Declared Services:

Introduction:

The advent of Negative regime ushered a plethora of changes in the area of Indirect Taxation. In the earlier comprehensive levy (positive) regime, taxability arose if a service specified under the list of taxable services was provided. The lengthy positive list was neither conducive for compliance or administration. It also resulted in legal disputes and litigations.

Hence after a lot of deliberation and discussion, a consensus was arrived at to introduce the Negative List. There have been divided opinions regarding the timing of Negative List. Some experts feel that it should have been introduced with GST, for a wider constitutional mandate. Others, feel that introduction of Negative List earlier would enable smoother transition to GST and ease the prospective hurdles in implementation of GST at a subsequent stage. Negative list could be safely laid out as a precursor for the would-be law GST.

Earlier the word "Service" was not defined anywhere in Chapter V of the Finance Act, 1994. In order to ensure wide coverage of services under the ambit of service tax, the term 'Service' has been defined under the new inserted section 65B(44) in the Finance Act, 2012, which reads as follows-

Definition of Service:

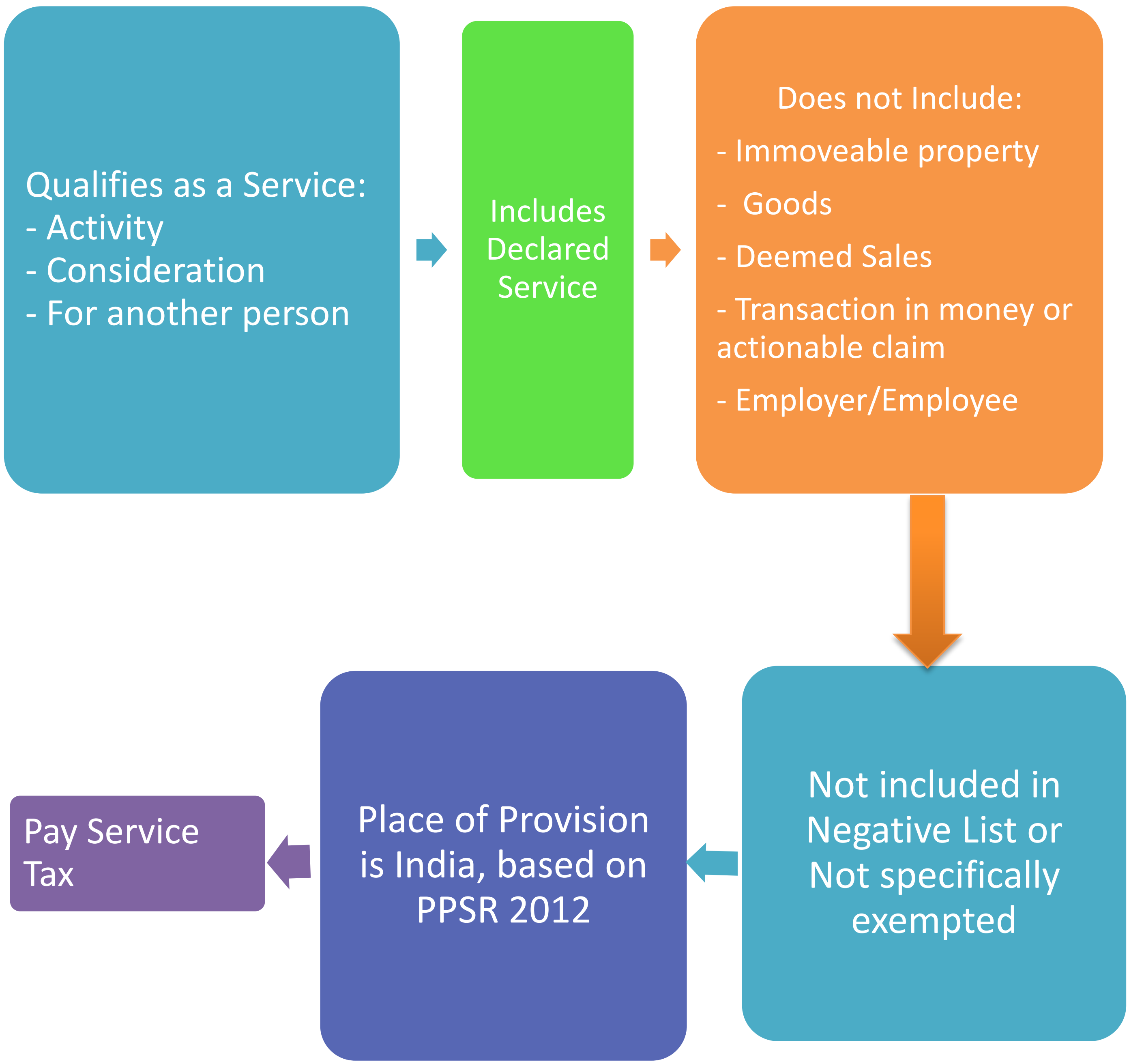
"Service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—

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
b. a transaction in money or actionable claim.
c. a provision of service by an employee to the employer in the course of or in relation to his employment;
d. fees taken in any Court or tribunal established under any law for the time being in force.

The definition prescribes the following three essential ingredients that must be present in order to call an activity as 'service'-

a. it must be an activity;
b. it must be performed by a person for another person;
c. the activity is performed for a consideration.

Current System of Levy



<u>Section 66E: What are declared Services?</u>

In Excise Law, certain activities are deemed manufacture even thought they might not involve any change in name or utility of the product.

On a similar note, Section 66E "declares" certain activities as declared.

The following shall constitute declared services, namely:—

a) **renting of immovable property;**

Renting has been defined in section 65B(90a) as ''allowing, permitting or granting access, entry, occupation, usage or any such facility, wholly or partly, in an immovable property, with or without the transfer of possession or control of the said immovable property and includes letting, leasing, licensing or other similar arrangements in respect of immovable property'

Is Renting of all immovable properties taxable?
All immovable properties other than

- vacant land for agriculture
- residential dwelling for residence
- by RBI or Government or Local authority

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.**

This service was already taxable as part of construction of residential complex service under clause 65(105) (zzzh) and 65(105) (zzq). This entry covers the services provided by builders or developers or any other person, where building complexes, civil structure or part thereof are offered for sale but the payment for such building or complex or part thereof is received before the issuance of completion certificate by a competent authority.

Competent authority means Government or any authority authorized to issue completion certificate. In case of non-requirement of such certificate, Architect or Chartered Engineer or licensed surveyor can issue the certificate.

Construction includes additions, alterations, replacements or remodeling of any existing civil structure.

It may be pointed out that in a recent judgment passed by the Mumbai High Court in the case of Maharashtra Chamber of Housing Industry and Others vs. Union of India [012-TIOL-78-HC-Mum-ST] has upheld the Constitutional validity of levy of service tax, under 65(105)(zzzh) and 65(105) (zzzzu), on similar construction services provided by a builder.

Most often the taxability of construction contracts depends on the model employed in the contract. The following are a few illustrative models:

- Flats agreed to be given by builder to the land owner towards the development rights and to other buyers
- Land is owned by a society, comprising members of the society with each member entitled to his share by way of an apartment. Society gives NOC or permission to the builder, for re-construction. The builder makes new flats for original owners of flats and may also be involved in constructing some additional flats for sale to others or arrange for rent for original owners during the period of reconstruction; or pay an additional amount to the original owners of flats in the society

- Build-Operate-Transfer(BOT)

c) **<u>temporary transfer or permitting the use or enjoyment of any intellectual property right;</u>**

Intellectual property right' has not been defined in the Act. The phrase has to be understood as in normal trade parlance as per which intellectual property right includes the following:-

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

Would the temporary transfer of a patent registered in a country outside India also be covered under this entry?

Since there is no condition regarding the law under which an intellectual right should be registered, temporary transfer of a patent registered outside India would also be covered in this entry. However, it will become taxable only if the place of provision of service of temporary transfer of intellectual property right is in taxable territory.

Permanent transfer or sale is not taxable as a declared service.

d) **<u>development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software;</u>**

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

- *Prepacked/canned software* which is put in media is in nature of goods. Tata Consultancy Services vs State of Andhra Pradesh [2002(178) ELT 22(SC)]

- *License to use a pre-packaged software:* A license to use software which does not involve the transfer of 'right to use' would neither be a transfer of title in goods nor a deemed sale of goods. Such an activity would fall in the ambit of definition of 'service' and also in the declared service category specified in clause (f) of section 66E.

- *Delivery of customized software* and delivered to client on media: TCS judgment would not be applicable as the transaction does not involve 'only' transfer of title in goods and dominant nature of the transaction is that of provision of service

e) **<u>agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;</u>**

Apart from those mentioned in the definition, any non-compete agreement with respect to geographical areas, specified products and services or any other manner would also be covered.

f) <u>transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;</u>

Transfer of right to use goods is a well-recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. 'Transfer of right of goods' involves transfer of possession and effective control over such goods in terms of the judgment of the Supreme Court in the case of State of Andhra Pradesh Vs Rashtriya Ispat Nigam Ltd. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control.

The test laid down by the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India [2006(2)STR161(SC)] to determine whether a transaction involves transfer of right to use goods, which has been followed by the Supreme Court and various High Courts, is as follows:

- There must be goods available for delivery;
- There must be a consensus ad idem as to the identity of the goods;
- The transferee should have legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;
- For the period during which the transferee has such legal right , it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language 91of the statute, viz., a 'transfer of the right to use' and not merely a license to use the goods;
- Having transferred, the owner cannot again transfer the same right to others.

The agreement has to be read as a whole, to determine if nature of the transaction, involves Transfer of goods.

g) <u>activities in relation to delivery of goods on hire purchase or any system of payment by installments;</u>

Is the delivery of goods on hire purchase of any system of payment by installments taxable?

No. The delivery of goods on hire purchase or any system of payment on installment is not chargeable to service tax is deemed to be a sale of goods.
However activities or services provided in relation to such delivery of goods are covered in this declared list entry.

It has been held by Supreme Court in the case of Association Of Leasing & Financial Service Companies Vs Union Of India [2010 (20) S.T.R. 417 (S.C.)] that in equipment leasing/hire purchase agreements there are two different and distinct transactions, viz., the financing transaction and the equipment leasing/hire-purchase transaction and that the financing transaction, consideration for which was represented by way of interest or other charges like lease management fee, processing fee, documentation charges and administrative fees, which is chargeable to service tax. Therefore, such financial services that accompany hire purchase agreement fall in the ambit of this entry of declared services.

h) **service portion in the execution of a works contract;**

Works contract has been defined in section 65B of the Act as a contract wherein transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and such contract is for the purpose of carrying out construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any moveable or immoveable property or for carrying out any other similar activity or a part thereof in relation to such property.

Typically every works contract involves an element of sale of goods and provision of service. Transfer of property in goods involved in execution of works contract is deemed to be a sale of such goods.

Taxation would be as per Rule 2A of Service Tax (Determination of Value) Rules 2012

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**

The following activities are illustration of activities covered in this entry-

- Supply of food or drinks in a restaurant;
- Supply of foods and drinks by an outdoor caterer.

Supply of any goods, being food or any other article of human consumption in any manner as part of a service is deemed to be a sale of such goods. Such a service therefore cannot be treated as service to the extent of the value of goods so supplied. The remaining portion however constitutes a service. This declared list entry is has been incorporated to capture this position of law in simple terms. The taxability of these services is as per Rule 2C of Valuation Rules.