Service Tax – Concept of Service

Introduction: Consequences which lead to introduction of Negative list of Service Tax

With the introduction of Negative Service tax regime in Finance Act 2012, the then Finance minister ushered drastic changes in indirect taxes regime.

After lot of deliberation and discussion, a consensus had been arrived that long positive list is neither conducive for tax administration or compliance. Besides, it also results in legal disputes and litigations.

As to the timing for the introduction of the Negative List, the opinion is divided. While some feel that it should be introduced at the time of GST, with a wider Constitutional mandate, there are others who feel that the introduction of Negative List should be done independently of the GST. In fact, it has been added that such introduction at an earlier stage will pave the way for the smooth transition to the GST, and significantly ease the challenges arising out of implementing the GST. It can be safely interpreted that Negative List is a precursor to the yet to be introduced GST regime.

Implementing the Negative list almost reduced the pages of law by 40% with 290 definitions reduced to 54 and number of exemptions from 88 to 10.

After giving due consideration to federal nature of our polity, the best international practices and our socio-economic requirements, the negative list of 17 Services has been drawn up.

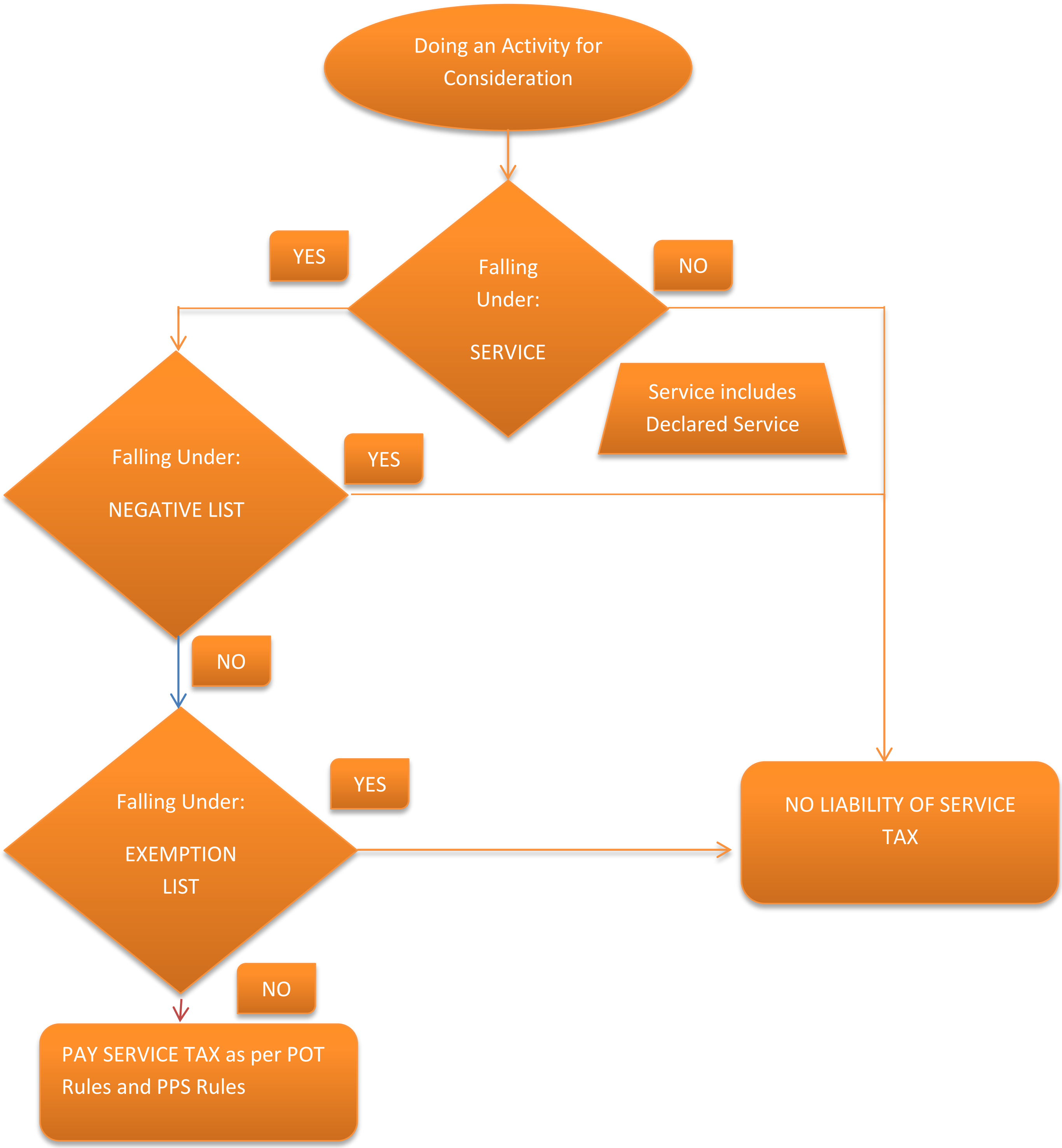
Introduction of Definition of Service:

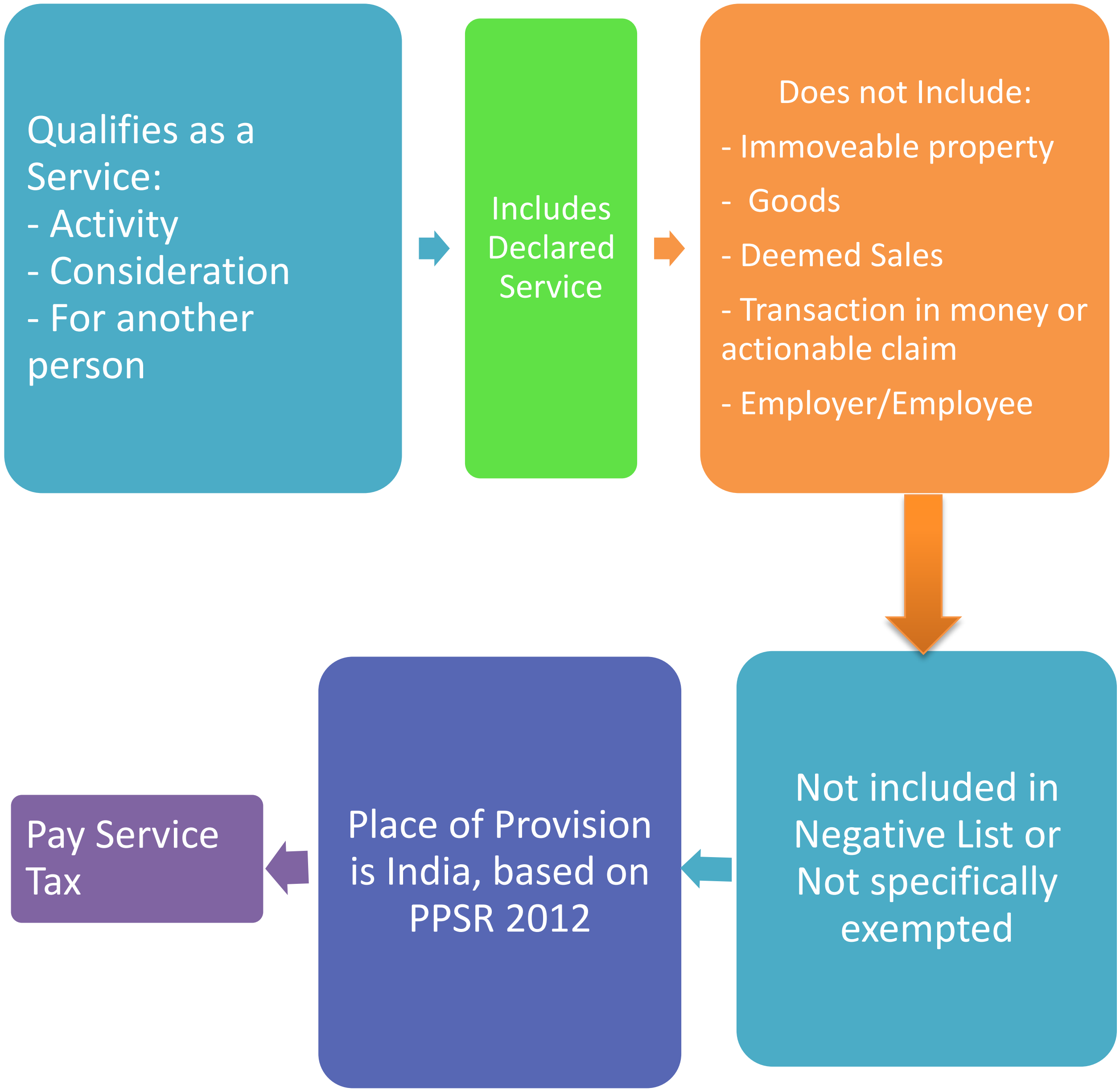
Earlier the word "Service" was not defined anywhere in Chapter V of the Finance Act, 1994. In order to ensure wide coverage of services under the ambit of service tax, the term 'Service' has been defined under the new inserted section 65B(44) in the Finance Act, 2012, which reads as follows-

"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.

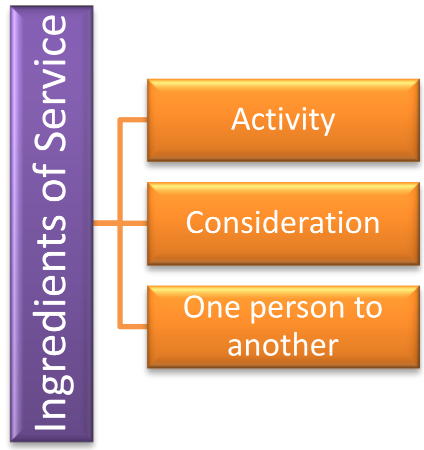
System of Levy under Negative List:





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.

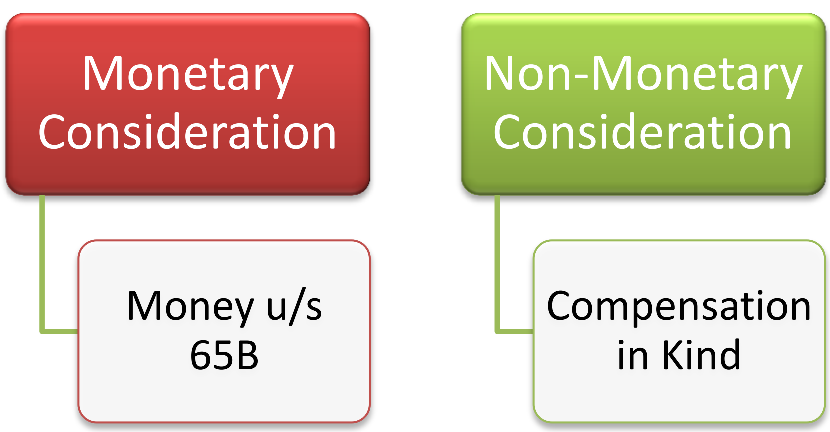


What is an activity?

- Activity has not been defined explicitly in the Act. Activity could be interpreted in a wide connotation. It could include any work done, deed carried out, provision of a facility etc.
- Under Section 66E which mentions about Declared Services, Agreeing to an obligation to refrain from an act or to tolerate an act or a situation has been specifically included.

What is Consideration?

- Explanation (a) to Section 67 of the Act defines consideration as payment for taxable services provided or agreed to be provided.
- By also referring to the Definition of Consideration in Indian Contract Act we can broadly define Consideration as:
- Everything received or recoverable for provision of a service shall include monetary and non-monetary consideration.



Implication that activity should be carried out for consideration:

- Any activity carried out without consideration like donation, gift or free charities are out of ambit of Service Tax.

- Amount contributed to scientific research where the researcher is not obliged to carry a particular line of research or transfer the patent would not be taxable.
- Donations to any charitable organization shall not be liable for Service Tax unless charity is obliged to give something in return.

Activity FOR a Consideration:

- The words "Activity for a Consideration" implies an element of contractual relationship wherein the person doing an activity does so at the desire of the person for whom the activity is done in exchange for a consideration.
- An activity done without express or implied contractual reciprocity of a consideration would not be an 'activity for consideration' even though such an activity may lead to accrual of gains to the person carrying out the activity.
- Consideration without activity cases of payments without an activity though they cannot be put in words as being "consideration without an activity". Grant of pocket money, gift or reward, alimony in a divorce are such examples.
- A reward given for an activity performed explicitly on the understanding that the winner will receive the specified amount in reciprocity for a service to be rendered by the winner would be a consideration for such service. Linux development is an example.

Consideration flowing from Third Party:

Consideration can also flow from a third party as long as nexus can be established.

Who all are covered under one person to another?

This signifies that activities provided to self are out of the ambit of service tax. Activities provided by Branch to Head office and vice versa are exempted except when either are located outside India.

Exceptions to the rule of Self Service:

Two specific exceptions have been carved out from in the Explanation to 65B (44):

a. an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons
b. An unincorporated association or body of persons and members thereof are also treated as distinct persons.

Taking into account this deeming provision, the services provided by a branch of multi-national situated outside India to its peer situated in India shall be liable for Service Tax if all other conditions are satisfied and vice-versa.

Definition of Person:

Defined in 65B to include all the forms of persons, similar to definition in Income Tax Act. Individual, HUF, Companies, Firms, AOP/BOI, Government, Artificial Juridical person are included.

Activities Specified in Declared Services: 66E

These nine activities are which are deemed to be services are:

1. Renting of immovable property;
2. Construction of a complex, building, civil structure or a part thereof, except where the entire consideration is received after issuance of completion-certificate by the competent authority.
3. temporary transfer or permitting the use or enjoyment of any intellectual property right;
4. development, design, programming, customization, adaptation, upgradation, 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 in 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 installments;
8. service portion in the 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 is supplied

Specific Exclusions from Definition of Service:

1. *Only Transfer of title in goods or immovable property, by way of sale, gift or in any other manner*

- Defined in section 65B of the Act Goods are as 'Every kind of moveable property other than actionable claims and money; and includes securities, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under contract of sale'.
- Since Immovable property has not been defined in the Act, General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.
- The word "Only" signifies that any activity in addition to the above carried out is not distinctively excluded from the scope of Service Tax. Section 66F will apply.

2. *Deemed Sale under Clause 29A of Article 266*

- Transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration
- Transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract
- Delivery of goods on hire-purchase or any system of payment by installments
- Transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration
- Supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration
- Supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration.

3. *Transactions only in Money or Actionable claims*

Inclusions in Transaction in Money	Exclusions from Transaction in Money
• The principal amount of deposits in or withdrawals from a bank account. • Advancing or repayment of principal sum on loan to someone. • Conversion of Rs 1,000 currency note into one rupee coins to the extent amount is received in money form without consideration • Investment expecting a return unless in lieu of any service or with consideration	Bank making a pay order or a Draft Debt Collection or Credit Control Services provided for consideration Chit Fund Business (Added by FA 2015)

~~Chit fund business is not liable for service tax as held by Delhi High Court in Chit Fund Association Limited~~. (Amended by FA 2015)

<u>Meaning of Actionable Claims:</u>

Section 3 of the Transfer of Property Act, 1893 "Means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or 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."

Examples of Actionable Claims:

- Unsecured debts
- Right to participate in the draw to be held in a lottery.
- Transfer/Assignment of Secured Debt for Consideration

4. *Services by Employee to Employer in the course of employment:*

- Only Services provided during the course of employment are outside the ambit of service tax.
- For suppose provision of services of employee on contract basis to the associate company of the employer are liable for service tax.
- Services produced on contract basis for a specified period are on principal to principal basis. Hence they are subject to Service tax.

<u>Status of Casual Labour /Contract Workers:</u>

- If the employer is responsible for discharging the daily wages of the casual labourers, it is in the course of employment and service tax is not applicable.
- However if casual workers are employed by the contractor, the amount received by contractor is within the purview of Service Tax.

Overview of Explanations to the Definition of Service:

Explanation 1	Service does not cover the functions/duties performed by MP, MLA, Members of Local Bodies, Chairperson/Director/Member of Bodies established by Central and State Government
Explanation 2	Transaction in Money excludes conversion from one denomination to another for which separate consideration is charged.
Explanation 3	Deeming provision that: Establishment of person located in taxable territory and non-taxable territory are distinct Unincorporated association/body of members and members are separate persons
Explanation 4	Branch or an agency of a person through which the person carries out business is also an establishment of such person.

Conclusion:

From the introduction of Service Tax vide Finance Act 1994; we have functioned for about 18 years without defining "What is a Service?" It was implied to be understood by everyone what a service was.

Due to the advent of Negative List regime, the concept of a service was clearly defined without much room for ambiguity.

Clearly decoding, what each clause and explanation stands for, is indeed the foundation to become familiar with the world of Service Tax.