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# **Basic Framework and the Concept of Service**

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# **BASIC FRAMEWORK AND CONCEPT OF SERVICE**

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## **1. SERVICE TAX - A GREAT OPPORTUNITY FOR PROFESSIONALS**

### **Introduction**

- 1.1 *Service tax is a great opportunity for professionals.* Under the ‘negative list regime’ where all services would be taxed unless they fall in the ‘negative list’ or are otherwise ‘exempted’, the service tax revenue looks to be a big avenue for the government and a vista of practice for professionals having great potential. It would also be an added advantage for professionals in Industry too where there is acute dearth of personnel having sound knowledge of service tax. Recent changes in the law has given rise to a number of issues. With these changes there would be a great need for professionals to advice and assist the assesseees. A tax professional with his training and experience is well-equipped to position himself in the new role as an advisor and facilitator for due compliance of service tax law.

### **Nature of Services**

- 1.2 The nature of services which a professional could render are given below.
- (i) Advisory services
  - (ii) Corporate training
  - (iii) Procedural compliance
  - (iv) Due diligence
  - (v) Support during department audit / investigation
  - (vi) Litigation – SCNs<sup>1</sup> & Appeals - Personal representation
  - (vii) Compliance Certification

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<sup>1</sup> Show Cause Notice

### **Onerous task to keep pace**

- 1.3 Service tax like excise is also administered more by way of notifications, circulars and trade notices issued from time to time. The service tax law is also fast changing like an FMCG (Fast Moving Consumer Goods) product! A tax professional will have to keep himself abreast of the latest notifications and trade notices in addition to the changes in law so as to meet the client expectations. Thus, in order to render good value added services in the area of service tax a tax professional has an onerous task to keep pace with the latest.

### **Service Tax – A great future**

- 1.4 Thus, service tax is one *area* which is in its growth path having immense future, both for the government for getting their revenues and for tax professionals as an avenue of practice as well as positioning oneself in the industry. It is said “*look before you leap*” but here the author advises the tax professionals “*don’t look just jump and grab the opportunity!*”

## **2. SERVICE TAX OVERVIEW**

### **Need for a tax on services**

- 2.1 Service tax is a *tax of the future*. The Supreme Court in *All India Federation of Tax Practitioners vs. Union of India* (2007) 7 STR 625 (SC) explained the reason for imposition of service tax in the following words:

“4. Service tax is an indirect tax levied on certain services provided by certain categories of persons including companies, association, firms, body of individuals etc. Service sector contributes about 64% to the GDP. Services constitute heterogeneous spectrum of economic activities. Today services cover wide range of activities such as management, banking, insurance,

hospitality, consultancy, communication, administration, entertainment, research and development activities forming part of retailing sector. Service sector is today occupying the centre stage of the Indian economy. It has become an Industry by itself. In the contemporary world, development of service sector has become synonymous with the advancement of the economy. Economists hold the view that there is no distinction between the consumption of goods and consumption of services as both satisfy the human needs.

5. In late seventies, Government of India initiated an exercise to explore alternative revenue sources due to resource constraints. The primary sources of revenue are direct and indirect taxes. Central excise duty is a tax on the goods produced in India whereas customs duty is the tax on imports. The word goods has to be understood in contradistinction to the word services. Customs and excise duty constitute two major sources of indirect taxes in India. Both are consumption specific in the sense that they do not constitute a charge on the business but on the client. However, by 1994, Government of India found revenue receipts from customs and excise on the decline due to W.T.O. commitments and due to rationalization of duties on commodities. Therefore, in the year 1994-95, the then Union Finance Minister introduced the new concept of service tax by imposing tax on services of telephones, non-life insurance and stock-brokers. That list has increased since then. Knowledge economy has made services an important revenue-earner.”

Thus, service tax was *“a new milking cow” for the Government.*

### **Genesis of service tax in India**

- 2.2 The imposition of service tax was in sequel to the Report of the Chelliah Committee on Tax Reforms. On these recommendations Dr. Manmohan Singh, the then Union Finance Minister, in his Budget speech for the year 1994-95 introduced the new concept of Service Tax and stated that, *“There is no sound reason for exempting services from taxation, when goods are taxed and many countries treat goods and services alike for tax*

*purposes. The Tax Reforms Committee has also recommended imposition of tax on services as a measure for broadening the base of indirect taxes. I, therefore, propose to make a modest effort in this direction by imposing a tax on services of telephones, non-life insurance and stock brokers.”* Thus, service tax was imposed on 3 services.

- 2.3 The baton then passed on to successive finance ministers who widened the service tax net in their budgets. The Finance (No.2) Act, 1996 added 3 more services followed by the Finance Act, 1997 and Finance (No. 2) Act, 1998, which added 12 services each, and the '**March**' towards service tax went on every **February**. By 2012, the service tax net covered 119 different types of services. Post 2012, it covers all services except some in the negative list or in the exempted category.

#### **Selective vs. Comprehensive coverage**

- 2.4 Depending on the socio-economic compulsions, each country evolved a taxation system on services adopting either a comprehensive approach or a selective approach. Under the selective approach only specified services are taxable and under the comprehensive approach all services are taxable unless they are specifically excluded. Upto 30.6.2012, India had a selective approach to taxation of services. From 1.7.2012, *on the eve of its adulthood*, India adopted a comprehensive approach to taxation of services. Now taxation of services is based on what is popularly known as '*Negative List of Services*'. Thus, India would also be joining the bandwagon of advanced countries of comprehensively taxing all services and excluding some specific services as against the present dispensation – a selective approach where only specified services are taxable. Truly, a

major step in taxing services in India on the eve of adulthood of the service tax law [the 1994 law has completed 18 years!]. It wishes to say '*I am 17 going on 18 but I need more money post 18!*'

2.5 The statistics of service tax revenue are as under:

<b>Financial Year</b>	<b>Revenue Rs. Crores</b>	<b>No. of Services taxed</b>
1994-95	407	3
1995-96	862	3
1996-97	1,059	6
1997-98	1,586	18
1998-99	1,957	30
1999-00	2,128	27
2000-01	2,613	26
2001-02	3,302	41
2002-03	4,122	51
2003-04	7,891	58
2004-05	14,200	72
2005-06	23,053	80
2006-07	37,598	100
2007-08	51,301	100
2008-09	60,941	106
2009-10	58,422	109
2010-11	71,016	117
2011-12	95,000	119
2012-13	1,24,000	All (except few)

*Source: Statistics of revenue collected are from the website [www.indiabudget.nic.in](http://www.indiabudget.nic.in)*

## **Constitutional Authority**

- 2.6 The constitutional authority for service tax is derived from Entry no. 97 (which is the residuary entry) in the Union list of the Seventh Schedule to the Constitution [*Chartered Accountants Association and Gujarat Institute of Civil Engineers and Architects vs. Union of India* [2001] 252 ITR 53 [Guj.]; *Tamilnadu Kalyana Mandapam Association v. Union of India* (2004) 167 ELT 3 (SC) and *All India Federation of Tax Practitioners vs. Union of India* (2007) 7 STR 625 (SC)]. The legal back-up is further fortified by the Constitution (88<sup>th</sup> Amendment) Act, 2003 which has introduced a new article 268A in the Constitution which states that taxes on services shall be charged by the Central Government and appropriated between the Union and the State. Simultaneously it has also inserted a new entry in the List I – Union List in the Seventh Schedule to the Constitution which reads “92C. Taxes on Services”. [*All India Federation of Tax Practitioners vs. Union of India* (2007) 7 STR 625 (SC)].

## **Nature of service tax - an indirect tax akin to VAT on the supply of services**

- 2.7 The Supreme Court in *All India Federation of Tax Practitioners vs. Union of India* (2007) 7 STR 625 (SC) explained the nature of tax as follows:

“6. At this stage, we may refer to the concept of Value Added Tax (VAT), which is a general tax that applies, in principle, to all commercial activities involving production of goods and provision of services. VAT is a consumption tax as it is borne by the consumer.

7. In the light of what is stated above, it is clear that Service Tax is a VAT which in turn is destination based consumption tax in the sense that it is on

commercial activities and is not a charge on the business but on the consumer and it would, logically, be leviable only on services provided within the country. Service tax is a value added tax.”

### **Law governing service tax**

2.8 There is no separate Act or legislation for service tax. Chapter V of the Finance Act, 1994 (sections 64 to 96) and Chapter VA of the Finance Act, 1994 (sections 96A to 96I) both the Chapters together are hereinafter referred to as the “Act”, as amended from time to time, provide for the levy of service tax and constitute the law governing service tax. The Government has also notified the following rules :-

- (i) Service Tax Rules, 1994
- (ii) Service Tax (Advance Ruling) Rules, 2003
- (iii) Cenvat Credit Rules, 2004
- (iv) Service tax (Registration of Special Category of Persons) Rules, 2005
- (v) Authority for Advance Rulings (Central Excise, Customs and Service Tax) Procedure Regulations, 2005
- (vi) Service Tax (Determination of Value) Rules, 2006
- (vii) Service Tax (Publication of Names) Rules, 2008
- (viii) Service Tax (Provisional Attachment of Property) Rules, 2008
- (ix) Service tax Return Preparer Scheme, 2009
- (x) Point of Taxation Rules, 2011
- (xi) Service Tax (Settlement of Cases) Rules, 2012
- (xii) Service Tax (Compounding of Offences) Rules, 2012
- (xiii) Service Tax (Removal of Difficulty) Order, 2012
- (xiv) Place of Provision of Services Rules, 2012

2.9 The Act is administered by the Excise department. The rate of service tax presently is 12%. Further, the Finance (No.2) Act, 2004 has levied an “education cess” @ 2% on the amount of the service tax w.e.f. 10.9.2004 and Finance Act, 2007 has levied an additional “secondary and higher education cess” @ 1% on the amount of service tax w.e.f 11.5.2007. Thus, presently the effective rate of Service Tax is 12.36%.

### **GST – Way Forward**

2.10 On 28.4.2010 while moving the Finance Bill, 2010, for consideration of the House, the Finance Minister, Mr Pranab Mukherjee, said that the Government is firmly committed to the goal of comprehensive tax reform through the introduction of the Goods and Services Tax (GST). The Central Government is closely engaged with the Empowered Committee of the State Finance Ministers in finalizing the GST design. Thus very soon the tax on goods and services would presumably be integrated as a single tax known as Goods and Service Tax (GST). On 16.3.2012 while moving the Finance Bill, 2012, the Finance Minister, Mr Pranab Mukherjee, said that the Constitution Amendment Bill, a preparatory step in the implementation of Goods and Services Tax (GST), which was introduced in Parliament in March 2011 is pending before the Parliamentary Standing Committee. Pending recommendations of the Committee, drafting of model legislation for Centre and State GST in concert with States is under progress. Further, he informed that the structure of GST Network (GSTN) has been approved by the Empowered Committee of State Finance Ministers and that GSTN will be set up as a National Information Utility and will become operational by August 2012. The GSTN will implement common PAN-based registration,

returns filing and payments processing for all States on a shared platform. The use of PAN as a common identifier in both direct and indirect taxes will enhance transparency and check tax evasion.

### **3. New system of taxation – basic framework**

#### ***Significant changes***

3.1 A virtual metamorphosis of the service tax law, i.e. Chapter V of the Finance Act 1994 (i.e. the law governing service tax), is made w.e.f 1.7.2012. Some of the significant changes are:

- (i) replacement of the definition section 65 by a new definition section 65B which *inter alia* for the first time defines the term ‘service’ [s. 65B(44)] – a long felt cry of the taxpaying fraternity. Thus, the definition of various services and the definition of ‘taxable service’ has been done away with. The new definition section also defines the terms ‘taxable territory’ and ‘India’;
- (ii) replacement of the existing charging section 66 by a new charging section 66B which *inter alia* mentions that the taxable event must happen in the ‘taxable territory’;
- (iii) introduction of the concept of exclusion of services by a ‘negative list’ and inclusion of services by a ‘declared list’;
- (iv) determination of place of provision of service for both import and export of services by a common set of rules called ‘Place of Provision of Services Rules, 2012’.
- (v) Laying down principles for interpretation of service descriptions and taxability of bundled services’ (s. 66F) instead of the principles classification of services (section 65A).

### ***Charge of service tax – 3 conditions***

3.2 The new charging section 66B provides that there shall be levied a tax @12% of *'the value of all services other than those specified in the negative list provided or agreed to be provided in the taxable territory, by one person to another...'*. Thus, in order for the charge of service tax to crystallise three conditions are required to be satisfied -

- (a) there must be a 'service' provided or agreed to provided by one person to another;
- (b) the service provided must not be specified in the 'negative list';
- (c) the service must be provided in the 'taxable territory';

If the above conditions are satisfied the charge of service tax crystallizes and the 'taxable event' viz., the service (provided or agreed to be provided) becomes impregnated with the levy. The measure of the charge is 12% [exclusive of cess] of the *'value of services'*.

3.3 The term 'service' is defined in the law and analysed below. The other two aspects of the charge viz., what are the services specified in the 'negative list' and when would a service be considered to be provided in the 'taxable territory' are dealt with by other speakers.

## **4. What is Service?**

### ***Definition***

4.1 The term 'service' has been defined in section 65B(44) of the Act as follows-

“(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but 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 a 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 purpose of this clause, transaction in money shall not include any activity 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.

*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.”

4.2 Thus, a ‘service’ means –

- any activity
- for consideration
- carried out by a person for another
- but excludes ‘specified transactions’
- and includes a ‘declared service’.

### ***Activity***

4.3 The term ‘activity’ is a term of very wide connotation and could be active or passive and would also include forbearance to act.

### ***Consideration***

4.4 ‘Consideration’ means everything received (both monetary and non-monetary) in return for provision of service. The Education Guide issued by the Central Board of Excise & Customs<sup>2</sup> clarifies that ‘recharges’ between establishments of an entity located in a non-taxable territory and taxable territory would amount to consideration<sup>3</sup>. The concept of ‘activity for consideration’ involves a contractual relationship. The activity and the consideration must be reciprocal. If there is no contractual reciprocity between an activity and consideration an activity would be considered as done without consideration even if the activity leads to accrual of gains to

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<sup>2</sup> The CBEC has issued an “Taxation of Services – An Education Guide” for better understanding of the new system of taxation. The para references given in footnote of this article refer to para number in the said Education Guide.

<sup>3</sup> Para 2.2.1

the person carrying out the activity<sup>4</sup>. However, consideration may be provided by a person not receiving the benefit of the service so long as there is a link between the provision of service and the consideration e.g. holding company may pay for services that are provided to its associated enterprises<sup>5</sup>.

4.5 Thus, donations; gifts; free charities; grants given for research where the researcher is under no obligation to carry out a particular research for the grantor; awards for personal contribution / achievements; ex-gratis payments received by a musician playing in a street from passers-by; pocket money; alimony for divorce; would not be consideration since there is no activity done at the desire of the payer. However, research grants given where the researcher provides the IPR rights in the outcome of the research to the grantor; or where people at large are invited to contribute to open software development (e.g. Linux) and getting an amount if their contribution is finally accepted, would be activities for consideration<sup>6</sup>.

4.6 Advances and deposits for agreeing to perform a service is consideration unless the deposits are returnable on completion of provision of service (e.g. security deposits). If tax is paid on the deposits received for agreeing to perform a service, then on return of the deposit on cancellation of an agreement the tax-payer would be entitled to refund to the extent specified in the law. However, security deposits forfeited for damages done by the receiver of service in the course of receiving a service not

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<sup>4</sup> Para 2.3

<sup>5</sup> Para 2.3.3

<sup>6</sup> Paras 2.2.2, 2.2.7 and 2.3

being relatable to provision of a service would not amount to consideration<sup>7</sup>.

4.7 Statutory fines and penalties would not amount to consideration<sup>8</sup> but demurrages payable for use of services beyond the period of initially agreed upon e.g. retention of containers beyond normal period is consideration and is covered by rule 6(1)(x) of the Service Tax (Determination of value) Rules, 2006 (“Valuation Rules”)<sup>9</sup>. Amount received in settlement of a dispute *per se* may not be consideration but if the amount is a portion of the consideration or the dispute itself pertains to consideration for provision of a service then it would be part of consideration<sup>10</sup>.

4.8 The Education Guide clarifies that excess payments made as a result of a mistake if returned is not consideration but if retained is consideration<sup>11</sup>. *This clarification is however, subject to question in the view of the author.*

4.9 Non-monetary consideration would have to be valued at equivalent money value of the consideration and if that is not ascertainable, then rule 3 of the Valuation Rules provides for the basis of valuation as follows:

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

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<sup>7</sup> Para 2.3.2 point nos. 2-6.

<sup>8</sup> Para 2.3.1

<sup>9</sup> Para 2.3.2, point no. 8

<sup>10</sup> Para 2.3.2, point no. 1

<sup>11</sup> Para 2.3.2, point no. 7

### ***Two distinct persons***

4.10 A service must be provided by one person to another – a requirement of two distinct entities. A service provided by a person to self is not taxable e.g. inter-branch transactions where branches are located in India. There are two statutory exceptions to this proposition:

- (i) an establishment (e.g. branch, agency or representative office) of a person located in the taxable territory and another establishment of such person located in a non-taxable territory will be separate persons. Example, a transaction between the Indian branch of a company and its overseas head office would be considered as ‘service’.
- (ii) an unincorporated association or body of persons and the members thereof are also treated as ‘distinct persons’. Thus, the intention is to pierce the doctrine of mutuality and tax transactions between members and a club of a ‘members’ club’.

4.11 The Education Guide clarifies that in case of in case of unincorporated Joint Ventures (JV) / profit sharing Association of Persons (AOP), the services provided by individual persons constituting the JV / AOP to the AOP and by the JV / AOP to third parties would be taxed separately. However, credit would be available to the JV / AOP of the tax charged by / paid to the persons constituting the JV / AOP as per the Cenvat Credit Rules<sup>12</sup>.

## **5. Six transactions not regarded as a service**

### ***Six types of transactions***

5.1 The following six transactions would not be regarded as service:

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<sup>12</sup> Para 2.4.3

- (i) any activity that constitutes **only** a transfer of title in
  - (a) goods or
  - (b) immovable propertyby way of sale, gift or in any other manner;
- (ii) any transfer, delivery or supply of goods which is deemed to be a sale within article 366 (29A) of the Constitution;
- (iii) a transaction only in money. A transaction in money shall not include any activity relating to –
  - (a) the use of money (e.g. lending) ; or
  - (b) Conversion of money, by cash or any other mode, from one form, currency or denomination to another form, currency or denomination (e.g. Conversion of Indian to foreign currency and vice versa)for which a separate consideration is charged.
- (iv) a transaction only in actionable claim.
- (v) any service provided by an employee to an employer in the course of the employment; and
- (vi) fees payable to a court or a tribunal set up under a law for the time being in force.

Each of the above exclusions are explained below.

***Transfer of title in goods / immoveable property***

- 5.2 An activity that constitutes **only** transfer of **title** in goods / immoveable property is excluded from the definition of service. The transfer must be of ‘title’ i.e. ownership and not merely of ‘custody’ or ‘possession’ i.e. renting or giving on hire goods or immoveable property.

5.3 Further, a transaction may involve provision of service as well as transfer of title in goods / immoveable property. Such transactions could take two forms –

- (i) separate discernible transactions i.e. where a transaction for provision of service and transfer of title in goods / immoveable property, although maybe associated, are discernibly separate transactions; or
- (ii) composite transactions i.e. where the element of provision of service and transfer of title in goods / immoveable property are inextricably linked to each other.

The test whether it is a former or the latter one depends upon whether the parties to the contract intend to or have in mind that separate rights arise out of the constituent contract of sale and contract of service.

5.4 If –

- (a) the transactions, although associated, are separate discernible transactions for transfer of title in goods / immoveable property and provision of services then the portion / transaction relating to transfer of title in goods / immoveable property would not be liable for service tax and the transaction for provision of service would be liable for service tax (subject of course to other conditions of taxability being fulfilled).
- (b) the transaction is a composite transaction, then the transaction would be regarded as service or sale depending on what is the '*dominant nature*' of transaction. However, please refer exceptions in para 5.9 below.

- 5.5 The Education Guide has clarified that notification no. 12/2003 dated 20.6.2003 that granted deduction of value of goods **sold** in the course of provision of service has been deleted since the essence and intent of the said notification is fully captured in the definition of ‘service’ itself by way of excluding a transaction in the nature of transfer of title in goods and deemed sales from the definition of ‘service’<sup>13</sup>.
- 5.6 The Education Guide has clarified that transfer of title in ‘securities’ which are included in the definition of ‘goods’ [section 65B(25)] by way of sale, purchase or redemption on principal to principal basis is excluded from ‘service’<sup>14</sup>. Thus purchase or redemption / sale of mutual funds would not be liable for service tax<sup>15</sup>. However, it is clarified that entry or exit loads are in the nature of consideration for documentation covering initial expenses, asset management, etc. Hence service tax would be leviable on such entry and exit loads<sup>16</sup>.
- 5.7 Transfer of a going concern, as a whole or an independent part thereof though not in the nature of sale of goods or immoveable property is exempted<sup>17</sup>.

***Deemed sale transactions [article 366(29A)].***

- 5.8 Any transfer, delivery or supply of goods which is deemed to be a sale within article 366 (29A) of the Constitution is excluded from the definition of service. These are six types of transactions:
- (a) Sale of goods otherwise than in pursuance of a contract.

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<sup>13</sup> Para 2.6.4

<sup>14</sup> Para 2.6.7

<sup>15</sup> Para 2.6.9

<sup>16</sup> Para 2.6.10.

<sup>17</sup> Notification no. 25 /2012 dated 20.6.2012 (Entry 37).

- (b) Transfer of property in goods involved in the execution of a “works contract”.
- (c) Delivery of goods on hire purchase or payment by installments
- (d) Transfer of the right to use goods (where the effective control and possession is transferred).
- (e) Supply of goods by unincorporated association to a member thereof.
- (f) Supply of food or drink by way of, or as part of, any service or in any other manner (catering contracts)

5.9 The only two exceptions to the treatment of a composite transactions based on the dominant nature test as per para 5.4 above are:

- (a) works contracts [article 366(29A)(b)]; and
- (b) catering contracts (i.e. supply of food or drink by way of, or as part of, any service or in any other manner) [article 366(29A)(f)]

where the goods portion is considered as a deemed sale and accordingly excluded from the definition of ‘service’ and the service portion is a ‘declared service’ liable for service tax. Thus in these two transactions, the dominant nature test will not apply.

***Transactions only in money***

5.10 A transaction ‘only’ in money is excluded from the definition of service. ‘Money’ is defined in section 65B(33) to mean “*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.*”

5.11 A transaction in money shall not include any activity relating to –

- (a) the use of money (e.g. lending) ; or
- (b) Conversion of money, by cash or any other mode, from one form, currency or denomination to another form, currency or denomination (e.g. Conversion of Indian to foreign currency and vice versa)

for which a separate consideration is charged [Explanation 2 to s. 65B(44)].

5.12 Thus, a transaction *per se* in money is excluded from the definition of ‘service’ but any activity related to a transaction in money for which a separate consideration is charged would not be treated as a transaction in money<sup>18</sup>. Thus, the principal amount of –

- (a) deposits in or withdrawals from a bank account;
- (b) drafts and pay orders purchased from a bank;
- (b) loans advanced or repaid;
- (c) currency exchanged say with a foreign exchange dealer;
- (d) investment of funds made by a person with another

are transactions in money. But the charges made by a bank as commission charged for preparation of the bank draft / pay order or the commission charged by the foreign exchange dealer for conversion services or a service fee / commission charged for managing investments is taxable and would not be a transaction in money<sup>19</sup>. Commission charged by a promoter of a Chit Fund is taxable and is not a transaction only in money<sup>20</sup>. A partner being admitted in a partnership for a share of

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<sup>18</sup> Para 2.8.5.

<sup>19</sup> Paras 2.8.1, 2.8.3, 2.8.4 & 2.8.5

<sup>20</sup> Para 2.8.2

profits is transaction in money<sup>21</sup>. Debt collection services or credit control services would not be considered to be transaction only in money<sup>22</sup>.

***Transactions only in 'actionable claim'***

5.13 A transaction 'only' in '*actionable claim*' is excluded from the definition of service. As per section 3 of the Transfer of Property Act, 1893 'actionable claims' means a claim to –

- (i) any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property; or
- (ii) 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. The Black's Law Dictionary defines 'beneficial interest' as follows-

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

Therefore 'beneficial interest in moveable property' is a right or expectancy in a moveable property like right to receive income accruing from a moveable property.

5.14 An unsecured debt or a right to participate in a lottery draw is an actionable claim<sup>23</sup>. But a 'voucher' entitling a person to avail health services in a club or recharge vouchers issued by service companies enabling a person to enjoy a telephone service is not a 'beneficial interest'

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<sup>21</sup> Para 2.8.4

<sup>22</sup> Para 2.8.6

<sup>23</sup> Para 2.8.7

in moveable property and hence not an actionable claim<sup>24</sup>. Thus, assignment of an 'unsecured debt' would not be liable but a service fee or charge collected in the course of assignment of the debt would be liable for service tax<sup>25</sup>.

***Services provided by an employee to an employer***

5.15 Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services. Thus, amount received on pre-mature termination of employment is not liable for service tax being received for services provided in the course of employment<sup>26</sup>. But, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service<sup>27</sup>.

5.16 Explanation 1 to section 65B(44) however clarifies that 'service' does not cover functions or duties performed by Members of – Parliament, State Legislatures, Panchayat and Municipalities or any other local authority or any person who holds any post in pursuance of the provisions of the Constitution or any person as a Chairperson or a Member or a Director in a body established by the Central or State Governments or local authority and who is not deemed as an employee.

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<sup>24</sup> Paras 2.8.11 & 2.8.12

<sup>25</sup> Para 2.8.8

<sup>26</sup> Para 2.9.3

<sup>27</sup> Para 2.9.1

*Fees payable to a court or a tribunal set up under a law for the time being in force.*

5.17 Fees payable to a court or a tribunal set up under a law for the time being in force is excluded. Fees paid to Government departments would be excluded under the negative list [section 66D(a)].

## **6. ‘Declared services’ [section 66E]**

*Nine types of transactions*

**6.1** Nine types of transactions specified in section 66E would be considered to be a service - termed as ‘declared service’. They are :

- (1) renting of immovable property;
- (2) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of certificate of completion by a competent authority;
- (3) temporary transfer or permitting the use or enjoyment of any intellectual property right;
- (4) development, design, programming, customization, adaptation, up gradation, enhancement, implementation of information technology software;
- (5) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;
- (6) transfer of goods by way of hiring, leasing, licensing or any such manner without transfer of right to use such goods;
- (7) activities in relation to delivery of goods on hire purchase or any system of payment by instalments;

- (8) service portion in execution of a works contract;
- (9) service portion in an activity wherein goods, being food or any other article of human consumption or any drink (whether or not intoxicating) is supplied in any manner as part of the activity.

## 6.2 Comparative Table

Declared Service [Sr. No. of para 6.1]	Coverage prior to 1.7.12	Coverage from 1.7.12	Some Remarks / Changes
(1) [Renting]	S.65 (105) (zzzz) r.w. S.65 (90a)	S.66E(a) r.w. S.65B (41)	<ul style="list-style-type: none"> <li>• Renting of Vacant land and for sports and entertainment covered now.</li> <li>• Lease of land given to parking contractor now liable.</li> </ul>
(2) [Sale of flats/ offices]	Explanation to S. 65 (105) (zzq)	S.66E(b)	<ul style="list-style-type: none"> <li>• Exclusion of less than 12 unit complex deleted.</li> <li>• Exclusion for personal use deleted except for a bungalow not forming part of a complex.</li> <li>• Previously O/C by government authority or certificate by an architect, engineer, licenced surveyor sufficient. Now CC by government authority compulsory. In the event such CC is not required under law, then certificate from architect, engineer, licenced surveyor sufficient.</li> </ul>

(3) [IPR Services]	S.65 (105) (zzr), S. 65 (55b) – IPR excluding Copy right S. 65 (105) (zzzt) – Copy right in films and sound recording	S.66E(c)	<ul style="list-style-type: none"> <li>• Previously, IPR under Indian law liable. Technical Know-how not covered. Now, Technical Know-how also covered.</li> <li>• Copy right in cinematograph films exempted.</li> </ul>
(4) [IT software services]	S.65 (105) (zzze) r.w. 65(53a)	S.66E(d)	<ul style="list-style-type: none"> <li>• Software Licencees – taxability is an issue – refer para 6.4.4 of Education Guide</li> </ul>
(5) [Agreeing to do, tolerate or not to do an act]	Not covered	S.66E(e)	<ul style="list-style-type: none"> <li>• Non – compete agreements covered</li> <li>• Exclusivity payments covered</li> <li>• Payments for grant of monopoly rights covered.</li> </ul>
(6) [Supply of tangible goods]	S.65 (105) (zzzzj)	S.66E(f)	No change
(7) [Activities in relation to hire purchase / installment payment contract]	–	S.66E(g)	–

(8) [Works contract services]	S.65 (105) (zzz)	S.66E(h)	<ul style="list-style-type: none"> <li>• “works contract” defined to include work contract of movable property as also e.g. maintenance &amp; repair, contract for construction of a bus-body, etc.</li> <li>• Composition scheme deleted but reckoning value of services on presumptive basis introduced.</li> </ul>
(9) [Catering contracts]	S.65 (105) (zzzzv)	S.66E(i)	No Change except that reckoning value of services on presumptive basis introduced.