

# Education under Negative Era



Under the negative list era, on the line of positive list scheme of service tax under the Finance Act, 1994, a specific entry called *Negative List* has been incorporated under Section 66D of the Act to exclude basic education from the scope of levy of service tax. Certain services provided by or to the educational institutions are specifically exempted under Mega Exemption Notification No. 25/2012 dated 20.06.2012. The author summarises the new provisions relating to service tax on education sector as amended by Finance Act, 2013. Word *education* is broad in scope covering various aspects of learning and cognition. New service-tax law levies service tax on all fields of education except which is specifically covered under the *negative list* and otherwise exempted by way of notification. *Read on to know more on this...*



**CA. Ravi Mansaka**

(The author is a member of the Institute who may be contacted at [ravimansaka@gmail.com](mailto:ravimansaka@gmail.com).)

Under the negative list era, on the line of positive list scheme of service tax under Finance Act, 1994, a specific entry has been incorporated under the Section 66D of the said Act, i.e. *Negative List*, to exclude basic education from the scope of levy of service tax. In addition to the exclusion provided under the *negative list*, certain services provided by or to the educational institutions are specifically exempted under *Mega Exemption Notification* No. 25/2012 dated 20.06.2012.

Before understanding the provisions relating to education sector under service tax law, it will be relevant to understand the meaning of the word

**Hence, in order to get covered in the negative list, a course should be recognised by an Indian law. Further, CBEC vide Circular No. 107/01/2009 – ST Dated 28.01.2009 also clarifies that many times private institutes conduct courses and issue diplomas or certificates in collaboration with certain foreign institutes/universities. In many cases private enterprises conduct campus interviews of the students of such institutes and offer them jobs. Such certificates/diplomas may be accepted for higher education abroad.**

education. Finance Act, 1994 does not define it. According to an online resource, education is *a form of learning in which knowledge, skills, and habits of a group of people are transferred from one generation to the next through teaching, training, research, or simply through auto-didacticism. Generally, it occurs through any experience that has a formative effect on the way one thinks, feels, or acts.* Education has a wider meaning covering all fields of learning. Various educational institutions impart training and conduct courses in different fields. Many of these institutions issue certificates/degrees/diplomas to the candidates upon successful completion of the courses, programmes or diplomas. Apart from the government-run or -aided institutions imparting education, training or coaching, there are several privately-run institutions that impart education/training/coaching, teach skills, help in preparation of competitive examinations or run classes on various subjects.

The new service-tax law levies service tax on all fields of education except which is specifically covered under negative list and otherwise exempted by way of notification.

### **Education Covered under Negative List**

Clause (1) of Section 66D provides:

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;*

### **Analysis of Provisions of Negative List**

(1) *Pre-school Education:* Pre-school education

may include crèche, day nursery, pre-K, prekindergarten, nursery school, day care centre, play group, play school, reception class, etc. All these types of education are not liable for service tax by virtue of negative list.

- (2) *Education up to Higher Secondary School or Equivalent:* Education upto secondary or higher secondary school i.e. Education upto XIIth Class are not liable for service tax. Further, the education *equivalent* to higher secondary is also not liable for service tax. It means education equivalent to higher secondary imparted by an international school providing international certificates is also not liable for service tax, e.g. IB certificates.
- (3) *Education as a part of a curriculum for obtaining a qualification recognised by any law for the time being in force:* This covers only such educational services as are related to delivery of education as 'a part' of the curriculum that has been prescribed for obtaining a qualification prescribed by law. It is important to understand that to be in the negative list, the service should be delivered as part of a curriculum. Conduct of degree courses by colleges, institutions or universities which lead to grant of qualifications recognised by law would be covered. However, the training given by private coaching institutes would not be covered as such training does not lead to grant of a recognised qualification.

*CBEC vide Circular No. 80 dated 10<sup>th</sup> September, 2004, clarifies that the phrase law for the time being in force implies such laws as are applicable in India. Therefore, the services provided by way of education as a part of a prescribed curriculum for obtaining a qualification recognised by a law of a foreign country is not covered in the negative list entry. Hence, in order to get covered in the negative list, a course should be recognized by an Indian law. Further, CBEC vide Circular No. 107/01/2009 – ST Dated 28.01.2009 also clarifies that many times private institutes conduct courses and issue diplomas or certificates in collaboration with certain foreign institutes/universities. In many cases private enterprises conduct campus interviews of the students of such institutes and offer them jobs. Such certificates/diplomas may be accepted for higher education abroad. However, such a certificate/diploma cannot be called as 'recognised by the law for the time being in force' unless such a diploma/ certificate has been specifically recognised by the statutory authorities such as UGC, AICTE. Consequently, such institutes would not fall under the*

exempted category and would be subjected to tax.

***Dual Qualification: One is Recognised and Other is Not***

Education guide issued by CBEC dated 20.06.2012, provides that provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are usually prescribed separately. Service in respect of each qualification would, therefore, be assessed separately. If an artificial bundle of service is created by clubbing two courses together, only one of which leads to a qualification recognised by law, then the rule of determination of taxability of a service which is not bundled in the ordinary course of business contained in the Section 66F of the Act shall come into play. Accordingly, it shall be treated as a course which attracts the highest liability of service tax. However, incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well being will be an example of naturally bundled course. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognised component *vis-à-vis* the recognised course.

**(4) Education as a part of an approved vocational education course (VEC)**

Approved vocational education course has been defined in Clause (11) of Section 65B of Finance Act, 1994 to mean -

- (a) a course run by an industrial training institute or an industrial training centre affiliated to the National Council for Vocational Training or State Council for Vocational Training offering courses in designated trades notified under the Apprentices Act, 1961; or
- (b) a Modular Employable Skill Course, approved by the National Council of Vocational

Training, run by a person registered with the Directorate General of Employment and Training, Union Ministry of Labour and Employment; or

- (c) a course run by an institute affiliated to the National Skill Development Corporation set up by the Government of India. [omitted by the Finance Act, 2013]

By the Finance Act, 2013, courses offered by the State Council for Vocation Training are also made exempt from the service tax. However, vide the Finance Act, 2013, an exemption is withdrawn in respect of a course run by an institute affiliated to the National Skill Development Corporation (NSDC) set up by the Government of India.

CBEC vides its Circular No. 164/15/2012-ST clarifies that -

- a) When a VEC is offered by an institution of the Government or a local authority, question of service tax does not arise. In terms of section 66D (a), only specified services provided by the Government are liable to tax and VEC is excluded therein.
- b) When the VEC is offered by an institution, as an independent entity in the form of society or any other similar body, service tax treatment is determinable by the application of either sub-clause (ii) or (iii) of section 66D(l) of the Finance Act, 1994. Sub-clause (ii) refers to "qualification recognized by any law" and sub-clause (iii) refers to "approved VEC". In the context of VEC, qualification implies a Certificate, Diploma, Degree or any other similar Certificate. The words "recognized by any law" will include such courses as are approved or recognized by any entity established under a central or state law including delegated legislation, for the purpose of granting recognition to any education course including a VEC.

**Education Guide issued by CBEC Dated 20.06.2012 provides that boarding schools provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in the Section 66F of the Act.**

**Services Provided by Boarding Schools**

Education Guide issued by CBEC dated 20.06.2012 provides that boarding schools provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in the Section 66F of the Act. Such services

in the case of boarding schools are bundled in the ordinary course of business. Therefore the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle. In this case since dominant nature is determined by the service of education, the entire bundle would be treated as a *negative list* service.

However, where such services like providing dwelling units for residence and food, i.e. hostel, are provided as an option and the charges for education and lodging and boarding are separable, taxability of such services would be separately dealt than along with education. In relation to such kind of services, service tax provisions may apply:

1. *Where services are provided by way of providing dwelling units for residence only*  
Such kind of services may be covered under clause (m) of Negative List provided under Section 66D of Finance Act which provides “services by way of renting of residential dwelling for use as residence”. Residential Dwelling, in normal parlance, is *any residential accommodation*, but does not include hotel, motel, inn, guest house, camp-site, lodge, house boat, or like places meant for temporary stay. In view of the above, it can be concluded that if only accommodation facility is provided in a hostel, then such services are covered under negative list and accordingly not liable for

service tax. Further, by virtue of this entry, an educational institute may also claim exemption in respect of rent received from staff for services by way of renting of staff quarters.

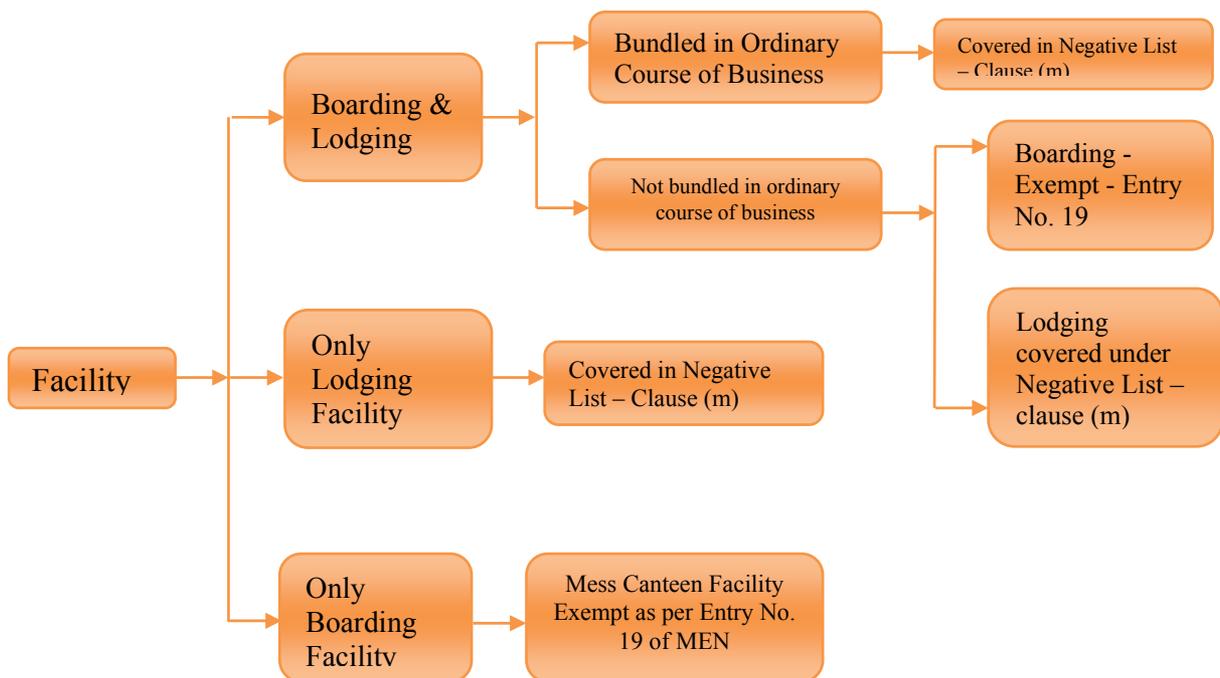
2. *Where services are provided by way of providing dwelling units for residence and food*

This may be a case of bundled services if the charges for lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in the Section 66F of the Act. In this case, since dominant nature is determined by the service of resident dwelling, i.e. accommodation, which is covered in a separate entry of the negative list, entire bundle would be treated as a negative list service.

3. *Where only Mess/Canteen Facility is provided*

Entry No. 19 of Mega Exemption Notification grants exemption for 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 AC or central air-heating in any part of establishment, at any time during the year.*

In view of the above entry, a mess or canteen established by educational institute may claim exemption for services provided in relation to serving of food or beverages subject to condition that there is no air-conditioning facility in any part of such canteen or mess at any time during the year.



### **Auxiliary Education Services**

An educational institution may provide a number of services to its students, staff or other persons such as transportation services to students or staff, hostel facility, books and uniforms, placement services, library services, games and sports participation, renting of quarters to staff, renting of auditorium or halls to others, mess or canteen facility, etc., for which it may charge separately or otherwise. Entry No. 9 of Mega Exemption Notification grants exemption in this respect to some of such auxiliary education services. One minor amendment with several consequences as related to education auxiliary services has been done in the Mega Exemption Notification vide Notification No. 3/2013-ST Dated 01.03.2013.

The implication of this amendment is explained:

Serial no. 9 of mega exemption notification reads as follows:

#### **Before Amendment**

9. *Services provided to or by an educational institution in respect of education exempted from service tax, by way of,-*

- (a) *auxiliary educational services; or*  
(b) *renting of immovable property;"*

*As per above entry, the auxiliary education services and renting services were exempt from service tax whether provided by any person to exempted educational institutions or provided by educational institution in respect of education exempted from service tax.*

#### **After Amendment**

9. *Services provided to an educational institution in respect of education exempted from service tax, by way of,-*

- (a) *auxiliary educational services; or*  
(b) *renting of immovable property;"*

*As per above amended entry, the auxiliary education services and renting services are exempt from service tax only where such services are PROVIDED TO EDUCATIONAL*

INSTITUTION in respect of education was exempted from the service tax. Thus, with effect from 1<sup>st</sup> April 2013, the *auxiliary education services* and renting services provided by all educational institutions are taxable irrespective of exemption of their basic education services from the service tax. Further, the above exemption is applicable only

**An educational institution may provide a number of services to its students, staff or other persons such as transportation services to students or staff, hostel facility, books and uniforms, placement services, library services, games and sports participation, renting of quarters to staff, renting of auditorium or halls to others, mess or canteen facility, etc., for which it may charge separately or otherwise.**

where such services are provided to an educational institution which provides exempted education services. Therefore, if the above services are provided to other education institutions then such services are not covered under this entry and accordingly, liable for service tax.

The term “auxiliary educational services” is defined in definition clause (f) of paragraph (2) of Mega Exemption Notification:

In term of the definition, the following activities are auxiliary educational services:

- any services relating to imparting any skill, knowledge or education, or
- development of course content, or
- any other knowledge – enhancement activity, whether for the students or the faculty, or
- any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including following services relating to:
  - admission to such institution
  - conduct of examination
  - catering for the students under any mid-day meals scheme sponsored by Government
  - transportation of students, faculty or staff of such institution.

The severe implications brought in by the minor amendment with regard to transportation facility can be tabulated:

Nature of Service	Taxable or Not
Transportation services provided by an educational institution whose basic education is exempted directly through own buses and Vans	Transportation Services are taxable

Nature of Service	Taxable or Not
Transportation Services provided by an educational institution (other than whose basic education is exempted) directly through own buses and Vans	Transportation Services are taxable
Transportation Services provided by a Contractor to an educational institution whose basic education is exempted where contractor is recovering charges from institute and institute is recovering such charges (with or without addition of its margin) from students, staff or faculty	Exempted by virtue of Entry No. 9 of Mega Exemption Notification
Transportation Services provided by a Contractor to an educational institution (other than whose basic education is exempted) where contractor is recovering charges from institute and institute is recovering such charges (with or without addition of its margin) from students, staff or faculty	Transportation Services are taxable
Transportation Services provided by a Contractor to any educational institution where contractor is recovering charges directly from students, staff or faculty	Taxable as such services do not amount to "provided to educational institution"

**Controversy with Entry No. 23 of Mega Exemption Notification** Apart from the Entry No. 9, Entry No. 23 of Mega Exemption Notification also grants exemption in respect of *transport of passengers, with or without accompanied belongings, by a contract carriage* for the transportation of passengers, excluding tourism, conducted tour, charter or hire. According to the Clause (m) of Definitions part of *Mega Exemption Notification Contract Carriage* has the meaning assigned to it in the clause (7) of Section 2 of the Motor Vehicles Act, 1988 (59 of 1988). Accordingly, the Clause (7) of Section 2 of Motor Vehicles Act, 1988 provides

**Generally, transportation of educational institutions fulfills all the conditions of a contract carriage and accordingly they may claim exemption under the abovementioned entry of Mega Exemption Notification. Presently, many educational institutions are claiming exemption defining their transportation as contract carriage. However, it is to be noted that in Motor Vehicles Act, 1988 as well as in every state motor vehicles Act generally there is a separate permit facility for transportation vehicles of educational institutions as educational institution buses, therefore, it may be incorrect to claim exemption by defining it as contract carriage.**

that a *contract carriage* means a motor vehicle which carries a passenger or passengers for hire or reward and is engaged under a contract, whether expressed or implied, for the use of such vehicle as a whole for the carriage of passengers mentioned therein and entered into by a person with a holder of a permit in relation to such vehicle or any person authorised by him in this behalf on a fixed or an agreed rate or sum—

- (a) on a time basis, whether or not with reference to any route or distance; or
- (b) from one point to another, without stopping to pick up or set down passengers not included in the contract anywhere during the journey, and includes-- (i) a maxicab; and (ii) a motor cab notwithstanding that separate fares are charged for its passengers;

Generally, transportation of educational institutions fulfills all the conditions of a *contract carriage* and accordingly they may claim exemption under the abovementioned entry of *Mega Exemption Notification*. Presently, many educational institutions are claiming exemption defining their transportation as *contract carriage*. However, it is to be noted that in Motor Vehicles Act, 1988 as well as in every state motor vehicles Act generally there is a separate permit facility for transportation vehicles of educational institutions as *educational institution buses*, therefore, it may be incorrect to claim exemption by defining it as *contract carriage*. Further, it can also be interpreted that when there are separate/special provisions for transportation of students and staff under the Entry No. 9, general provisions provided under the Entry No. 23 need not be applied and accordingly, the transportation of students and staff may be covered only by the Entry No. 9.

### ***Admission Fee, Examination Fee or Development Fee charged from students***

Last limb of the definition of auxiliary education services provides *any other services which educational institutions ordinarily carry out themselves but may obtain as outsourced services from any other person, including services relating to admission to such institution, conduct of examination, catering for the students under any mid-day meals scheme sponsored by Government, or transportation of students, faculty or staff of such institution.* A thorough perusal of above provisions provides that this limb does not grant exemption in respect of admission fees or examination fee but provides exemption in respect of services relating to admission to such institution or conduct of examination and not the service of admission or examination itself. For example, where the work of conduct of examination or admission process is given on contract by such educational institute then contract fees charged by such contractors are exempt for services tax, if such services are provided to an exempt educational institute.

In other words, the admission fee or examination fees are not regulated through the definition of *auxiliary education services* but are carved within the meaning of basic education covered in *negative list*. Further, tuition fee or development fees are also not liable for service tax. It may also be noted that it is obligatory (and not optional) for students to avail the services of admission or development or examination and to pay the fees in respect of such services along with basic tuition fee. Therefore, it is also a case of bundled services where tuition is having dominant nature which is covered under negative list and accordingly, all other fees charged along with tuition fees (mandatorily) would not be liable for service tax.

### ***Renting of Immovable Property by or to Educational Institution***

While providing basic education services, an educational institute may let out its spare immovable properties on rent and similarly, it may also take the immovable property on rent for providing its educational services. By virtue of Entry No. 9(b) of Mega Exemption Notification, the services provided by way of renting of *immovable property to an educational institution in respect of education exempted, is exempt from service tax.* In other words, services of renting of immovable property taken by educational institutions are exempt only when the basic educational services provided by such institution are also exempt from

service tax otherwise not.

However, after amendment made by the Notification No. 3/2013 (*supra*), the services provided by way of renting of immovable property by an educational institute is liable for service tax unless such renting is made exempted elsewhere. Such renting would be taxable whether or not their basic education services are exempt from service tax. However, where an education institute (whose basic education is exempt or not) provides services by way of renting to other education institute (whose basic education is exempt), such services are exempt as the receiver education institute is providing services by way of education which are exempt from service tax. Further, according to the Clause (a) of *Negative List*, where a government educational institute (if it is squarely covered in the definition of government) provides services by way of renting of immovable property to any non-business entity then it would be exempt from service tax.

By virtue of above provisions, the renting of auditorium, Halls, etc. by an educational institute is liable for service tax and no exemption in this regard is available in Mega Exemption Notification.

### ***Placement Services to or by Educational Institutions***

Placement services provided to educational institutions for securing job placements for the students are not covered in any entry of negative list or *Mega Exemption Notification*. Therefore, placement services provided to all educational institutions are liable for the service tax. Service tax is liable on the services provided by the educational institutions such as NITs, IIMs, etc., charging a fee from the prospective employers like corporate houses/MNCs, who come to the institutes for recruiting candidates through campus interviews since such services are not covered in the negative list or *Mega Exemption Notification*.

### ***Educational Services by Charitable Trusts***

In India, generally, educational institutions, schools, colleges and universities are registered under the provisions of Section 12AA of Income-tax Act, 1961

**Placement services provided to educational institutions for securing job placements for the students are not covered in any entry of negative list or Mega Exemption Notification. Therefore, placement services provided to all educational institutions are liable for the service tax.**

and claim exemption from income tax under the provisions of the Sections 11 and 12 of the said Act. However, all such educational institutions, schools, colleges and universities are not exempt from whole of the service tax leviable on services provided by them. Entry No. 4 of *Mega Exemption Notification* exempts services provided by an entity registered under the Section 12AA by way of charitable activities. Clause (k) provided in the definition part of the said notification defines the term charitable activities to include specified education programmes only.

The definition is:

“charitable activities” means activities relating to -

- (i) .....
- (ii) .....
- (iii) *advancement of educational programmes or skill development relating to,-*
  - (a) *abandoned, orphaned or homeless children;*
  - (b) *physically or mentally abused and traumatized persons;*
  - (c) *prisoners; or*
  - (d) *persons over the age of 65 years residing in a rural area;*
- (iv) .....
- (v) .....

Clause (zd) of the definition part of *Mega Exemption Notification* defines *rural area* to mean the area comprised in a village as defined in land revenue records, excluding the area under any municipal committee, municipal corporation, town area committee, cantonment board or notified area committee or any area that may be notified as an urban area by the Central Government or a State Government. In view of the above, an educational institute registered as *Charitable Trust* is not exempt from service tax wholly unless it provides services in relation to specified education programmes only (as discussed above) or it is not liable for service tax under another entry of negative list.

Clause (34) (b) of the Notification No. 25/2012 Dated 20.06.2012 provides exemption for services received from a provider of service located in a non-taxable territory by an entity registered under the Section 12AA of the Income-tax Act, 1961 for the purposes of providing charitable activities. In other words, if an educational institution providing above mentioned charitable activities and registered under the Section 12AA of Income-tax Act, 1961, receives any service from a provider of service located in non-

taxable territory then such services are not liable for service tax on reverse charge mechanism.

### ***Construction of Government Schools, Colleges, Universities or Other Educational Institute***

Entry No. 12 of *Mega Exemption Notification* exempts the services provided to the Government, a local authority or a governmental authority by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of a structure meant predominantly for use as an educational establishment. However, if the above services are provided to private educational establishments then such services are liable for service tax even their basic education is covered under negative list.

### ***Library Fees***

Entry No. 35 of *Mega Exemption Notification* covers services of public libraries by way of lending of books, publications or any other knowledge-enhancing content or material. Therefore, the fees charged by an educational institute for lending of books, publication, etc. are exempt from service tax by virtue of this entry.

### ***Training or Coaching relating to Arts, Culture or Sports***

Entry No. 8 of *Mega Exemption Notification* exempts services by way of training or coaching in recreational activities relating to arts, culture or sports. The benefit is available to coaching or training relating to all forms of dance, music, painting, sculpture making, theatre, sports, etc. By virtue of this entry, the fees charged by any educational institute in respect of training or coaching in recreational activities relating to arts, culture or sports are exempt from the service tax whether or not their basic education services are exempt from service tax.

### ***Receipts from Sale of Books, Uniforms and other Materials***

Normally, educational institute charges for books, uniforms and other materials from students along with education fee. Before introduction of new *negative list* regime, the Notification No. 12/2003 – ST exempted so much of the value of all taxable services as was equal to the value of goods and materials sold by the service provider to the service recipient subject to condition that there is documentary proof of such value of goods and materials. This was necessary under the regime of taxation of services based on specified descriptions as some of the specified descriptions could include an

element of transfer of title in goods. On the other hand, under the negative list scheme, specified descriptions of taxable services have been done away with and transactions that involve transfer of title in goods or are 'deemed to be sale of goods' under the Constitution are excluded from the ambit of service by the very definition of service provided under the Clause (44) of Section 65B of Finance Act, 1994. Therefore if, in the course of providing a service, goods are also being sold by a service provider for which there is such documentary proof as to make the sale a distinct and a separate transaction then the activity of sale of such goods gets excluded from the definition of service itself. The essence and intent of Notification No. 12/2003 has, therefore, been fully captured in the definition of service itself.

On the lines of the above clarification, an educational institute can also exclude the value of books, uniforms and other materials from the value of taxable service as it involves transfer of title in goods or deemed to be sale of goods subject to a documentary proof as to make the sale a distinct and a separate transaction from service. However, where books and uniforms are supplied as a part of service and no separate fee is charged from students then value of such goods are not to be excluded from the value of composite contract. The Honorable Supreme Court in the case of *Bharat Sanchar Nigam Limited vs. Union of India [2006 (2) STR 161 (SC)]* held that except in cases of works contracts or catering contracts [exact words in Article 366(29A) being – 'service wherein goods, being food or any other article of human consumption or any

drink (whether or not intoxicating) is supplied in any manner as part of the service'] composite transactions cannot be split into contracts of sale and contracts of service.

The nature of a composite transaction, except in case of two exceptions carved out by the Constitution, would be determined by the element which determines the 'dominant nature' of the transaction. Obviously, for an educational institute the 'dominant nature' of transaction is provision of educational services and accordingly, the whole transaction would be treated as a service and taxed as such even if the transaction involves an element of sale of goods. Further, under the Section 66D of the Act, Clause (e) of Negative List covers trading of goods, therefore, this entry may also cover, the amount charged by educational institutions towards, books, uniforms and other material which are covered in the definition of Goods. Such amounts are not subject to charge of service tax by virtue of this entry.

### Conclusion

Right to Education appears to be only on paper as the very same government which claims to promote the education sector at one hand, shooting the educational institutions at another hand by way of taxing the education. Apart from the basic education and approved vocational educational courses, all other forms of education are made liable for the service tax. Further, the incidental and auxiliary services to education are also made liable for tax except as provided in Mega Exemption Notification. ■

