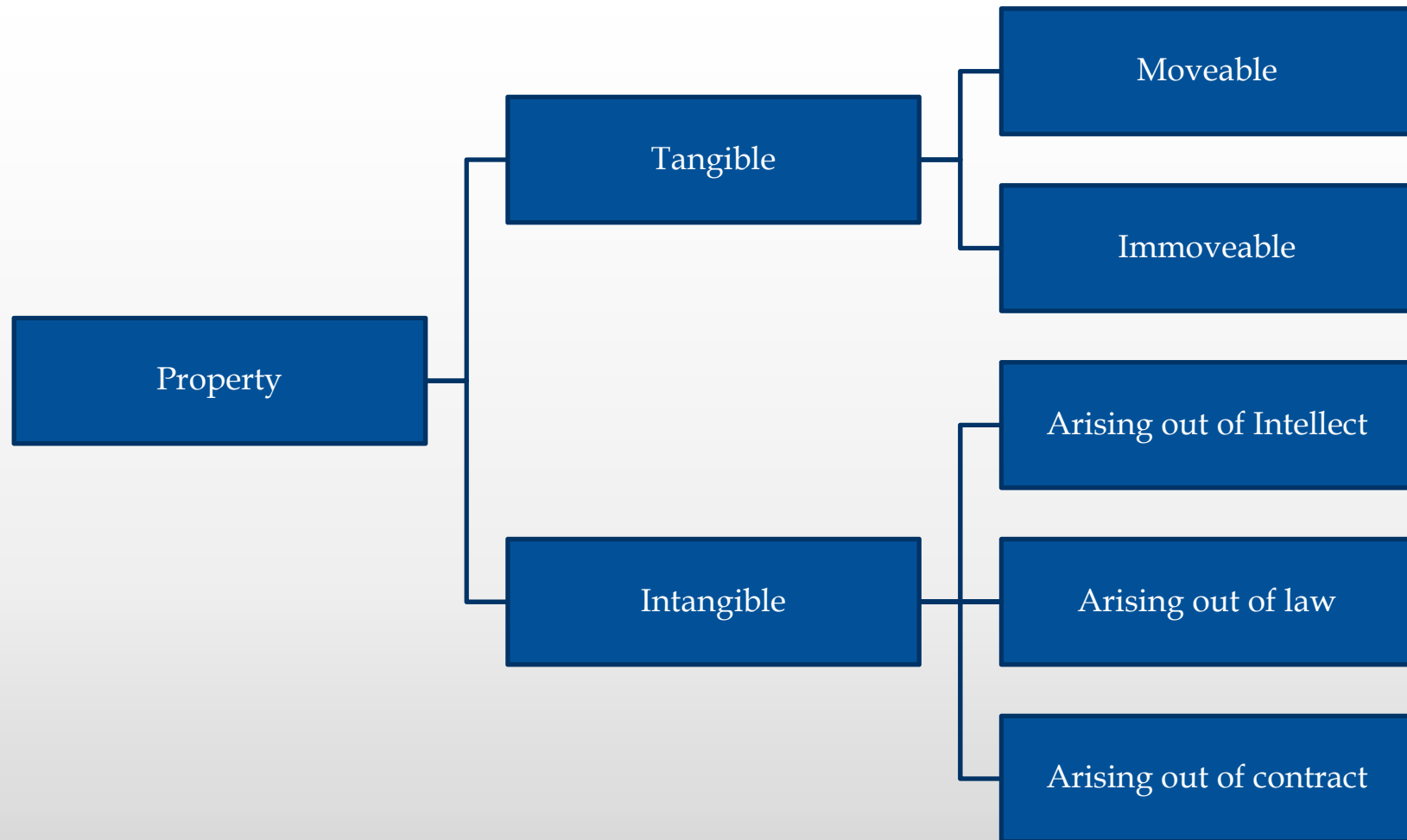


Applicability of Tax on IPR and related transactions

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Classification of Property



Is Intellectual Property Goods?



⇒ Associated Cement Companies Ltd. Vs. Commissioner of Customs, 2001 (128) E.L.T. 21 (S.C.)

'Intellectual property when put on a media is to be regarded as an article on the total transaction value of which customs duty is payable'

⇒ Tata Consultancy Services Vs. State Of Andhra Pradesh, 2004 (178) E.L.T. 22 (S.C.)

'It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods.'

⇒ **MVAT Act, 2002**

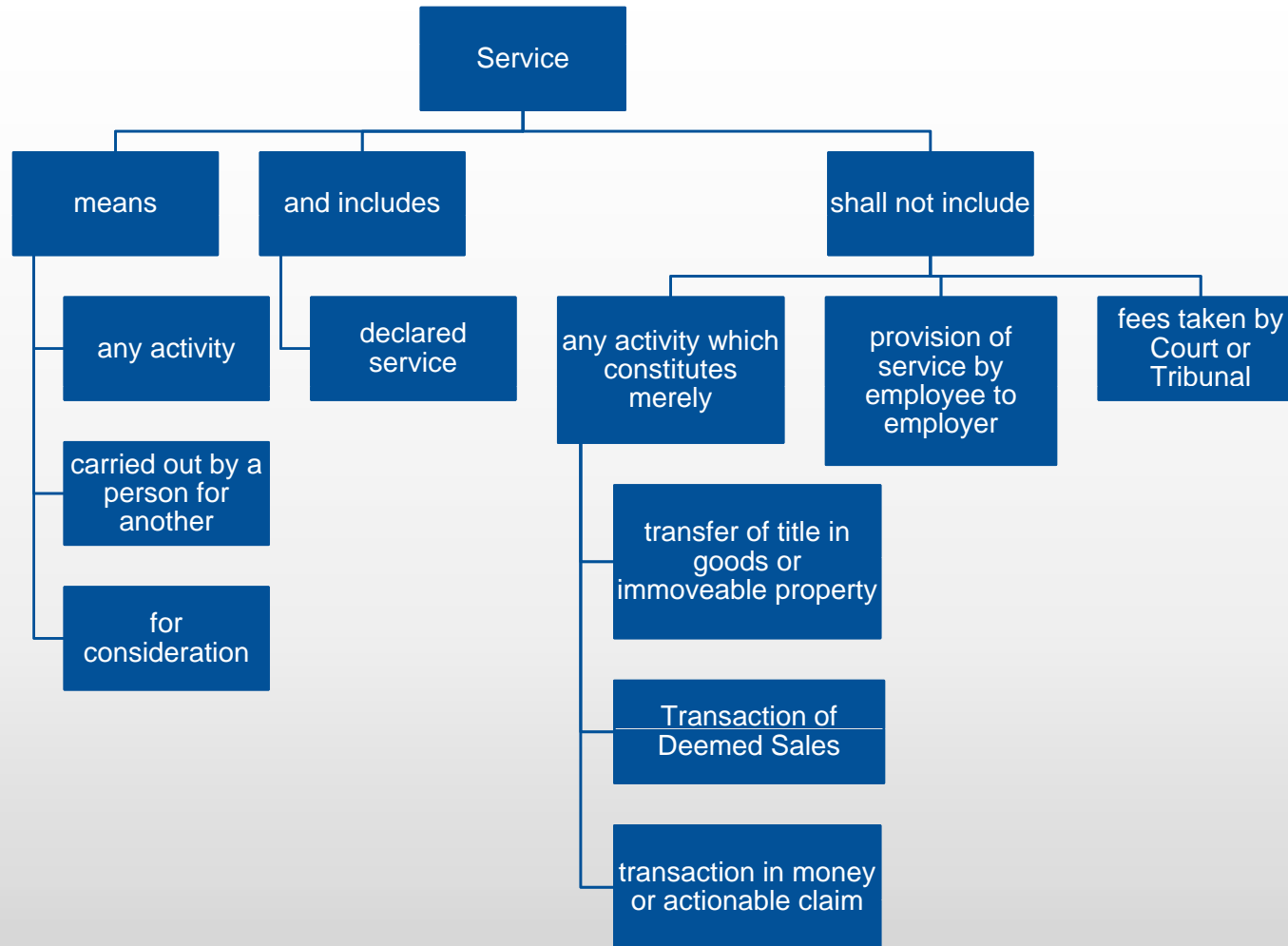
⇒ Entry A-27 - Goods of incorporeal character under than those notified under C-39.

⇒ C-39- deals with the goods of intangible or incorporeal nature and includes patents, trademarks, software packages, technical know-how, live telecasting right, designs, etc.

⇒ Delhi Value Added Tax Act, 2004 under entry no. 3 includes all intangible goods like copy rights, patents, rep. license, goodwill etc.

⇒ **VAT is payable on sale of intellectual property**

Is Intellectual Property a Service?



Permanent Transfer vs. Perpetual License vs. Temporary Transfer / License



Permanent Transfer	Perpetual License	Temporary Transfer /License
Permanent transfer of the IPR	Transfer of right to use the IPR for a perpetual period	Temporary transfer of the right or the use of the IPR
All rights are transferred permanently	Ownership right remains	Ownership right remains
Goods	(will substance over form prevail?)	Concepts of deemed sale, mutual exclusivity of taxes

Co-Owned Intellectual Property

Thermax Ltd. Vs. Commissioner Of Central Excise, Pune-I, 2014 (36) S.T.R. 318 (Tri. - Mumbai)- permanent transfer of intellectual property right does not amount to rendering of service. The appellant had become a co-owner of the intellectual property which would mean that the transfer is permanent and therefore Service Tax is not payable. (Appealed before Apex Court)

Deemed Sale Concept



⇒ **As per Article 366(29A) of the Constitution of India:**

(d) 'tax on the sale or purchase of goods' includes a tax on the **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

⇒ **Finance Act, 1994**

Prior to 01.07.2012

Section 65(55a)

"intellectual property right" means any right to intangible property, namely, trade marks, designs, patents or any other similar intangible property, **under any law for the time being in force**, but does not include copyright;

Section 65(55b)

"intellectual property service" means, – (a) transferring, [temporarily]; or (b) permitting the use or enjoyment of, any intellectual property right;]

Effective 01.07.2012

Section 66E of Finance Act, 1994 includes following as declared service:

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

Conflicts in Judicial Interpretations



- ⇒ The Supreme Court in the case of **Bharat Sanchar Nigam Limited [2006 (002) STR 161 (S.C.)]** that mutual exclusivity of VAT and Service Tax should be maintained. The Supreme Court had listed 6 essential ingredients to constitute a transaction for the transfer of right to use the goods

VAT is not payable

- ⇒ **Malabar Gold Pvt. Ltd. Vs. Commercial Tax Officer, Kozhikode, 2013 (32) S.T.R. 3 (Ker.)**

During the period in question the franchisee is having the right, it is not to the exclusion of the franchiser and as it is seen that even during the period during which the transaction is going on, the franchiser can again transfer the right to other.

- ⇒ **AGS Entertainment Pvt. Ltd. Vs. Union Of India, 2013 (32) S.T.R. 129 (Mad.)**

The temporary transactions of copyrights or the permission to use or enjoyment of the copyright cannot be brought either under Entry 54 of List II or Entry 92A of List I.

VAT is payable

- ⇒ **Tata Sons Limited vs The State Of Maharashtra 2015-VIL-69-BOM**

The petitioner had entered into agreements with various TATA companies with a view to systematically develop, promote and enhance the Tata brand, as well as to legally protect the same. The High Court held that the transfer of right to use goods of incorporeal or an intangible character such as trademarks, copyrights, patents, etc. is eligible to State Value Added Tax and that there need not be any exclusive and unconditional transfer. The transaction should attract tax even if there may be multiple transferees and the transferor continues to use goods.

Types of Arrangements:



- Grant of Intellectual Property against :
 - Lumpsum Consideration (One Time / in Instalments)
 - Payment of Royalties
 - Combination

- Taxable Event is service provided/agreed to be provided

- Ongoing Activity vs. One time grant

⇒ Collector Of C. Ex., Hyderabad Vs. Vazir Sultan Tobacco Co. Ltd., 1996 (83) E.L.T. 3 (S.C.)

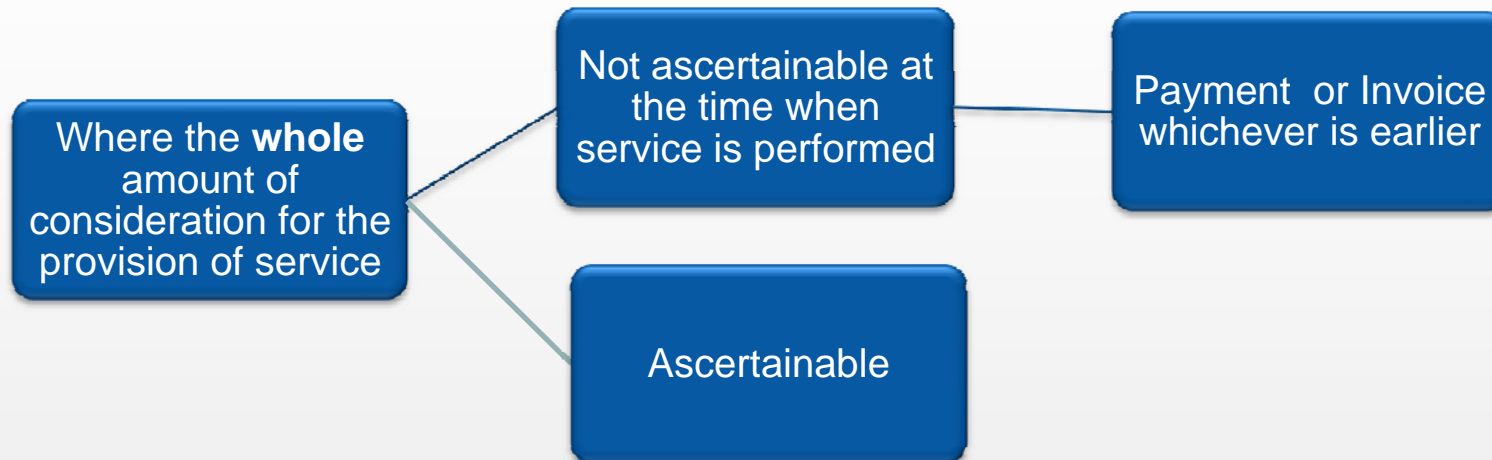
The levy is and remains upon the manufacture or production alone. Only the collection part of it is shifted to the stage of removal.

Taxable event is the manufacture or production of goods

Point of Taxation Rules, 2011



As per Rule 8 of PoT Rules, 2011:



Overlaps in Valuation



⇒ **Excise/ Customs**

Royalty payments are included in value of excisable/imported goods and excise/customs duty is payable on the same (in certain situations)

⇒ **Service Tax**

Temporary transfer is declared as a service.

Reverse charge applies for foreign remittances.

⇒ **Overlapping Central Taxes !!!!**

⇒ **United Shippers Ltd. Vs. Commissioner Of Central Excise, Thane-II, 2015 (37) S.T.R. 1043 (Tri. - Mumbai)**

Charges for transportation of imported goods from mother vessel to jetty is part of import transportation of bringing goods into India from a place outside India, hence, import duty leviable. Such transportation charges are not includible in value of Cargo Handling Service charges.

- ⇒ Section 67:
 - ⇒ Value is the gross amount **charged**
 - ⇒ Value of non monetary consideration to be added
- ⇒ What is the extent of coverage of “non monetary consideration” ?
 - ⇒ Should it also be charged?
- ⇒ Whether following includible?
 - ⇒ Commitment towards marketing and business development (Recoupable)
 - ⇒ Commitment towards marketing and business development (Non Recoupable)
 - ⇒ Actual Amount spent towards marketing and business development (against a commitment)
 - ⇒ Actual Amount spent towards marketing and business development (without any specific commitment, but with knowledge of the transferor)
 - ⇒ Actual Amount spent towards marketing and business development (without any commitment or knowledge)

Exemptions under Service Tax Law



Following services are exemption through E. 15 of Mega Exemption Notification 25/2012 dated 20.06.2012

Services provided by way of temporary transfer or permitting the use or enjoyment of a copyright, –

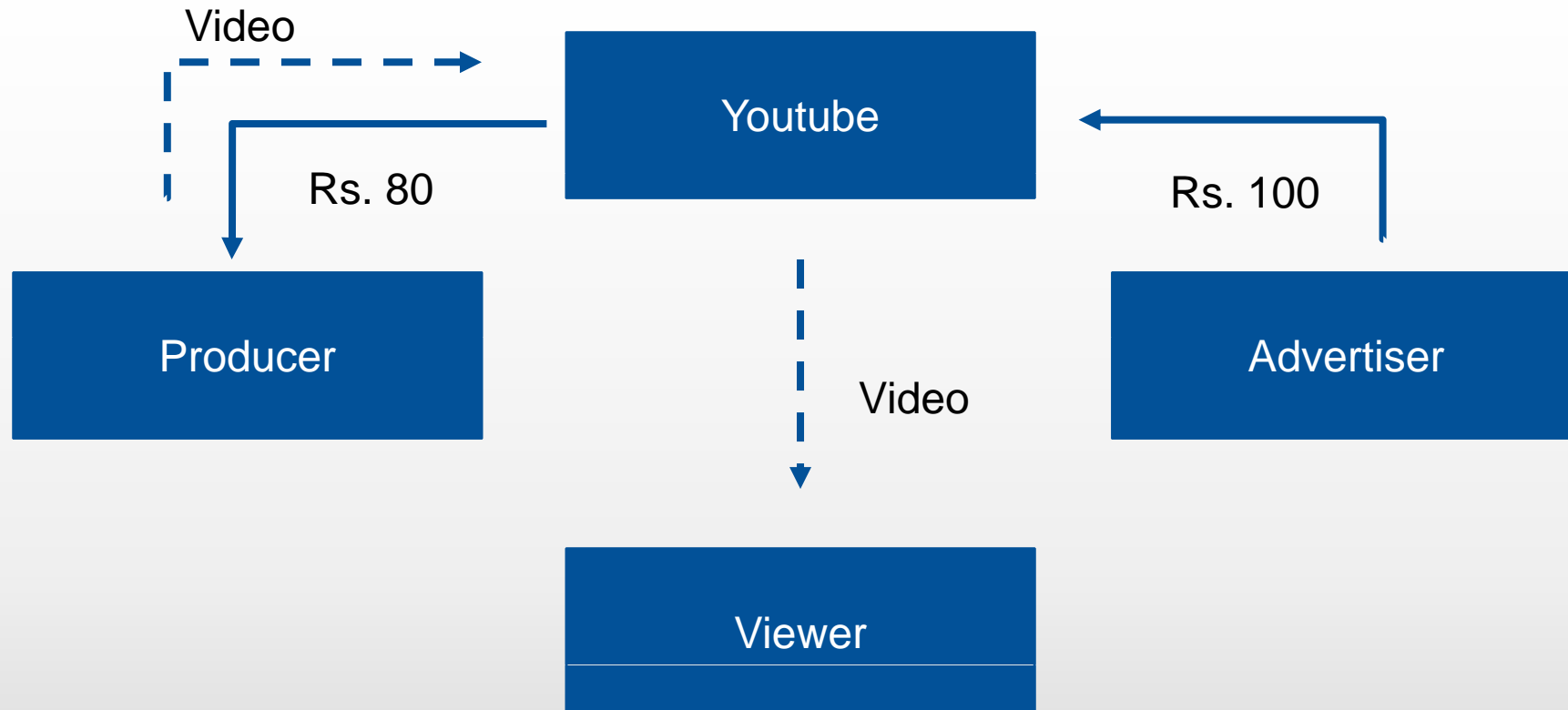
- (a) covered under clause (a) of sub-section (1) of section 13 of the Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical or artistic works; or
- (b) of cinematograph films for exhibition in a cinema hall or cinema theatre;

Copyright Act, 1957 (as amended by the Copyright Amendment Act 2012)

Section 13(1)

- (a) original literary, dramatic, musical and artistic works; (including computer programmes)
- (b) cinematograph films; and
- (c) sound recordings;

Decoding tax impact





Thank You

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