that any recovery of tax by coercive measures is straightway not permissible unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, adjudication thereof by a reasoned order and protective remedies such as appeals.

It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. Without completing the process of investigation, no arrest could be permissible.

# Other Miscellaneous Provisions

## Special audit under Service Tax

Section 72A empowers the Principal Commissioner/ Commissioner of Central Excise to direct any person liable to pay service tax to get his accounts audited by a chartered accountant or cost accountant nominated by him if he has reasons to believe that such person-

(i) has failed to declare or determine the value of a taxable service correctly; or

(ii) has availed & utilized CENVAT Credit

(a) which is not within the normal limits having regard to the nature of taxable service provided, the extent of capital goods used or the type of inputs or input services used, or any other relevant factors as he may deem appropriate; or

(b) by means of fraud, collusion, or any willful misstatement or suppression of facts; or

(iii) has operations spread out in multiple locations and it is not possible or practicable to obtain a true and complete picture of his accounts from the registered premises falling under the jurisdiction of the said commissioner.

- Such CA or CWA shall submit a report duly signed & certified to the said Commissioner within a specified period mentioning therein specified particulars.
- The Commissioner is empowered to order for such audit irrespective of the facts that the accounts of such person have been audited under any other law for the time being in force.
- The Commissioner shall give an opportunity of being heard to such person in respect of any material gathered on the basis of the audit and proposed to be utilized in any proceedings under the provisions of the Act.

## Rectification of Mistake (Section 74)

As per sec 74 of the Act, the prescribed officer can rectify the order if there is any mistake apparent from record. Rectification order can only be passed by the officer who has passed the order. Rectification order can be passed within 2 years from the date of original order. However, if the issue in appeal or has been settled no rectification of the same can be done.

## Power to Search Premises (Section 82)

If the Joint Commissioner has reason to believe that any document or book or things, which in his opinion would be useful for or relevant to any proceedings under the Act are secreted in any place, he may authorize any Superintendent of Central Excise to search and seize such documents / books / things or commissioner may himself do it.

Section 82(1) is amended along with Section 12F(1) of the Central Excise Act 1944, whereby the Joint Commissioner or Additional Commissioner or any other officer notified by the Board can authorize any Central Excise Officer to search and seize.

## Best Judgement Assessment (Section 72)

Section 72 of the Act authorizes the Central Excise Officer to make such assessment after allowing the assessee to represent his case, where the assessee has failed to make service tax returns or assess the tax properly. Thus in case where the assessee fail to assess tax properly or fail to furnish return itself they could face the risk of a best judgment assessment.

There are no revisionary powers with Commissioner. However, the Commissioner may on his own call for and examine the records of any proceeding in which order is passed by an officer subordinate to him and in case he is not satisfied with the decision, he shall direct such authority or any central excise officer to apply to Commissioner (Appeals) for determination of such point arising out of the decision or order as the case may be.

## Application of Certain Provisions of Act 1 of 1944

Section 83 is amended whereby following additional provisions of Central Excise Act, 1944 are made applicable to Service Tax.

| Section of the CE Act, 1944 | Particulars |
|---|---|
| 31 | Settlement Commission |
| 32 | |
| 32A to 32P | |
| 35EE | Revision by Central Government |

## Other changes

### 1. Advance Ruling

Section 96C(2)(e) is amended whereby Advance Ruling can also be sought for admissibility of credit of duty or tax in terms of CENVAT Credit Rules, 2004.

"Resident private limited company" has been notified as class of persons under section 96A(b)(iii) of the Finance Act, 1994 who can make application for advance ruling.

W.e.f. 1st March, 2015 benefit of advance ruling has been extended to residential firm.

### 2. Retrospective exemption to "management, maintenance or repairs services"

Section 97 provides that no service tax shall be levied or collected in respect of management, maintenance or repair of roads, during the period on and from the 16th day of June, 2005 to the 26th day of July, 2009 (both days inclusive).

Section 98 provides that no service tax shall be levied or collected in respect of management, maintenance or repair of non-commercial Government buildings, during the period on and from the 16th day of June, 2005 till the date on which section 66B comes into force.

Consequently, refund shall be granted for service tax levied during aforesaid period which otherwise would not have been so collected if the said exemption was in force at all material times.

The claim for refund is to be made within 6 months from 28th May 2012.

### 3. Retrospective benefit for services rendered to developer/unit of SEZ

Rule 6(6A) provides that provision of Rule 6(1) to Rule 6(4) are not applicable in case the taxable services are provided without payment of service tax to a developer/unit of SEZ for their authorized operations. The said amendment is granted retrospective effect w.e.f. 10th February, 2006.

*Hon'ble Bangalore CESTAT in the case of Sobha Developers Ltd. Vs CCE-LTU, Bangalore (2011) TIOL 1170*has held that Rule 6(1) of CCR, 2004 is not applicable in respect of services supplied to SEZ Units/Developers. Exemption available for maintaining of separate account is available only for export of goods to SEZ developer under Rule 6(6) of Cenvat Credit Rules, 2004. Export of Service Rules, 2005 specifically

provides that export of service means export of service outside India and SEZ developer is not covered in it. There is a specific exemption Notification No. 4/2004-S.T. dated 31.3.2004 which exempted the taxable service provided in relation to various operations in SEZ and received by a developer or a unit of SEZ. The very fact that the Notification No. 4/2004 issued clearly shows that wherever the notification exempts goods or provides specific concessions, provisions have been made in the relevant enactment. The fact that the Rule 6 covers export of goods to SEZ also supports this view. The services are allowed to be provided to SEZ units/ developer subject to conditions which are required to be fulfilled by SEZ developer/ unit. This is similar to erstwhile Chapter X Procedure in Central Excise Rules, 1944. The Notification No. 4/2004-S.T. dated 31.3.2004 is a conditional exemption and therefore, demand / restriction under Rule 6 of Cenvat Credit Rules, 2004 would not apply.

However, while granting the relief, in Para 16, the Hon'ble CESTAT declined to give retrospective effect to the amendment of insertion of Rule 6(6A) *vide* Notification No.3/2011-CE (NT) w.e.f. 1st March, 2011.

## 4. Restoration of certain exemptions withdrawn last year for projects, contracts in respect of which were entered into before withdrawal of the exemption.

(A) Exemption from Service Tax on services provided to the Government, a local authority or a governmental authority by way of construction, erection, etc. of –

(i) a civil structure or any other original works meant predominantly for use other than for commerce, industry, or any other business or profession;

(ii) a structure meant predominantly for use as

(i) an educational,

(ii) a clinical, or

(iii) an art or cultural establishment;

(iii) 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;

was withdrawn with effect from 1.4.2015. The same is being restored for the services provided under a contract which had been entered into prior to 01.03.2015 and on which appropriate stamp duty, where applicable, had been paid prior to that date. The exemption

is being restored till 31.03.2020. [Notification No. 25/2012-ST as amended by notification No. 09/2016-ST dated 1st March, 2016 refers]

The services provided during the period from 01.04.2015 to 29.02.2016 under such contracts are also exempted from service tax by a new section 102 inserted in the Finance Act, 1994.

(B) Exemption from Service Tax on services by way of construction, erection, etc. of original works pertaining to an airport, port was withdrawn with effect from 1.4.2015. The same is being restored for the services provided under a contract which had been entered into prior to 01.03.2015 and on which appropriate stamp duty, where applicable, had been paid prior to that date subject to production of certificate from the Ministry of Civil Aviation or Ministry of Shipping, as the case may be, that the contract had been entered into prior to 01.03.2015. The exemption is being restored till 31.03.2020. [Notification No. 25/2012-ST as amended by notification No. 09/2016- ST dated 1st March, 2016 refers].

The services provided during the period from 01.04.2015 to 29.02.2016 under such contracts are also exempted from service tax by inserting a new section 103 inserted in the Finance Act, 1994.

# Appendix-1
# Possible Common Errors in Service Tax

The errors have been bifurcated into the errors in understanding the concepts, errors in systems and others as under:

## Conceptual

This type of error tends to get accepted over a period of time if no issues arise there from.

1. Services provided outside India being considered as provided in India without reference to Place of Provision of Service Rules, 2012.

2. Services provided in India considered as provided outside India since the service provider is outside India.

3. Services received outside India booked as expenditure and Service Tax not paid.

4. Services, not being liable suffering the tax.

5. Services, which are specified and liable for tax not being considered as taxable and tax not discharged. This is by far the most dangerous. Many a times the associations in their anxiety to pro*vide* relief to their members take a view that the tax is not applicable and make representations. In case the representations fail (which is very often) the members would have to suffer the interest and penalty.

6. Incorrect methodology being adopted for composite services.

7. CENVAT credits (input credit or input services credit) missed out due to lack of knowledge on admissibility/ or clarified wrongly by departmental officers.

8. Input Credits not proportionately reduced for short payment. As such, department has often been seen to raise eligibility issues on the short paid amounts.

9. Credits availed for inputs not used for manufacture of excisable items and non-taxable services.

10. 100% credit taken instead of upto 50% allowed on capital goods.

11. Balance of 50% of credit on capital goods of previous year not taken in the subsequent year.

12. Error in classifying goods as input instead of capital goods.

13. Non-admissible exemptions claimed. (conditions not fulfilled)

14. Credits on differential duty charged by the supplier by way of an invoice not being taken as inputs, not received at that time, when such differential duty is charged.

15. 6% (now 7%) duty not reversed when both common inputs are used in manufacture of products, services, which are leviable to duty and exempt, when no separate accounts are maintained to distinguish usage.

16. Utlilisation for the payment of duty of credits availed in respect of the goods received after the relevant month but before the due date of payment.

17. The value adopted for payment of tax on the services without considering the re-imbursements of related expenditure.

18. Frequent delays in taking the CENVAT credit, necessitating the payment of tax in cash.

19. Inputs removed on payment of duty when actually the credit had not been taken on the receipt of the same materials.

## Systems

The compliance procedures as well as the record- keeping aspects have also been covered as under:

1. The procedure of ensuring that tax credit are examined for their eligibility and then only availed.

2. Having a proper system of ensuring completeness that credits have been taken on all payments for taxable services. Consequently no available credits missed out.

3. The system of double-check on credits to confirm whether short / excess availed.

4. Inquiry of instances of inordinate time gap between the bill date and the credit taken date especially on input services invoices dated after 1.4.2011.

5. The registration number not mentioned on the invoices.

6. The system of raising of invoice much prior to or after the date of service especially during year ends.

7. The absence of a system of recording entry in the job work control register when the capital goods are sent for service jobs.

8. The system of sending and receiving the materials without delivery challans/ documents.

## Compliance Procedures-Omissions

1. The non-declaration by the assessee to the department about the records maintained by the assessee could allow the extended period of limitation being sought to be imposed and a valuable defence being lost.

2. The system to ensure returns are filed on time. The delay in filing of return on a few occasions or beyond a period would make one vulnerable for the departmental verification/ audit.

3. Failure to intimate the Department within 30 days of change in the constitution of the firm or company. Such intimation is to be given by filing ST-1 online by using ACES utility for making amendment in particulars which is given in ST-2 certificate.

4. The system of acting on departmental views/ oral instructions, which are not provided in writing.

# Appendix 2
# Records Maintenance and Others

1. The system of reconciliation of credit figures as per accounts and the figures as per returns not done.

Following are some of the common accounting entries that occur while accounting the service tax related transactions.

| *Sl. No* | *Scenario* | *Relevant Rule* | *First Event* | *Subsequent Events* | *Point of Taxation* | *Accounting Entries* | *Accounting Entries* | *Accounting Entries* | *Note* |
|---|---|---|---|---|---|---|---|---|---|
| 1 | Normal situation (not covered under later rules) | 3(a) | Issue of Invoice | Completion of service or receipt of advance payment | Time of Invoice | By Party A/c | To Service Charges | To Service Tax | |
| | | 3(a) | Completion of service | Invoice issued within 30 days | Time of Invoice | By Party A/c | To Service Charges | To Service Tax | |
| | | *Proviso* to 3(a) | Completion of service | Invoice *not* issued within 30 days | Date of completion of service | By Party A/c | To Service tax | | If amount not determinable at the time of completion of service, then pay the amount, on |

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| | | | | | | | | | provision basis. |
| | | 3(b) and *Explanation* to rule 3 | Receipt of payment or advance | Invoice or completion of service | Time of receipt of payment, *to the extent of such payment* | By Bank A/c (advance) | To Party A/c | To Service Tax | |
| 2 | Continuous supply of service (applicable separately to each event as specified in contract) | *Proviso(i)* to 3(a) &(b) | Issue of Invoice | Completion of service or receipt of advance payment | Time of Invoice | By Party A/c | To Service Charges | To Service Tax | |
| | | *Proviso(i)* to 3(a) &(b) | Completion of service | Invoice issued within 30 days | Time of Invoice | By Party A/c | To Service Charges | To Service Tax | |
| | | *Proviso(i)* to 3(a) &(b) | Completion of service | Invoice *not* issued within 30 days | Date of completion of service | By Party A/c | To Service Tax | how to determine the value of service, based on completion certificate from professionals | |
| 3 | Continuous supply of | *Proviso(i)* to 3(a) | Receipt of payment or | Invoice or completion of | Time of receipt of | By bank A/c | To Party A/c | To service tax | |

| | | | | | | | | | |
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| | service (applicable separately to each events as specified in contract)<br><br>Taxable service provided *before* change in effective rate of service tax | &(b) | advance | service | payment, *to the extent of such payment* | | | | |
| | | 4(a)(i) | Invoice issued and payment received after the change in effective rate | N.A | Date of receipt of payment or date of issuance of invoice, whichever is earlier | By Party A/c | To Service Charges | To Service Tax | or |
| | | 4(a)(ii) | Invoice issued prior to change in effective rate | Payment received after change in effective rate of tax | Date of issue invoice | By Party A/c | To Service Charges | To Service Tax | old rate of tax |
| | | 4(a)(iii) | Payment received before change in effective rate | Invoice issued after change in effective rate of tax | Date of receipt of payment | By Bank A/c | To Party A/c | To Service Tax | old rate of tax |
| 4 | Taxable service provided *after* change in | 4(b)(i) | Invoice issued prior to change in effective rate of tax | Payment received after change in effective rate of tax | Date of receipt of payment | Same as entry for Sl No 7 | new rate | | |

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| | effective rate of service tax | | | | | | | | |
| | | 4(b)(ii) | Invoice issued and payment also received prior to change in effective rate of tax | Taxable service provided | Date of receipt of payment of issuance of invoice, whichever is earlier | | | | |
| | | 4(b)(iii) | Payment received before change in effective rate | Invoice issued after change in effective rate | Date of issuing of Invoice | By Party A/c | To Service Charges | To Service Tax | new rate |
| 5 | New service brought under tax net | 5(a) | Invoice issued and payment received before service became taxable | N.A | No service tax payable | By Party A/c | To Service Charges | | |
| | | 5(b) | Payment received before service became | Invoice issued within 14days of provision of service | No service tax payable | By Party A/c | To Service Charges | | |

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| | | | taxable | | | | | | |
| 6 | Services where tax payable by recipient of service under reverse charge | 7(b) | Receipt of service | Payment made to service provider in advance or within six months of date of invoice of service provider | Date of Payment | By Service Charges A/c | To Party A/c | By Service tax | To bank |
| | | 7(b) and second provision to rule 7 | Receipt of service | Payment not made to service provider within six months of date of invoice of service provide | As per rule 3, 4, 5, or 8 (as applicable) . Interest would be payable. | | | | |
| 7 | Professionals and firms providing specified taxable service | 7(c) | Invoice, completion of service or receipt of payment in any sequence | | Date of receipt of payment | By Bank A/c | To Service Charges | To Service Tax | |

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|---|---|---|---|---|---|---|---|---|---|
| 8 | Service received from associated enterprise when service provider outside India | Second provision to rule 7 | Date of credit in books of accounts of person receiving service | Date of making payment | Date of credit in books of account of person receiving service | By Service Charges A/c | To Party A/c | By party a/c | By Service tax A/c |
| | | Second provision to rule 7 | Date of making payment | Date of credit in books of account of person receiving service | Date of making payment | By Party A/c | To Bank | By Service tax A/c | To bank A/c |
| 9 | Intellectual Property Service (copyright, trade mark, design or patent), where consideration not ascertainable at the time of service | 8 | Receipt of payment or benefit is received by service provider | Invoice issued by service provider | Receipt of payment or benefit is received by service provider | By bank A/c | To Party A/c | To Service Tax | |

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | | 8 | Invoice issued by service provider | Receipt of payment or benefit is received by service provider | Invoice issued by service provider | By Party A/c | To Service Charges | To Service Tax | |
| 10 | Service completed on or before 30-6-2011 | 9 | Issue of Invoice | Receipt of payment | Issue of invoice or date of receipt of payment, at the option of tax payer | | | | |

# Appendix 3
# Steps to be taken by Service Tax Auditor

## 1. Ascertaining scope of the assignment

The auditor should first understand the requirements of the management. The scope of the assignment should be designed by the auditor considering the requirement. This is to avoid a scenario where the client perceives the audit effort in a different way from the one it actually is. This is quite common in the service sector as the concept of service tax audit is new to them as well as the fact that clients are specialists in their respective fields with not much of exposure to subject of accounting or auditing. At times the client may wish a pre-audit or shifting of the responsibility of compliance on the auditor. Further, many a time, assessees in the service sector mistake auditing for outsourcing, and expect the auditor to engage in an outsourcing job rather than reporting to the management on compliance related issues. The scope can be ascertained and confirmed by preparing a letter/scope document detailing the areas which would be covered and the aspects which would not be taken up during the audit.

## 2. Knowledge of the business and the activities performed

This is one of the most important aspects to be taken care of by the auditor. The auditor should first of all understand the assessee's business, the services he provides, the activities that are involved at various levels of the organization in providing these services, the customer profile whether sub-contracted or not etc. before the start of his review/verification. For this purpose, he may interview the key management personnel in the organization besides going through major contracts and agreements, organization chart, manuals and publications of the organization. He should also make it a point to visit the premises from where the services are provided, to the extent possible and interview the technicians / engineers who actually perform the tasks (wherever applicable) to get a firsthand information of the nature of the processes involved in case of services of a technical nature.

## 3. Obtaining relevant information for a preliminary review and risk analysis

The auditor should make it a point to understand the financial performance of the entity in the recent past as well as during the audit period. Apart from analyzing the same, it would also help in devising his procedures accordingly. He/she should also make it a point to perform a quick review of the concerned records like the service tax returns, CENVAT bills, invoices and

agreements with major clients'/ customers so that the risk arising from non-compliance can be assessed. The following aspects assume significance:

- Review of the past-audited financial statements for understanding the past financial performance in terms of incomes, expenses, receipts and payments apart from accounting policies and nature of investments.
- Review of the ledgers for the period under audit to check the income and expenditure pattern besides understanding the customer profile and the pattern of billing
- Review of the CENVAT invoices, agreements with major customers, service bills raised on customers by the assessee, Excise invoices if any raised by the assessee, review of the fixed asset registers to form an idea as to record keeping and compliance with the law.
- The auditor should have a grip on the organizational structure of the assessee with the assignment of responsibilities along with the associated internal controls. For this he would be required to use an Internal Control Questionnaire which would document the areas where the controls are sought to be tested. He should also specifically address the issue as to the internal reporting framework and MIS in his questionnaire so that the functional linkages can be checked. Wherever possible, the auditor could take copies of the organizational chart and manuals for his permanent audit file.

The auditor would have to document his findings so that he can effectively move on to the next stage. For this purpose, he/she may use an assessee profile which would consist of all relevant information needed for a desk review. The assessee profile should be drawn up in such a way that apart from financial indicators, even the nonfinancial indicators like existence of branches, manner of providing services etc. are also reflected. This could form part of the permanent audit file to be used even in subsequent audits.

## 4. Desk review of the information obtained and preliminary meeting

The auditor, on the basis of his/her findings at the previous stage, should carry out a desk review of the information available with him to arrive at proper conclusions as far as the possible risk levels involved, are concerned. The desk review should ideally indicate to the auditor the level of checking required and the areas he should concentrate on in order to arrive at proper conclusions at the end of the audit. On the basis of the review, he should document the risk level prevalent in the audit. These days, it is always preferable for the auditor to spend at least 20% of his time in planning the audit after getting the idea of the process and people involved in the client's organization to enhance his effectiveness.

Once this has been done, he should identify the audit team that would take up the task and discuss the preliminary findings with the members of the team to apprise them of the likely issues that could crop up during the audit apart from explaining the impact the legal provisions would have on the assessee's business and his activities.

## 5. Devising the audit programme for carrying out compliance and substantive tests

The audit plan should basically aim at performing the audit with maximum efficiency possible under the circumstances. This is possible only where the audit team is able to address contentious and core issues within a limited time frame. The auditor should devise a proper audit plan only after carrying out a desk review so that the same would be more effective than a program which is common to all audits irrespective of the differences in services, related activities and the risk levels involved. This would enable the auditor to concentrate on key areas which would be relevant to arrive at proper conclusions at the end of the audit. The audit check list should indicate the areas to be covered and the individuals who are supposed to take it up. (See at end of topic)

## 6. Documentation and proper supervision of audit effort

The auditor should ensure that the audit findings and the explanations given from the assessee are documented properly by his audit team. A standardized pattern may also be followed to facilitate easy reading of the observations. The team should ideally consist of individuals at various stages of a learning curve. The team can consist of three members with one of the members being a senior with sufficient experience and two juniors. The responsibility of supervising the team on a daily basis would be with the senior and the entire audit effort would have to be supervised at regular intervals by the qualified professional/partner. The audit findings should be discussed at periodic intervals (if not on daily basis) with the executive designated from the assessee's side so as to ensure assessee's cooperation. This would also ensure that the audit is headed along the right path with every likelihood of achieving its intended objectives at the conclusion stage.

## 7. Formulation of the draft report and discussions with the management

Once the audit has been completed, the draft report containing the draft of the observations should be formulated and a copy is sent to the management. This would then be followed by a discussion of the points in order to ascertain the future course of action to be taken, which should also be documented. The report should make it clear as to whether the assessee has agreed to his/her findings or disputed the same. The auditor could come up with valuable

suggestions here in order to secure effective compliance with the law and to avoid pitfalls in future. This discussion is critical for the acceptance of the observation and its correction.

## 8. Finalizing the draft and ensuring audit follow-up

Once the draft has been prepared, the points discussed with the management and future course of action ascertained, the final report is to be sent with all the relevant details like the observations, the reply from the assessee's side, the corrective action taken up by the assessee, the course of action which is to be taken in the future. The auditor's responsibility does not end here and he would have to ensure proper follow up by going through the steps taken by the assessee for the purpose of ensuring compliance with the law.

# Appendix 4
# Landmark Judgments in Service Tax

## Levy of Service Tax:

1. Madurai District Central Co-operative Bank Ltd. V. Third Income-tax Officer, Madurai1975 AIR 2016, 1976 SCR (1) 136

The Apex Court has held that Parliament is competent to introduce a charging provision in a Finance Act. In the said judgment, it had been further held that even an additional charge (surcharge) can be levied by Finance Act for the purposes of the Union. Thus, the levy of a tax is totally in the hands of the legislature and it can do it for public good.

2. All India Federation of Tax Practitioners V. Union of India (UOI) [2007 (7) STR 625(SC)]

Held by the Court that service tax is a value-added tax and is on commercial activities. Further, it was observed that Service tax is leviable only on services provided within the country and is on value addition by rendition of services.

3. Narne Construction P. Ltd. Vs UOI 2013 (29) S.T.R. 3 (S.C.)

Background: The Company was engaged in the promotion of ventures for development of lands into house-sites. The company had undertaken to develop the plots and obtain permissions/approvals of the lay outs. Subsequent to the amounts paid by the purchasers the plots were developed.

Issue: Whether the company was, in the facts and circumstances of the case, offering any "service" to the purchasers within the meaning of the Consumer Protection Act, 1986 so as to make it amenable to the jurisdiction of the fora established under the said Act.

Held: Offer of plots for sale to customers / members with an assurance of development of infrastructure / amenities, lay-out approvals etc. was a ‘service’ under Section 2(1)(o) Consumer Protection Act, 1986.

## Taxable Event:

1. Association of Leasing & Financial Service Companies vs. UOI 2010 (20) STR 417 SC

Financial leasing services– Hire- purchase and equipment leasing - Constitutional validity of Service tax levy - Legislative competence of Parliament to levy Service tax on financial leasing services including equipment leasing and hire-purchase - Article 366(29A) of Constitution of India is essentially sales tax specific and was brought to expand sales tax base by taxing mere delivery on hire purchase as deemed sale - Parliament not divested itself of the power to levy Service tax by said amendment to Constitution - Doctrine of pith and substance applicable and Service tax is a tax on activities - Equipment leasing and hire-purchase finance are activities of long term financing and are facilities/financial services falling within Banking and Other Financial Services - Such services rendered come within the expression "taxable services" as per Section 65(105)(zm) of Finance Act, 1994 - Impugned Service tax is not on material or sale but it is on activity of funding/financing of asset - Impugned tax does not cease to be Service tax nor does it become on hire-purchase/leasing transactions under Article 366(29A) ibid read with Entry 54, List-II merely because finance/interest charges are taken into account for valuation purpose and merely because Service tax is imposed on financial services with reference to hiring/interest charges - State Legislature competent to impose tax on sale by legislation relatable to Entry 54 of List-II of Seventh Schedule to the Constitution and tax on aspect of services not being relatable to any entry in the State List, is within the legislative competence of Parliament under Article 248 ibid read with Entry 97 of List-I of Seventh Schedule - Articles 248 and 366(29A) ibid - Sections 65(12) and 65(105)(zm) ibid. [paras 18, 29, 30, 32, 37, 39, 40]

Banking and Other Financial Services– Hire- purchase and lease - Funding or financing by Non-Banking Financial Companies (NBFCs) by giving loans, or equipment leasing or hire-purchase finance falls in the category of financial services and such activity is in relation to the hire-purchase or lease transaction - Elements of finance lease or loan transaction different from those in equipment leasing/hire-purchase agreements between owner (lessor) and hirer (lessee) - Service tax levy intended to tax financial facilities extended to customers by the NBFCs under Section 66 of Finance Act, 1994 as they come under Banking and Other Financial Services under Section 65(12) ibid -Finance lease and hire-purchase finance squarely come under the expression "financial leasing services" in Section 65(12) ibid - Such services rendered come within the expression "taxable services" as per Section 65(105)(zm) of Finance Act, 1994 - Sections 65(12) and 65(105)(zm) ibid. [paras 20, 21, 37]

Banking and Other Financial Services - Equipment leasing and hire- purchase finance -

Circulars issued by Reserve Bank of India show that equipment leasing and hire-purchase are activities undertaken as business by Non-Banking Financial Companies (NBFCs) which are regulated as para-banking activities by the RBI - Activities supra are financing activities encompassed under Section 45-I(c)(i) of RBI Act, 1934 and constitute "rendition of services to its customer" which is the taxable event under Section 65(105)(zm) of Finance Act, 1994 - Activities of equipment leasing and hire-purchase finance undertaken by NBFCs are facilities extended to customers and they are financial services rendered by NBFCs falling within "banking and other financial services" - Section 45-I(c)(i) of RBI Act, 1934 - Sections 65(12) and 65(105)(zm) of Finance Act, 1994. [Para 18]

Valuation - Financial leasing and hire purchase - Lessor merely finances the equipment/asset which the lessee is free to select, order, take delivery and maintain - Lessor arranges and accepts the invoice from the vendor and pays him - Amount received as principal is not the consideration for services rendered - Income earned by lessor by way of finance/ interest charges in addition to the management fees or documentation charges, etc. - Such charges treatable as consideration for services and the income constitutes the value of taxable services on which Service tax is payable - Exemption from Service tax to financial leasing services including equipment leasing and hire-purchase on taxable value comprising of 90% of the amount representing as interest provided under Notification No. 4/2006-S.T. - Service tax payable only on 10% of interest portion - Section 67 of Finance Act, 1994. [Paras 32, 37]

Service v. sale - Equipment leasing and hire purchase - Leased assets required to be shown as "receivables" and not as fixed assets - Equipment leasing and hire-purchase finance are financial facilities and Service tax levied on these services as taxable services - Service tax on said activities is not a tax on material or sale - Impugned Service tax different and distinct from tax on sale of goods under Entry 54 List-II of the VII Schedule to the Constitution - Sections 65(12) and 65(105)(m) of Finance Act, 1994. [para 19]

Taxable event - Service tax - Rendition of service is the taxable event for Service tax - Section 66 of Finance Act, 1994. [para 19]

Banking and Other Financial Services - Scope of - Funding activity undertaken by financing party in the form of loan or equipment leasing or hire-purchase financing, exigible to Service tax if such activity falls in the category of Banking and Other Financial Services under Section 65(12) of Finance Act, 1994. [para 20]

Leasing and hire purchase - Service tax v. Sales tax - Financing transaction and equipment leasing/hire-purchase transaction are two different and distinct transactions - Financing transaction exigible to Service tax under Section 66 of Finance Act, 1994 whereas the latter exigible to local sales tax/VAT - Section 66 ibid. [para 20]

Service tax and Sales tax - Nature and character of - Service tax is a tax on activity whereas Sales tax is a tax on sale of a thing or goods - Value of taxable service is not determinative of character of levy - Sections 66 and 67 of Finance Act, 1994. [paras 22, 39]

Constitution of India - Interpretation of taxing entries - Entry 97 of List-I with Article 246(1) of Constitution of India confers exclusive power first, to make laws in respect of matters specified in Entries 1 to 96 in List-I - Secondly, it confers residuary power of making laws by Entry 97 - Article 248 ibid not provides for any express powers of Parliament but only for its residuary power - Article 248 adds nothing to the power conferred by Article 246(1) ibid read with Entry 97, List-I - Entry 97, List-I which confers residuary powers on Parliament provides "any other matter not enumerated in List-II and List-III including any tax not mentioned in either of those lists" - Word "other" is important and it means "any subject of legislation other than the subject mentioned in Entries 1-96" - Articles 246 and 248 ibid. [para 36]

Interpretation of statutes - Wide interpretation, exception thereto - Principle that legislative entries must be given the widest interpretation is subject to the exception that where the entries use legal terms, they must be given their legal meaning. [para 23]

Words and phrases - Hire purchase and equipment leasing - In the bailment termed "hire" bailee receives both possession of the chattel and the right to use it in return for remuneration- Equipment leasing is long term financing which helps the borrower to raise funds without outright payment in the first instance. [para 21]

Words and phrases - Finance lease and operating lease - A finance lease transfers all the risks and rewards incidental to ownership, even though the title may or may not be eventually transferred to the lessee - Lessee could use the asset for its entire economic life and thereby acquires risks and rewards incidental to the ownership of such assets in financial lease - Finance lease is a financial loan from the lessor to the lessee - Tax-based financial lease, a leverage lease and an operating lease are different types of financial leases - Operating lease is a lease other than the finance lease. [paras 20, 32]

2. CCE&C, Vadodara-II Vs Schott Glass India Pvt. Ltd. [2009] 14 STR 146 (Guj.)

The taxable event in relation to service tax is admittedly the rendering of taxable service.

3. Delhi Chit Fund Association vs UOI (2013-TIOL-331-HC-DEL-ST) [2013 (30) S.T.R. 347 (Del.)]

Background: The petitioner was an association of chit fund companies based in Delhi. The said association had filed a writ petition before the High Court of Delhi to quash notification no.26/2012-ST[post negative list] in so far as it seeks to subject the activities of business chit

fund companies to service tax to the extent of 70% of the consideration received for the services. Contending that there is no question of exempting a part of the consideration received for the services in chit fund business when the law provides that such services are not taxable at all in the first place.

Issue: Whether the services rendered in connection with a chit business are taxable services or not.

Decision: H'ble High Court of Delhi allowed the writ

(a) Quashing Sl .No. 8 of notification No.26/2012-ST dated 20-6-2012.

(b) In a chit business, the subscription is tendered in any one of the forms of 'money' as defined in section 65B(33). It would, therefore, be a transaction in money. So considered, the transaction would fall within the exclusionary part of the definition of the word 'service' as being merely a transaction in money.

(c) The services rendered by the foreman of the chit business for which a separate consideration is charged, not being an activity of the nature of/ relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged, would be out of the clutches of the definition.

## Rate & Payment of Service Tax:

1. Commissioner Vs Advantage Media Consultant- 2009 (14) S.T.R. J49 (SC) Commissioner Vs Maruti Udyog Ltd. 2002(141) ELT 3 (SC)

Receipts to be taken as cum-duty value when service tax is not paid separately by customer.

2. Tempest Advertising (P.) Ltd. Vs CCE&C, Hyderabad-II [2007] 5 STRJ 312 (CESTAT-Bangalore)

Liability to pay service tax only on the value of taxable services calculated as per the provisions of the Finance Act, 1994 and not on the amount reflected in Income Tax Returns or any other statute.

3. Delhi Chartered Accountants Society (Regd) vs UOI and Ors(2013-TIOL-81-HC-Del-ST), 2013 (29) S.T.R. 461 (Del.)

Background: Service tax authorities rely on two circulars issued by TRU Circular no.154/5/2012-ST dated 28.3.2012 and 158/9/2012-ST dated 8.5.2012 which say in case of 8

specified services[including chartered accountants services] provided by individuals or proprietary firms or partnership firms and in case of services wherein tax is required to be paid on reverse charge by service receiver, if payment is received or made, as the case maybe, on or after 1st April, 2012, the rate of service tax applicable will be 12% and not 10%.

Issue: The rate of service tax for the services provided by the Chartered Accountants prior to 1.4.2012 and the invoice also issued prior to 1.4.2012 but payment received after 1.4.2012.

Decision: It was held that where services of Chartered Accountants were actually rendered before 1.4.2012 and the invoices also issued before that date, but the payment was received after that date, the rate of service tax would be 10% and not 12%.

In Vistar Construction (P) Ltd Vs UoI (2013-TIOL-73-HC-DEL-ST) rate of tax applicable is the one prevailing at the time of providing the service, not the receipt of payment. Therefore, the taxable event, in so far as service tax is concerned, is the rendition of the service. Similarly held in CST Vs Consulting Engineering Services (I) Pvt Ltd (2013-TIOL-60-HC-DEL-ST)

4. Nagarjuna Construction Co. Ltd. vs. Government of India [2012-TIOL-107-SC-ST]. 2012 (28) S.T.R. 561 (S.C.)

Background: The Appellant executed various contracts which were in the nature of composite construction contracts. Prior to 01-06-2007 Appellant had paid service tax under the following categories of Erection and commissioning, Commercial construction and Construction of residential complex service. While paying the service tax (prior to 01-06-2007) under the above- mentioned categories, the appellant had opted to claim the benefit of Notification No. 1/2006-S.T, paying service tax only on 33% of the total value, subject to the condition of non-availment of CENVAT Credit on Inputs, capital goods and input services.

Issue: With effect from 01-06-2007, the Central Government introduced the works contract (Composition Scheme for payment of Service Tax) Rules, 2007. Under this scheme an option of composition was offered at 2% of the gross amount charged on the works contract. The appellant opted to pay service tax under the new scheme. The issue was whether the Appellant was eligible to convert to the new scheme and pay tax at the rate specified in the new scheme.

Held: The Supreme Court held that in respect of works contract, where service tax had already been paid, no option to pay service tax under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007 [“the Composition Scheme Rules”] can be exercised. Assessee who wants to avail of benefit of payment of service tax as per Rule3 of the Composition Scheme Rules must opt to so do before making payment of service tax in

respect of said works contract. Option so exercised would apply to entire works contract, and assessee is not permitted to change option till said works contract is completed.

## Obligation to pay - Liability of Service tax: Service Provider/ Service Recipient:

1. Pearey Lal Bhawan Association Vs M/s Satya Developers Pvt. Ltd. (2011-TIOL-114-HC-DEL)

Tax liability - Renting of immovable property for business purposes - Maintenance of leased premises by lessor - Agreement with lessee providing that lessor was liable for taxes, entered before 1-6-2007 when Finance Act, 1994 was amended to introduce levy of Service tax - HELD : Service tax was a species of levy which parties had not envisioned while entering into their arrangement - Object of levy of tax is service, and levy is indirect, meaning thereby that user has to bear it, by including it in cost of service - In that view, lessee was liable to pay the tax - This position found to be supported by Sections 12A of Central Excise Act, 1944, prescribing that provider of goods/service had to indicate quantum of tax in invoice, Section 12B ibid thereof prescribing that seller is deemed to have passed on full incidence of duty/tax to buyer, and Section 64A of Sale of Goods Act, 1930 prescribing that in case of imposition of tax after making of a contract, seller is entitled to be paid such tax. [paras 14, 15, 16, 17, 18]

2. Thermal Contractors Association vs. Director, Rajya Vidyut Utpadan Limited (2006-4-STR-18-Allhabad HC)

Tax liability - Service Tax - Payer of service tax though entitled to realise service tax from its customers, yet it all depends upon contracts entered into between parties - Service provider free to charge or not to charge amount of service tax from its customers and to pay it from its own pocket - Prayer, that petitioner's association is entitled to realise amount of service tax from its customers, the respondent No. 2 is obliged to pay service tax, cannot be acceded to in absence of any contract having been filed along with petition - Section 68 of Finance Act, 1994 as amended by Finance Act, 1997 read with Rule 2(1)(d)(4) of Service Tax Rules, 1994. [para 5]

3. Devyani International Ltd. vs. UOI (2011-22-STR-262-Kar HC)

Writ Petition - Maintainability and locus standi - Service tax - Renting of immovable property service - Challenge to levy - Locus standi to challenge levy - Petitioner a tenant, a lessee of the schedule premises - Tenant not a service provider - Privity of contract between landlord and tenant - Whether landlord collects rent/tax and pays to Revenue or pays out of rent amount without passing liability, a different aspect - Petitioner not a service provider hence having no locus standi to challenge imposition of Service tax on renting - Petitions disposed of as not maintainable - Section 65(105)(zzzz) of Finance Act, 1994. [para 3]

## Valuation

1. Aggarwal Colour Advance Photo System vs. Commr. of C. Ex., Bhopal 2011 (23) S.T.R. 608 (TRI. - LB)

Valuation (Service Tax) - Photography - Papers, consumables and chemicals used to bring photograph into existence - Recipient of photograph does not go to buy these items, does not make separate payments for them - He only expects photograph - In that view, fact that Notification No. 12/2003-S.T. granted exemption of value of goods/materials used in production of photograph found to be immaterial, and value of photograph held to include all elements used to bring it to deliverable state - Service tax found to be leviable on gross value of photographic service, and more so as it is not a composite contract of sale of goods and service - In that view, Supreme Court decision in Surabhi Color Lab followed in Technical Color Lab departed from, as it was found to be based purely on incorrect clarification issued by officer of CBEC, which furthermore, could not be relied on in law - Apex Court decision in C.K. Jidheesh [2006 (1) S.T.R. 3 (S.C.)] followed, especially as several High Courts had given similar opinions - Section 67 of Finance Act, 1994. [paras 21, 23]

Valuation (Service Tax) - Consideration for services - Agreement between parties to deal with it - HELD : Such agreement does not affect incidence of Service tax - It is insignificant in law as to the manner recipient and provider of taxable services mutually arrange their affairs for their benefit to deal with consideration - Section 67 of Finance Act, 1994. [para 17]

Valuation (Service Tax) - Cost to make services reach consumer - All of them are includible in valuation of services, since Service tax is destination based consumption tax - Section 67 of Finance Act, 1994. [para 17]

Exemption (Service Tax) - Photograph - Goods/materials sold by service provider (photographer) to recipient - HELD : Term 'sold' in Notification No. 12/2003-S.T., has to be read with 'sale' in Central Excise Act, 1944 - It does not include 'deemed sale' - in that view, only value of goods/materials sold separately by service provider (photographer) are covered by Notification ibid - Burden to prove such sale, value of goods/materials with specific documents, and fulfilment of condition of notification that credit of duty has not been availed, is on assessee. [paras 17, 18, 19, 22]

2. Intercontinental Consultants And Technocrats Pvt Ltd vs. UOI & Anr [2012-TIOL-966- HC-Del-ST]

Background: Assessee rendered consultancy services and receives payments not only for its service but is also reimbursed expenses incurred by it such as air travel, hotel stay, etc.

Issue: It was not paying any service tax in respect of the expenses reimbursed by the clients. Whether for valuation reimbursements is includible in assessable value.

Held: H'ble High Court of Delhi held that:

(a) In the valuation of the taxable service, nothing more and nothing less than the consideration paid as quid pro quo for the service can be brought to charge.

(b) Rule 5 of Valuation Rules, purports to tax not what is due from the service provider under the charging Section, but it seeks to extract something more from him by including in the valuation of the taxable service the other expenditure and costs which are incurred by the service provider "in the course of providing taxable service".

(c) What is brought to charge under the relevant Sections is only the consideration for the taxable service. By including the expenditure and costs, Rule 5(1) goes far beyond the charging provisions and cannot be upheld.

## Export of Services:

1. ABB India Ltd. Vs. CST (2008) 17 STT 233 (CESTAT)

Question of delivery is decided leniently and treated as export of service for booking sales orders in India for company situated in Singapore

2. Lenovo (India) Pvt. Ltd. v. CCE (Appeals-II) & Ors. 2009 – TIOL – 911 –CESTAT – DEL

Rebate - Export of service - Rebate of Service tax paid on commission received under Business Auxiliary Services - Impugned order rejecting rebate on the ground that promotion of sale of products undertaken in India and exemption under Export of Services Rules, 2005 not applicable - Services provided to person outside India on receipt of sales commission - Services of procurement of order and forwarding the same to principal in Singapore - Identical issue settled in favour of assessee in 2009 (13) S.T.R. 65 (Tribunal) by holding that recipient of service being overseas company, service not delivered in India - Impugned order set aside - Rule 5 ibid. [paras 2, 5.1, 5.2, 5.3]

3. Microsoft Corporation (India) Private Ltd. vs. Commissioner of Service Tax & Anr. (AIT -2009- 418 Delhi HC)

Stay/Dispensation of pre-deposit - Export of Services - Business Auxiliary Services - Technical support services including marketing provided to Singapore subsidiary by Indian subsidiary of

holding company in U.S.A. and commission received therefor - Impugned Tribunal order directing pre-deposit of ₹70 crores - Principles applicable while dealing with stay application as per Supreme Court judgments considered and various points discussed in detail by Tribunal while taking prima facie view - Singapore subsidiary provides services to petitioner and vice versa - Indian consumers pay for services which go out to holding company and part of it comes back to India in the shape of commission - Economic and commercial activities also take place in India -Both sides have arguable case and final determination to be made only by Tribunal - All necessary parameters kept in mind by Tribunal and equitable order passed - Not a fit case to exercise writ jurisdiction - Petitioner granted four weeks' time to make deposit as directed by Tribunal - Section 35F of Central Excise Act, 1944 as applicable to Service tax *vide* Section 83 of Finance Act, 1994. [paras 1, 11, 13, 15, 16]

Appellate Tribunal's order - Equitable order - Quantum of pre-deposit - Tribunal in exercise of discretion, directing pre-deposit of ₹70 crores and stay of balance amount of around ₹300 crores granted - Supreme Court judgments laying down principles to be kept in mind while considering stay applications, considered by Tribunal - Reliance by Tribunal on Supreme Court ruling in 2009 (237) E.L.T. 3 (S.C.) holding that merely on showing prima facie case, interim order of protection not to be passed, sustainable - Detailed discussion by Tribunal on various points while taking prima facie view - Necessary parameters for deciding applications for stay/waiver of pre-deposit kept in mind by Tribunal - Impugned Tribunal order is an equitable order and sustainable - Section 86 of Finance Act, 1994. [paras 13, 14, 15, 16]

There are recent decisions where held that procuring orders for foreign company is export of services. Recently held in Microsoft case (2014-TIOL-1964-CESTAT-DEL) held that Service provided to Principal situated in Singapore to market products in India is an Export of Service and not liable to Service Tax i.e. services were being exported in terms of Export of Services Rules, 2005 and not liable to Service Tax.

4. Commr. Of C. Ex., Mysore vs. Chamundi Textiles (Silk mills) Ltd. 2010 (258) E.L.T. 141 (Tri. - Bang.)

Refund - Cenvat credit of Service tax - Refund of Cenvat credit of Service tax on input services used in export goods - Not necessary that refund should be filed in same month when credit taken - There is a natural time lag between the two - After input services are used, goods have to be exported and then refund filed - If credit is admissible in a particular month, it will be admissible in preceding and succeeding months also - CBEC has prescribed time-limit of one year for filing claims on quarterly basis - Exporter can claim refund after nine months, which will obviously not relate to export of goods in same month - Not the case of Revenue that assessee had accumulated credit which they could have used for their DTA clearances - Ratio of export turnover is relevant only in case of substantial clearances to DTA - Rule 5 of Cenvat Credit Rules, 2004. [para 4]

Cenvat credit of Service tax - Input services - Credit of Service tax paid on consultancy services received for acquisition of business outside India - Company yet to be acquired, and not known whether any company would be acquired or not - Absence of details of consultancy service, service not related to business activity - Cenvat credit claim fairly given up - Rule 2(l) of Cenvat Credit Rules, 2004. [para 5]

Cenvat credit of Service tax - Customs House Agent service - Exporter is entitled to take credit on Service tax - Rules 2(l) and 3 of Cenvat Credit Rules, 2004. [para 7]

Cenvat credit of Service tax - Authorised Service Station service - Servicing of car - Exporter is entitled to take credit of Service tax paid on it - Rules 2(l) and 3 of Cenvat Credit Rules, 2004. [para 8]

Cenvat credit of Service tax - Documents for availing credit - Invoices relating to export of services - In absence of specific evidence as to services on which credit was inadmissible, it could not be denied to assessee - Rule 9 of Cenvat Credit Rules, 2004. [para 9]

Cenvat credit - Goods supplied to SEZ - Credit can be taken of duty paid on them - Rule 3 of Cenvat Credit Rules, 2004. [para 10]

Appeal by Department - Grounds - Grounds not raised in show cause notice, cannot be taken before Tribunal - Section 35B of Central Excise Act, 1944. [para 4]

Cenvat credit - Availment of - Invoice raised on agent of assessee who had discharged liability which would have otherwise been discharged by them - Assessee could not be denied credit - Rule 9 of Cenvat Credit Rules, 2004. [para 6]

## Import of Service:

### 1. Indian National Ship owners Association (2009) 18 STT 212 BOM HC DB

Import of Services - Liability of recipient - Date of effect - Service tax not leviable under Rule 2(1)(d)(iv) of Service Tax Rules, 1994 on petitioners as impugned demand related to service received by vessels and ships outside India - Person providing service alone regarded as an assessee as per Chapter V of Finance Act, 1994 - Rule 2(1)(d)(iv) ibid cannot be framed as not to carry the purpose of the Chapter V ibid - Services provided to petitioners outside India became taxable service as per Explanation to Section 65(105) ibid but charge being on service provider, petitioners not liable - Law laid down in Laghu Udyog Bharati case [2006 (2) S.T.R. 276 (S.C.)] applicable to Rule 2(1)(d)(iv) ibid - Statutory provision absent before enactment of Section 66A of Finance Act, 1994 - Recipient in India liable to Service tax for service received from abroad only from 18-4-2006 after enactment of Section 66A ibid - Sections 65(105), 66, 66A, 68(2) and 73 ibid - Rule 2(1)(d)(iv) ibid. [paras 16, 17, 18, 19, 20, 21]

Import of Services - Liability of recipient - Rules cannot be made to make service recipient liable when Finance Act, 1994 makes service provider liable - Rule 2(1)(d)(iv) of Service Tax Rules, 1994 is invalid. [para 17]

Demand (Service tax) - Liability of recipient - Demand of Service tax from service recipients based on Notification No. 1/2002-S.T. - Service rendered in Continental Shelf, Exclusive Economic Zone and Territorial Waters of India taxable under notification ibid - Impugned notification not having effect of levying Service tax on service recipients - Demand without authority of law - Section 66 of Finance Act, 1994. [paras 6, 16]

## Cenvat Credit:

1. *ABB LTD. Vs. COMMISSIONER OF C. EX. & S.T., BANGALORE 2009 (15) S.T.R. 23 (Tri. - LB)*

Cenvat credit of Service tax - Input service - Goods Transport Agency service - Outward freight for transportation of final product from place of removal whether an input service - Expression "activities relating to business" covers transportation upto customer's place and word "relating" widens scope - Credit not deniable relying on coverage of outward transportation upto place of removal in inclusive clause - No restriction on "activities relating to business" being related to main or essential activities - All activities relating to business fall under input service - Input service not restricted to services specified after expression "such as" as it is purely illustrative - Transportation of goods to customer's premises is an activity relating to business and credit of Service tax thereon admissible - Rules 2(l) and 3 of Cenvat Credit Rules, 2004. - We also note that transportation of goods to customer's premises is an activity relating to business. It is an integral part of the business of a manufacturer to transport and deliver goods manufactured. If services like advertising, market and research which are undertaken to attract a customer to buy goods of a manufacturer are eligible to credit, services which ensure physical availability of goods to the customer i.e. services for transportation should also be eligible to credit. [paras 1, 3, 4, 12, 13, 14, 15, 25]

Cenvat credit of Service tax - Input service - Outward transportation - No requirement that cost of freight to be included in transaction value of manufactured goods for admissibility of credit of Service tax on outward transportation - Valuation of excisable goods not involved - Valuation and Cenvat credit are independent of each other and have no relevance to each other - Service tax and excise duty being consumption taxes borne by consumer, Service tax levy on transportation will become tax on business if credit denied - Interpretation of "input service" cannot fluctuate with change in definition of "value" under Section 4 or Section 4A of Central Excise Act, 1944 or tariff value under Section 3 ibid - Sections 3, 4 and 4A ibid - Rule 2(l) of Cenvat Credit Rules, 2004. [paras 18, 19, 21, 22]

Cenvat credit of Service tax - Input service - Definition of input service in Rule 2(l) of Cenvat Credit Rules, 2004 having different limbs providing independent benefit - Credit admissible if one limb is satisfied even if others are not satisfied - Rule 2(l) ibid. - To illustrate, input services used in relation to setting up of, modernization, renovation or repairs of a factory will be allowed as credit, even if they are assumed as being an activity relating to business. [para 4]

Cenvat credit of Service tax - Input service - Interpretation of Rule 2(l) of Cenvat Credit Rules, 2004 - Expression "outward transportation" used in inclusive clause by way of abundant caution to avoid dispute based on "means clause" - Transportation within a factory covered by inclusive clause - Freight from depot to customer's premises covered under "service used directly or indirectly or in relation to clearance from place of removal" where depot is place of removal as also from factory to customer's premises - Rule 2(l) ibid. [para 17]

*2. COCA COLA INDIA PVT. LTD. Vs. COMMISSIONER OF C. EX., PUNE-III 2009 (242) E.L.T. 168 (Bom.)*

Interpretation of - Definition of input service using terms "means", "includes" and "such as" - Expression "means" and "includes" exhaustive - Services which may otherwise not be within ambit of definition clause included by use of "includes" and these are made exhaustive by word "means" - Words "such as" illustrative and not exhaustive and refer to services related to business in the context of business - Rule 2(l) of Cenvat Credit Rules, 2004. [paras 23, 24]

Cenvat credit of Service tax - Input service definition - Interpretation of term "business" - Expression "business" is an integrated/continuous activity and not confined or restricted to mere manufacture of product - Activities in relation to business can cover all activities related to functioning of a business - Term "business" cannot be given restricted definition to say that business of manufacturer is to manufacture final products only - "Business" is of wide import in fiscal statutes - Rule 2(l) of Cenvat Credit Rules, 2004. [para 25]

Cenvat credit of Service tax - Input service - Burden of Service tax borne by ultimate consumer and not manufacturer or service provider - Cenvat credit on input stage goods and service admissible as long as connection between such goods and services is established - Any input service that forms part of value of final product should be eligible for Cenvat credit - Rule 2(l) of Cenvat Credit Rules, 2004. [para 34]

Cenvat credit of Service tax - Input service - Definition of input service containing five categories or limbs - Credit admissible if any one of the limbs satisfied even if other limbs are not satisfied - Rule 2(l) of Cenvat Credit Rules, 2004. - To illustrate input services used in relation to setting up, modernization, renovation or repairs of a factory will be allowed as

credit, even if they are assumed as not an activity relating to business as long as they are associated directly or indirectly in relation to manufacture of final products and transportation of final products upto the place of removal. [para 39]

Interpretation of statutes - Cenvat credit of Service tax - Input service definition - Scope of phrase “activity relating to business” widened by words “relating to” - Expression “relating to” widens scope of definition - Use of word “activities” signifies wide import of phrase “activities relating to business” - Qualifying words like “main activities” or “essential activities” not employed in the rule - All and any activity relating to business covered under input service subject to relation between manufacture of final product and the activity - Rule 2(l) of Cenvat Credit Rules, 2004. [paras 26, 27]

Interpretation of statutes - General v. Specific Provision - Principle that specific provision will override general provision not applicable to provision in the nature of concessions or exemptions. [para 41]

*3. Bhushan Power & Steel Ltd. vs. CCE (2008) 10 STR 18 (Tri-Kolkata)*

Service tax on Goods Transport Agency services payable as a recipient of services can be paid by utilisation of Cenvat credit.

*4. CCE vs. Vandana Energy & Steel Pvt. Ltd. (2008) 9 STR 31 (Tri. - Del.)*

Credit taken on the basis of the photocopy of the invoices is inadmissible

*5. M/s Gujarat Ambuja Cements Ltd. vs CCE, Ludhiana AIT-2007-151-CESTAT*

Held that the outward transportation from the factory to the depot is an 'Input Service' and an outward transportation from the factory and from the depot to the premises of the buyer is also an 'Input Service'. It follows that once it is an input service there cannot be any denial of the credit.

6. *Portal India Wireless Solutions P Ltd vs CST, 2012 (27) STR 134 (Kar),* Aviva Global Services (Bang) Pvt. Ltd. vs. Commissioner of ST, Bangalore [2014 (33) S.T.R. 270 (Tri. - Bang.)]

Background: Assessee was a 100% STPI unit engaged in development and export of software.

Issue: Refund was not granted on the ground that assessee was not registered with service tax department.

Held: The High Court also held that registration under Service tax is not a prerequisite for availing credit as per the provisions of law. Hence order passed denying credit on this ground is bad in law and liable to be set aside.

*7. CCE v Cadila Healthcare Ltd [2013-TIOL-12-HC-AHM-ST]*

Background: The taxpayer was a manufacturer of medicines classifiable under chapter 30 of

First Schedule to Central Excise Tariff Act, 1985. The taxpayer availed services of foreign

Agents who were procuring sale orders for the taxpayer.

Issue: The Revenue Authorities were of the view that the foreign agents were acting as commission agents and not involved in sales promotion of the product. Further, according to the definition of 'input services', services of commission agent do not fall under the ambit of 'input services'.

Decision: The HC held that since there was nothing on record to indicate that the commission agents were involved in any sales promotion activities, credit of service tax paid on commission paid to such agents will not be available.

Punjab and Haryana Hon'ble High Court in CCE vs Ambika Overseas 2012 (025) STR 348 (P&H): wherein held that canvassing and procuring orders were in relation to sales promotion and would fall under sales promotion activities. These activities were, thus, included in the definition of input services and the assessee was entitled to benefit of Cenvat credit of service tax. Hence respondent is eligible for Cenvat credit on the commission paid.

*8. Gujarat Ambuja Cements Ltd. 2007 (212) E.L.T. 410 (Tri.-Del.)*

Issue: Up to what stage a manufacturer/consignor can take credit on the service tax paid on goods transport by road?

Held: The Delhi Bench of CESTAT in Gujarat Ambuja Cements Ltd held the view that credit should be allowed only upto the place of removal.

## Exemption vs. Cenvat Credit:

*1. Khyati Tours & Travels versus Commissioner of C. Ex., Ahmedabad 2011 (24) S.T.R. 456 (Tri. - Ahmd.)*

Exemption - Rent-a-cab - Abatement of 60% of Service tax liability claimed by service provider subject to Notification No. 1/2006-S.T. - Benefit denied on the ground of availment of Cenvat

credit along with benefit of abatement - Credit so availed reversed by service provider subsequently - Reversal of Cenvat credit amounts to non-availment of credit and accordingly, benefit under notification ibid, not deniable - Section 93 of Finance Act, 1994. [Order-in-Appeal No. 197/2010(STC)/MM/Commr (A), dated 9-8-2010 followed]. [paras2, 4]

Cenvat credit - Reversal of wrongly availed credit with interest has the effect as if no credit was availed - Rule 6 of Cenvat Credit Rules, 2004. [para 4]

## Service Tax vs. VAT

1. *Imagic Creative Pvt. Ltd. vs. CCT (2008) 9 STR 337 (SC)*

The Supreme Court held that a composite contract [as distinguished from an indivisible contract] for services and sale and accordingly sales tax would not be payable on the value of entire contract but only on the material component.

2. *Idea Mobile Communication. v CCE, Cochin2011-TIOL-71-SC-ST)*

Held that in cases where the dominant intention is to provide services, any incidental supply of goods does not change the dominant nature of the transaction as a service transaction.

The Apex Court has taken the view that the SIM card has no intrinsic sale value and is supplied to customers for providing mobile service to the customers; that the sale of SIM card is merely incidental to the service being provided and only facility is identification of the subscribers, their credit and other details, and it would not be assessable to sales tax.

3. *Bharat Sanchar Nigam Ltd v. Union of India [(2006) 145 STC 91*

There can be a simultaneous levy of two different taxes, namely, sales tax and service tax, on the same transaction, they shall be on different components such as sales tax on the "goods" component and service tax on the "service" component

4. *Kerala Classified Hotels And Resorts Association vs UOI 2013-TIOL-533-HC-KERALA-ST*

Facts: The petitioners in the above writ petitions are challenging the validity of restaurant service and accommodation service relating to levy of service tax on taxable services referred thereunder.

Issue: Whether service tax can be imposed on the service involved during the sale of a product.

Decision: Held necessarily service forms part of sale of goods and State Government alone will have the legislative competence to enact the law imposing a tax on the service element forming part of sale of goods as well. It is declared that sub Clauses (zzzzv) and (zzzzw) to Clause 105 of Section 65 of the Finance Act 1994 as amended by the Finance Act 2011 is beyond the legislative competence of the Parliament as the sub Clauses are covered by Entry 54 and Entry 62 respectively of List II of the Seventh Schedule. If any payments have been made, petitioners are entitled to seek refund of the same.

In UOI vs Kerala Bar Association (2014-TIOL-1913-HC-KERALA-ST) division Bench of Kerala High Court holds States alone have power to impose tax on Hotels and Restaurants.

Exemption:

5. *Share Medical Care Vs. Union of India {2007 (209) ELT 321 –SC}*

Exemption - Even if an applicant does not claim benefit under a particular notification at initial stage, he is not debarred, prohibited or estopped from claiming such benefit at a later stage - Section 25 of Customs Act, 1962. [para 15]

Exemption - Option to choose - If applicant is entitled to benefit under two different Notifications or under two different heads, he can claim more benefit and it is the duty of authorities to grant such benefits if applicant is entitled to such benefit - Section 25 of Customs Act, 1962. [para 16]

6. *IOCL Vs. CCE, VADODARA, {2012-TIOL-04-SC-CX}*

Refund - Aviation fuel supplied to Air India for foreign bound flights which was exempt from payment of excise duty - Proof - Duty paid mistakenly and refund claim filed later on rejected for non-compliance with requirement of Rules and exemption notification - With respect to claim which fell within the period of limitation which was rejected on the ground of non-compliance with mandatory requirements, in the case of very petitioner, the High Court remanded the proceedings before the Revisional Authority for fresh consideration - To the extent the petitioner's refund claim pertained to the period beyond one year from the relevant date, the same would not be maintainable - To the extent the claim is within the period of limitation, the Revisional Authority to re-examine the issue. [paras 8, 10]

Highlights of some other case Laws:

7. *CCEx. V. Bajaj Auto Finance Ltd., [2008] 10 STR 433 (SC)*

Hire-purchase finance different from HP Agreement. It is in the nature of extending finance. Not liable to Tax.

8. *Commissioner of Service Tax vs. Lincoln Helios (India) Ltd. 2011 (23) STR 112 (Kar.)*

Held that excise duty is levied on the aspect of manufacture and service tax is levied on services. Hence, it would not amount to payment of tax twice and assessee would be liable to pay service tax on the value of services.

9. *Umasons Auto Compo Pvt. Ltd. Vs. Commissioner of Central Excise & Customs, Aurangabad [2014 - TIOL – 126 – CESTAT - MUM]*

Service Tax - Reverse Charge liability paid by Service Provider should not be demanded again from Service Recipient

10. *M/s Bhagwati Security Services (Regd.) Versus Union of India [2013 (11) TMI 649]*

The service provider can get the reimbursement of service tax already paid by him, from the service recipient.

The Hon'ble High Court of Allahabad held that Service tax is a statutory liability and is a tax which is required to be collected by service provider from service recipient and thereafter to be deposited with Government treasury within prescribed time. Essentially, law is imposing tax on service recipient and service provider is merely a collecting agency. Therefore, BSNL was directed to reimburse Service tax amount to the Petitioner.

11. *Commissioner of Service Tax Vs. Arvind Mills Ltd. [(2014) 45 taxmann.com 376 (Gujarat)]*

Deputation of employees for limited period on cost-sharing basis does not fall under Manpower Supply Agency's Services.

12. *Commissioner of Income Tax (TDS), Jaipur Vs. M/s. Rajasthan Urban Infrastructure [2013 (8) TMI 12 – RAJASTHAN HIGH COURT]*

No TDS on Service Tax if shown separately

The Hon'ble Rajasthan High Court, in this case held that if as per the terms of the agreement between the payer and the payee, the amount of service tax is to be paid separately and was not included in the fees for professional services or technical services, no TDS is required to be made on the service tax component u/s 194J of the Income Tax Act, 1961.

13. B4U Television Network (I) Pvt. Ltd. Vs. Commissioner of Service Tax, Mumbai [2014-TIOL-884-CESTAT-MUM],

Excess Service tax paid for earlier period can be adjusted against future Service tax liability

The Hon'ble CESTAT, Mumbai held that if the assessee has paid Service tax during a particular period for which they have not provided the service to the client and the said Service tax paid to the Department has been either refunded to the client or not collected, the excess payment of Service tax can be adjusted against future tax liability. The assessee need not require filing refund claim for the excess Service tax so deposited.

14. Gap International Sourcing (India) Pvt. Ltd. Vs. Commissioner of Service Tax [(2014) –TIOL- 465 CESTAT-DEL)]

Services performed in India for a service recipient located abroad will be treated as export of services.

15. Commissioner of Income Tax-III vs. Kaypee Mechanical India (P.) Ltd. [(2014) 45 taxmann.com 363 (Gujarat)]

Where assessee had not collected and deposited Service tax but on being pointed out by the Department, deposited the same along with Interest, it can be treated as expenditure deductible under Section 37 of the Income Tax Act, 1961.

16. *Ahluwalia Contracts (I) Ltd. Vs. Commissioner of Service Tax [2014 (7) TMI 328 - CESTAT NEW DELHI]*

For availing the benefit of abatement notification, it is not necessary to include in the value of taxable services, the value of supplies made free of cost by the service recipient to the service provider.

17. *CST, Delhi Vs. Ms. Shriya Saran, [2014 (7) TMI 78 - CESTAT New Delhi]*

An activity is not liable to Service tax under a pre-existing category when that activity had been brought under Service tax net from a certain date.

18. *Shri Hemant V Deshmukh and Shri Balram V Jat Vs. Commissioner of Central Excise, Goa [2014 (7) TMI 116 - CESTAT Mumbai]*

Payment made on Lump sum basis and not on the basis of supply of labour is not taxable under Manpower recruitment and supply agency service.

19. *Commissioner of Customs, Central Excise & Service Tax vs. Monsanto Manufacturer (P.) Ltd. [(2014) 46 taxmann.com 4 (Allahabad)]*

There is no jurisdiction with Tribunal to pass order on merit when demand is found time barred

20. *CCE, Ludhiana Vs. Nestle India Ltd. [2014 (6) TMI 766 - CESTAT NEW DELHI]*

Testing of samples in India received from foreign sister concerns tantamount to services performed outside India.

21. *Bharat Petroleum Corporation Ltd. and Hindustan Petroleum Corpn. Ltd. Vs. Commissioner of Service tax, Mumbai-I [2014-TIOL-1114-CESTAT-MUM]*

The Appellants are buying CNG from Mahanagar Gas Limited ("MGL") who sells the same on payment of VAT/ Sales Tax and the Appellants in turn sell to its customers on RSP. Therefore, no commission is received by the Appellants from MGL. Further it was held that the profit margin cannot be construed as commission and the Appellants cannot be said to provide any service of BAS to client for marketing of goods.

22. *Commissioner of Central Excise, Madurai Vs. Strategic Engineering (P) Ltd. [(2014) 45 taxmann.com 541 (Madras)]*

No interest and penalty can be levied if Cenvat credit is merely taken but not utilized and is reversed before utilization.

23. *Sachdeva Roadlines Vs. CST, New Delhi [*2014 *(6) TMI 628 - CESTAT NEW DELHI]*

Subsequent reversal of Cenvat credit initially availed would amount to non-availment of credit.

24. *Teknow Overseas (P) Ltd. Vs. Assistant Commissioner of Service Tax (VCES), Delhi [(2014) 45 taxmann.com 542 (Delhi)]*

Courts have no power to extend deadline prescribed under VCES for payment of initial 50% of tax dues.

25. *R.V. Man Power Solution Vs. Commissioner of Customs & Central Excise [(2014) 45 taxmann.com 215 (Uttarakhand)]*

No power under Section 87(b) of the Finance Act to freeze bank accounts of the assessee - At most, money can be claimed from bank itself after final adjudication has been done after quantifying.

26. *Aksh Technologies Ltd. Vs. Commissioner of Central Excise, Jaipur [(2014) 42 taxmann.com 396 (New Delhi – CESTAT)]*

The Hon'ble Tribunal held that when during the relevant time Revenue was of the view that service tax was to be paid on the Impugned input service under reverse charge, credit taken on such input service under the Credit Rules cannot be disputed for the reason that later it was decided that the appellant need not have paid the service tax.

Therefore, it was held that Cenvat credit taken by the appellant is proper and demand for reversing such Cenvat credit is not maintainable.

27. *M/s HRMM Agro Overseas Pvt. Ltd. Vs. CCE, Meerut-I [2014 (3) TMI 509 - CESTAT NEW DELHI]*

The Appellant is exporters of rice and sugar. They filed a refund claim for service tax paid on various services availed by them for export e.g. services provided by the ports, CHAs etc. Along with other denials by the Adjudicating Authority, the refund claim in respect of port service was rejected on the ground that this amount represents the service tax paid on the water front royalty charges which have no nexus with the port service.

The Hon'ble Delhi CESTAT held that when the department has accepted service tax on these amounts under port services, the Jurisdictional Central Excise authorities cannot seek to reopen the assessment of service tax at the end of the service provider at the time of considering refund of the service tax paid on port services to the service recipient. Hence, refund claim in respect of port service was allowed.

28. *M/s. Kouni Travels Pvt Ltd. vs. Commissioner of Service Tax – Bangalore - Service tax [2014 (3) TMI 545 - CESTAT BANGALORE]*.

The Hon'ble Tribunal has held that even though the appellant made mistake in calculation of tax payable (though he had filed the return correctly), as soon as the same was pointed out and a show-cause notice was issued, the appellant paid the amount with interest. Hence, mis-declaration cannot be interpreted as intention to evade duty/tax. If the intention was to evade the tax, the amount received would not have been declared correctly.

Accordingly, the impugned order and penalties imposed were set aside by invoking the provisions of Section 80 of Finance Act, 1994.

*29. The Hon'ble Ahmedabad CESTAT in the case of M/s GAIL (India) Ltd. Vs. CCE, Vadodara [2014 (3) TMI 733 - CESTAT AHMEDABAD],* followed the decision of CST Ahmedabad Vs. Poornima Advertising & Promotion Pvt. Ltd. [2010 (20) STR 107 (Tri-Ahmd)] and held that the issue of credit note/ debit note is a standard practice and accepted practice in accounting terminology for deciding liability or claim for refund. In such a situation, issue of credit note would be sufficient unless there is a clear finding that the amount has not been refunded by the Appellant to the customers, and hence, unjust enrichment clause cannot be invoked.

Thus, the Hon'ble Ahmedabad CESTAT decided the case in favour of the Appellant and sanctioned the refund.

In the case of M/s Silver Lines Estates versus the Commissioner of Service Tax, Bangalore [2014 (3) TMI 735 – CESTAT Bangalore] states that service tax collected from the customers and kept in the escrow account and not paid to the Government would attract provisions of Section 73A of the Finance Act, 1994 or not.

In this case it is stated that if the amount was kept in escrow account by the appellant, the same amount shall be paid with interest if the amount is not liable to be paid, providing assurance to the buyer and it is held that if the liability exists, the amount will have to be paid to the government. The liability will be determined by the Commissioner and amount would have been paid to the Government.

Therefore the Hon'ble Commissioner of Service Tax decided the case in favour of assessee.

## Indian Institute of Aircraft Engineering Vs UOI 2013-Tiol-430-Hc-Del-ST

*Background:* The Petitioner was an Aircraft Maintenance Engineering Training School approved by the DGCA for providing Aircraft Maintenance Engineering (AME) training and conducting examination as per the course approved by the DGCA under the Aircraft Act, 1934 (the Act) and the Aircraft Rules, 1937 (the Rules) and the Civil Aviation Requirements (CAR) issued by the DGCA under Rule 133B of the Rules.

*Issue:* Whether the above said training provided by the petitioner is liable to service tax under commercial training or coaching centre service?

*HeId:* The High Court was of the view that the Act, the Rules and the CAR, having provided for grant of approval to such institutes and having laid down conditions for grant of such

approval and having further provided for relaxation of one year in the minimum practical training required for taking the DGCA examination, have recognized the Course Completion Certificate and the qualification offered by such Institutes.

Thus, the certificate/training/qualification offered by approved Institutes, has by the Act, Rules and the CAR been conferred some value in the eyes of law.

"The Instruction holding the petitioner to be assessable to Service Tax is contrary to Section 65(27) and the Notification dated 25th April, 2011. Accordingly, the said Instruction and the show cause notices given to the petitioner are quashed".