

Negative List of Services — A Paradigm Shift in Service Tax Law



Service tax was initially introduced in 1994 on three services. The scope of applicability of service was widened over the years, and by 2011, about 117 services were made subject to service tax. Thus, the concept adopted was that of positive list of services i.e. the services specified in Section 65(105) of Finance Act, 1994 would be taxable service. The scope was so vast that practically all services, except in education, medical treatment and statutory activities were subject to service tax. However, the definitions of each service was often vague and broad. There were always disputes about taxability of a particular activity and also its classification in a particular taxable head. To get over the administrative difficulties in defining a service, locating possible persons providing the service and administering the service tax, a new concept was floated last year, that of negative list of services. In the Budget 2012-13 negative list has been finally introduced, which is a paradigm shift in service tax and is being dubbed as quite reformatory. Read on to know more...

Negative list, basically means that all services, excluding those specified in negative list of services will be subject to service tax. Of course, this does not mean that all services except those in negative list will be automatically subject to service tax. In addition to items included in negative list, there will be exemptions, abatements and composition schemes.

In order to ensure wide coverage of service tax, 'service' has been defined for the first time.

Effective date of the provisions - The provisions will be effective after the Finance Act, 2012 is enacted and effective date is notified. If all goes well, it seems the new provisions will be in place by 1st July, 2012.

Meaning of 'Service'

Proposed Section 65B(44) of Finance Act, 1994 reads as follows -

"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



V. S. Datey

(The author is an expert in indirect taxes. He can be reached at dateyvs@yahoo.com)

sale, gift or in any other manner; or (ii) 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 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 3.— 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.

Observations on Aforesaid Provision

The word 'activity' has not been defined. It is a very broad word. Though the definition requires 'activity', agreement not to do any activity is also covered under clause (e) of 'declared services' as stated below. Thus, agreements like non compete agreements or agreeing not to participate in a case or event will also be subject to service tax.

Explanation 2 and 3 really have nothing to do with 'service' and are really at wrong place.

Declared Services

The aforesaid definition of service states that it includes 'declared service'.

Proposed Section 66E of Finance Act, 1994 states as follows -

The following shall constitute declared services, namely:—

- a) Renting of immovable property.

The services covered in this category can be broadly classified as follows - (a) Statutory activities (b) Agriculture related services (c) Activities which are under State

List i.e. List II and hence cannot be taxed by Central Government (d) Basic education (e) Interest on loans (f) Non-luxury transportation (f) 'Manufacturing activity where Central excise or State excise provisions apply. ”

- b) 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 completion-certificate by the competent authority. *Explanation.*— For the purposes of this clause,— (I) the expression "competent authority" means the Government or any authority authorised to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:— (A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or (B) chartered engineer registered with the Institution of Engineers (India); or (C) licensed surveyor of the respective local body of the city or town or village or development or planning authority; (II) the expression "construction" includes additions, alterations, replacements or re-modelling of any existing civil structure.
- c) Temporary transfer or permitting the use or enjoyment of any intellectual property right.
- d) Development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software.
- e) Agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act.
- f) Transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods.
- g) Activities in relation to delivery of goods on hire purchase or any system of payment by installments.
- h) Service portion in the execution of a works contract.
- i) 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.

Observations and Comments

Though the term used is 'declared service', some of these are really 'deemed services'. Some of these are

included here as abundant precaution, otherwise, they would have gone in List II i.e. State List and hence might have gone out of the purview of service tax (e.g. renting, construction).

Negative List of Services

Proposed Section 66D of Finance Act, 1994 defines 'Negative list as follows -

The negative list shall comprise of the following services, namely:—

- a) Services by Government or a local authority **excluding** the following services to the extent they are not covered elsewhere (i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided to a person other than Government (ii) services in relation to an aircraft or a vessel, inside or outside the precincts of a port or an airport (iii) transport of goods or passengers; or (iv) support services, other than services covered under clauses (i) to (iii) above, provided to business entities.
- b) Services by the Reserve Bank of India.
- c) Services by a foreign diplomatic mission located in India.
- d) Services relating to agriculture by way of— (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing; (ii) supply of farm labour; (iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market. (iv) renting or leasing of agro machinery or vacant land with or

Negative list is not the end of story. In addition, there is a huge list of services which have been exempted, vide Notification No. 12/2012-ST dated 17-3-2012.

This notification will be effective on the date when the provisions relating to negative list are notified. Distinction between negative list and exempt service is that services in negative list are not taxable at all as they have been excluded from the proposed charging Section 66B of Finance Act, 1994 itself, while exempted services are taxable but are exempted by Central Government by issue of a notification issued under powered delegated vide Section 93(1) of Finance Act, 1994. ☺☺

without a structure incidental to its use; (v) loading, unloading, packing, storage or warehousing of agricultural produce; (vi) agricultural extension services; (vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce.

- e) Trading of goods.
- f) Any process amounting to manufacture or production of goods.
- g) Selling of space or time slots for advertisements **other than** advertisements broadcast by radio or television.
- h) Service by way of access to a road or a bridge on payment of toll charges.
 - i) Betting, gambling or lottery.
 - j) Admission to entertainment events or access to amusement facilities.
- k) Transmission or distribution of electricity by an electricity transmission or distribution utility.
- l) Services by way of— (i) pre-school education and education up to higher secondary school or equivalent (ii) education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force (iii) education as a part of an approved vocational education course.
- m) Services by way of renting of residential dwelling for use as residence.
- n) Services by way of— (i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount (ii) inter se sale or purchase of foreign currency amongst banks or authorised dealers of foreign exchange or amongst banks and such dealers.
- o) Service of transportation of passengers, with or without accompanied belongings, by— (i) a stage carriage; (ii) railways in a class **other** than— (A) first class; or (B) an air-conditioned coach (iii) metro, monorail or tramway (iv) inland waterways. (v) public transport, other than predominantly for tourism purpose, in a vessel of less than fifteen tonne net; and (vi) metered cabs, radio taxis or auto rickshaws.
- p) Services by way of transportation of goods— (i) by road **except** the services of— (A) a goods transportation agency; or (B) a courier agency (ii) by an aircraft or a vessel from a place outside India to the first customs station of landing in India; or (iii) by inland waterways.
- q) Funeral, burial, crematorium or mortuary services including transportation of the deceased.

Observation and Comments

The services covered in this category can be broadly

classified as follows — (a) Statutory activities (b) Agriculture related services (c) Activities which are under State List i.e. List II and hence cannot be taxed by Central Government (d) Basic education (e) Interest on loans (f) Non-luxury transportation (f) 'Manufacturing activity where Central excise or State excise provisions apply.

One thing has to be appreciated that at least after death, there is no service tax! [see clause (q) above]

Exemptions

Negative list is not the end of story. In addition, there is a huge list of services which have been exempted, *vide* Notification No. 12/2012-ST dated 17-3-2012. This notification will be effective on the date when the provisions relating to negative list are notified.

Distinction between negative list and exempt service is that services in negative list are not taxable at all as they have been excluded from the proposed charging Section 66B of Finance Act, 1994 itself, while exempted services are taxable but are exempted by Central Government by issue of a notification issued under powered delegated *vide* Section 93(1) of Finance Act, 1994.

Change in negative list will require Parliamentary approval, while change in list of exempted services can be effected by Central Government by simply issuing a notification in gazette.

The entire list of exemptions is not reproduced here, but major among the exemptions are given below.

- Services by UN and specified international organisations
- Medical services, clinical trials
- Charitable activities conducted by entity registered under Section 12AA of Income Tax Act (does it mean that other charitable activities are taxable?)
- Conducting religious ceremony and Renting of religious places to public
- Services provided by individual advocate to person other than business entity
- Training in recreational activities relating to arts, culture or sports
- Mid-day meal and transportation services to educational institutions

Broadly, what is presently subject to service tax will continue to be subject to service tax. What is presently excluded or exempted will continue to be exempted

or excluded from service tax net in many cases, except border line cases. Present disputes about many services which people were claiming as not subject to service tax will go. ☞

- Services by player, referee, umpire, coach or manager to sports body
- Sponsorship to specified tournaments or championships (not IPL)
- Non-commercial civil structure including relating to educational and clinical establishment.
- Construction of residential complex for self-use or use of employees, low cost housing schemes, MP, MLA, Members of municipalities or local authorities, etc.
- Infrastructural activities relating to road, bridges, tunnel, etc.
- Erection and construction of airport, port or railways, cold storages for agricultural produce
- Copyright relating to original literary, dramatic, musical, artistic works or cinematograph films
- Performing artists of folk or classical arts
- Journalists
- Hotel, guest houses with less than ₹1,000 per day tariff
- Non-air conditioned and non-alcoholic restaurants
- Transport by rail or vessel of petroleum products, relief material, defence equipment, postal mail, newspapers or magazines, foodstuff, fertilisers, oil cakes
- Transport by road of fruits, egg, milk, food grains or pulses, small transport less than ₹750 per consignee
- Hire of vehicle to state transport undertaking or goods transport agency
- Air transport in north east
- Transport of passengers in goods carriage, excluding tourism
- Parking services
- Specified services to Government or local authority
- Specified general insurance services
- Services to own members by housing society (upto ₹5,000 per member) and trade unions
- Sub broker, mutual fund agents, marketing agents of lottery tickets, SIM cards or recharge coupons
- Job work of agriculture, printing, textile processing, diamonds and gemstones and where principal manufacturer is paying excise duty
- Business exhibition outside India
- Public telephones or free telephones
- Slaughtering of bovine animals
- Services from outside India to Government or local authority or individual or charitable organisations

Comments and Observations

Broadly, almost all present exemptions available under notifications issued under service tax have been covered in the aforesaid omnibus exemption notification.

It may be noted that as per proposed Section 66F(1) of Finance Act, 1994; reference to a service (i.e. main service) shall not include reference to a service which is used for providing main service. Thus, situations are possible when 'main service' is either excluded or exempt from service tax, but service provided by sub-contractor to the 'main service' provider may come under tax net, defeating the very purpose of exemption.

Some services like medical services and infrastructure related services have been kept under 'exemption notification' and not under 'negative list'. Really, these should be under 'negative list', so that Government cannot withdraw these exemptions at its will and whim.

Conclusion

Broadly, what is presently subject to service tax will continue to be subject to service tax. What is presently excluded or exempted will continue to be exempted or excluded from service tax net in many cases, except border line cases. Present disputes about many services which people were claiming as not subject to

service tax will go.

Present abatements available in respect of outdoor catering, pandal, shamiana, goods transport agency service, tour operator, renting of vehicle, etc. are broadly continuing under Notification No. 13/2012-ST dated 17-3-2012 (to be effective after the provisions relating to negative list of services become effective)

Of course that does not mean that disputes will disappear. Borderline cases will always be there, e.g. (a) whether demurrage charged is subject to service tax [In fact, rule 6(1)(x) of Service Tax Valuation Rules (proposed to be amended) specifically provide that these will be subject to service tax] (b) Construction of residential complex for self-use (c) Agriculture related activities, etc. Many more disputes would arise in due course.

It may be noted that as per proposed Section 66F(1) of Finance Act, 1994; reference to a service (i.e. main service) shall not include reference to a service which is used for providing main service.

Thus, situations are possible when 'main service' is either excluded or exempt from service tax, but service provided by sub-contractor to the 'main service' provider may come under tax net, defeating the very purpose of exemption.

Many such anomalies and issues would come to notice in due course. ■