COMPREHENSIVE TAXATION OF SERVICES

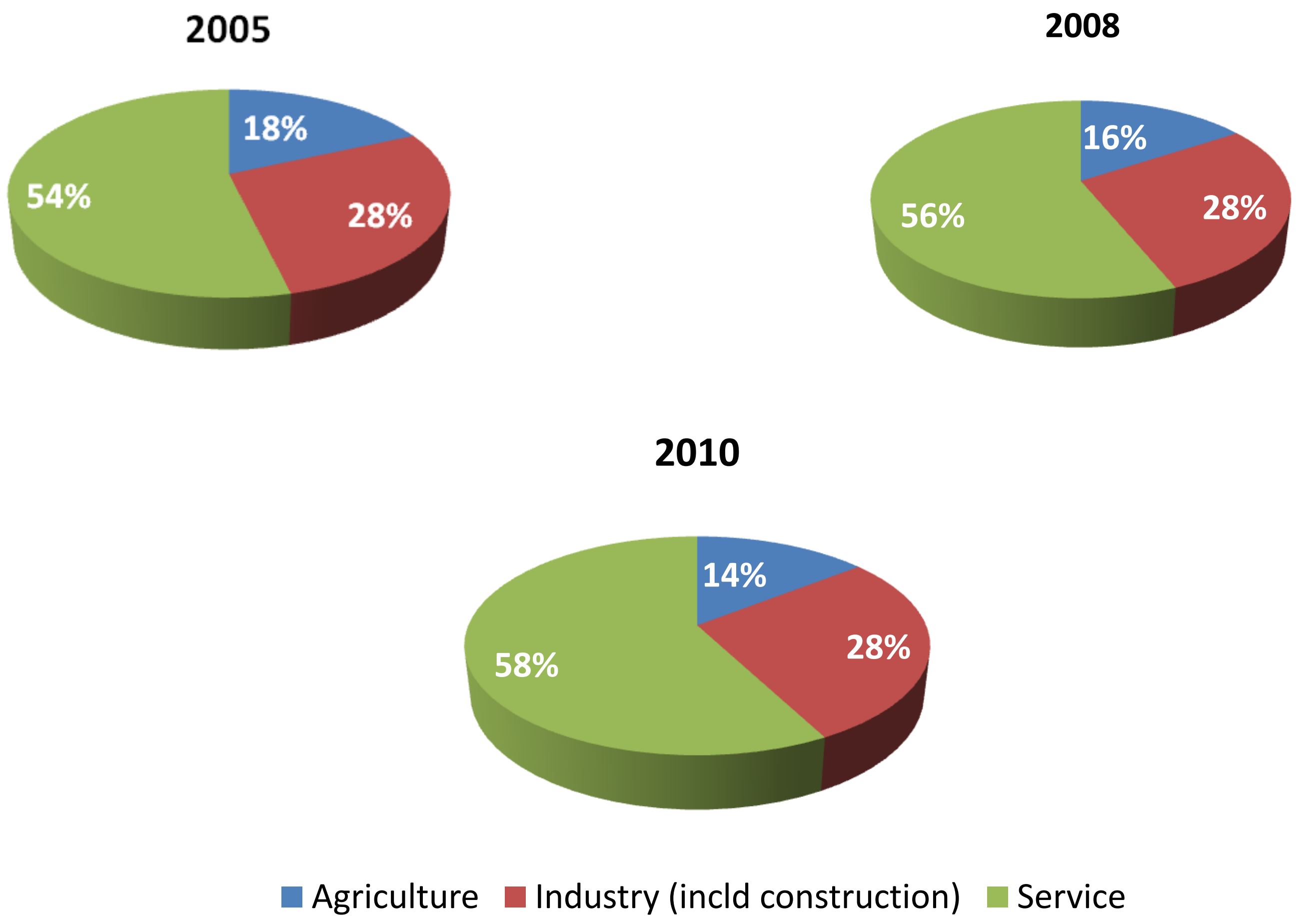
- MANAGEMENT ACADEMY

JULY 2012

INTRODUCTION

SECTORAL GROWTH

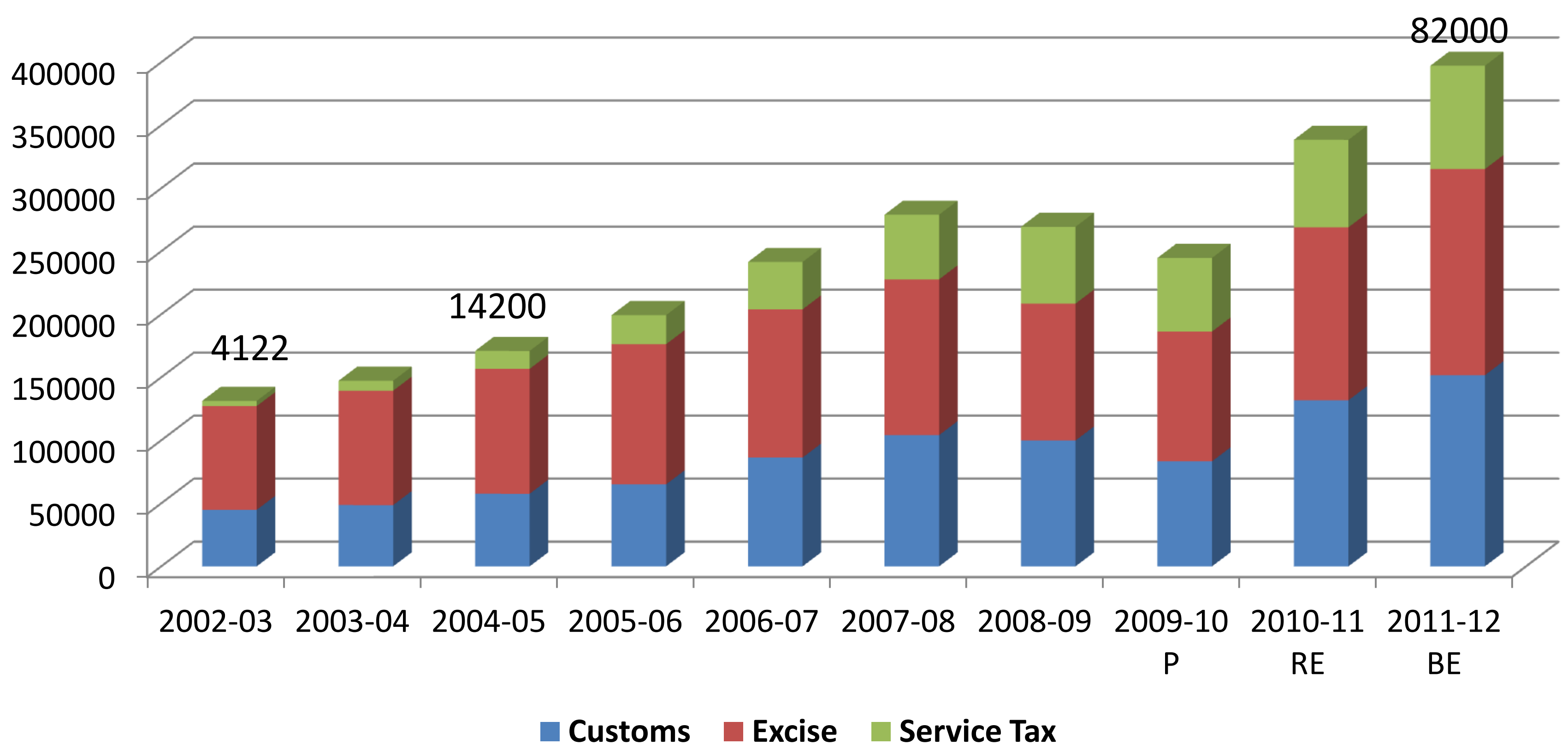
Changing pie of GDP Growth



INDIRECT TAX COLLECTIONS

Share from customs, excise and service tax

In Crore



CURRENT SERVICE TAX REGIME

CURRENT SERVICE TAX REGIME

Current Framework

- Tax based on a **positive list –119 services**
- No definition of "services" – but taxable category defined
- Liability on service provider with few exceptions
- Import of service and Export of Services governed by separate Rules

COMPREHENSIVE SERVICE TAX REGIME

OVERVIEW OF SCHEME

Charging section
Section 66B prescribing 12%

"Service"
Defined under section 65B(44)

Negative list
17 categories of services provided under section 66D

Mega Exemption
39 categories of services provided under exemption notification

Declared Services
Provided under section 66E

Place of Provision of Services
Rule making power under section 66C

Interpretation
Principles provided under section 66F

Comprehensive levy on all activities except those excluded from the definition of 'service' and those specified in negative list and exemption list

COMPREHENSIVE SERVICE TAX REGIME

Complete Overhaul

- **Complete overhaul** of taxation of services
  - Revamp of various provisions
  - Change in existing concepts relating to taxability of various revenue streams, classification, valuation, abatements, exemptions, exports, imports and credits scheme
- **Education Guidance** issued to explain:
  - Service including declared service
  - Negative list of services
  - Exempted services
  - Place of Provision of Service

KEY DEFINITIONS

Key Definitions

- Service
- India
- Taxable Territory
- Person
- Goods
- Interest
- Renting
- Works contract

KEY PROVISIONS

Key Provisions

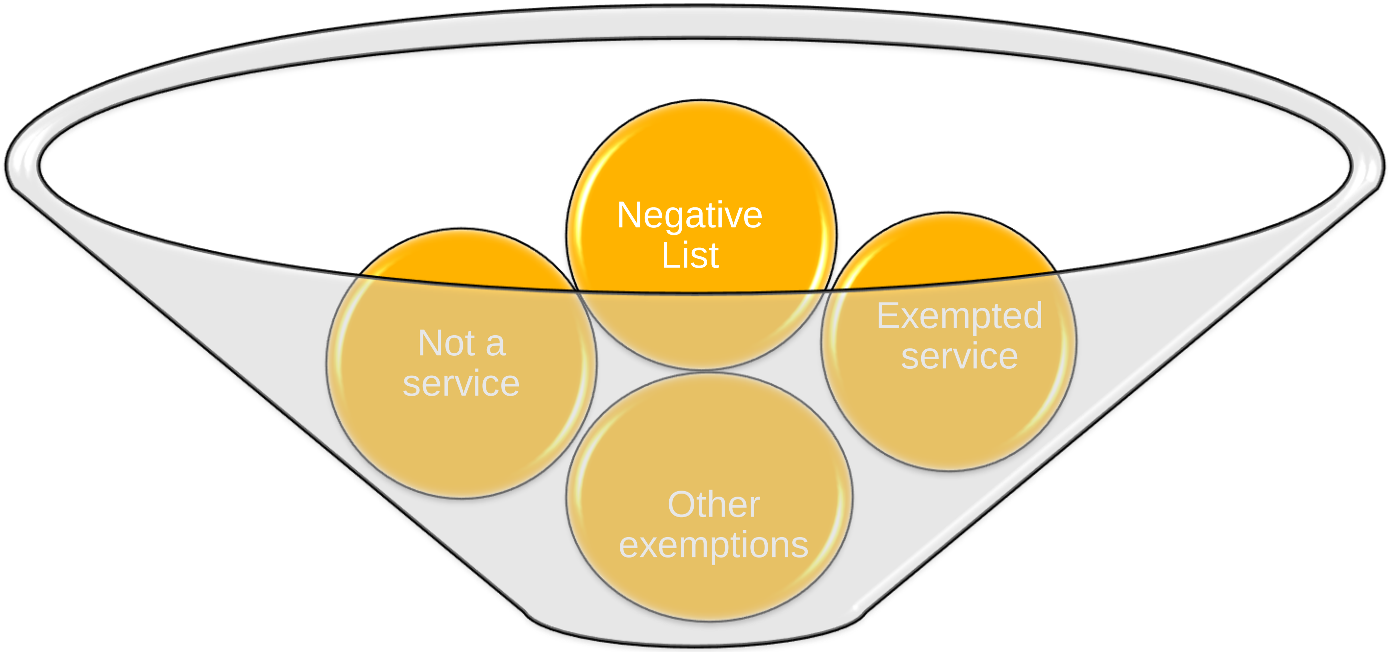
- Charge of service tax
  - Provided /Agreed to be provided
  - In taxable territory
  - Not in Negative list
- Negative list
- Principles of Interpretation and bundled services
- Place of provision
  - Export/Import
  - SEZ (wholly consumed)
  - J&K
  - Multi-location – Tax jurisdiction

KEY PROVISIONS

Key Provisions

- Date of determination of rate of tax, value and rate of exchange
- Exempted Services
- Cenvat Credit

CHARGEABILITY



Except the above pool – Service tax is attracted on **ALL SERVICES** provided

Services **provided in a non-taxable territory** not liable – No requirement to fulfil the export conditions

GALLOPING SERVICE TAX AND LITIGATION

Yearf	Revenue (in INR crores)	Remarks
July 1, 1994	407	3 services taxed
July 1, 2012	1,00,000	All services to be taxed

Prior to July 1, 2012	From July 1, 2012
• **New services** each year	• **All services** taxed except in negative/ exempt list
• Multiple **definitions** of taxable service ○ No definition for service	• **Definitions** to continue ○ Service defined ○ Declared Service
• **Classification** disputes ○ Classification Rules	• **Classification** disputes to continue ○ Bundling of services
• **Valuation** disputes • **Cenvat** credit eligibility • **Export/Import** of services – settled positions	• **Valuation** disputes to continue • **Cenvat** credit – higher cost • **Place of Provision** of service – revisit positions

SERVICE

SERVICE

Definition of "service"

Definition of service

- Any activity
- For **consideration**
- Carried out by a person for another, and
- Includes "**declared services**"

•Foreign establishment and Indian establishment treated as distinct persons
•Unincorporated AOP / BOP and a member treated as distinct persons
•Establishment includes branch/ agency/representation office

SERVICE

Definition of "service"

Exclusions

- **Mere transfer** of property in goods / immovable property
- **Deemed sales** within the meaning of clause (29A) of Article 366
- Transaction only in money or actionable claim
- **Employee to an employer** in the course of or in relation to the employment
- Fees payable to court or tribunal

SERVICE

Issues to be dealt

- Post sale services like free maintenance, inspection, etc - not ‘mere’ sales??
- Remunerations to partner of a partnership firm/member of LLP??
- Referral Bonus , Joining Bonus, overtime and termination amount?
- Awards/Rewards to employees
- Amount received in Court Settlement
- Service provided by employer to employee?? (stay in guest house, training, private use of car, to and fro transportation)

SERVICE

Issues to be dealt

- Operating Lease – Taxable??
- Government Subsidies
- Directors - Commission, sitting fee and ESOPs??
- Non-compete agreements
- Forfeiture, penalties, liquidated damages
- Amount repatriated from abroad
- Amount received in consideration for life time contribution
- Free to air channels
- Prize winnings (KBC, Game Shows)

COMPREHENSIVE SERVICE TAX REGIME - SUMMARY

Qualifies as Service:
- Activity
- Consideration
- For another person

Included as a Declared Service

Does not involve
- Transfer in title of goods or immoveable property
- Deemed sale as per clause (29A) of Article 366
- Transaction in money or actionable claim

Not included in negative list of services as per proposed section 66D or not specifically exempted

Place of provision of service shall be in India (except J&K), based on the PPS Rules

Liable to Service Tax

BMR

NEGATIVE LIST

NEGATIVE LIST – KEY SERVICES

- **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

BMR

NEGATIVE LIST – KEY SERVICES

- Services by the **Reserve Bank of India**
- Services relating to **Agriculture** or agricultural produce
- **Trading** of Goods
- Processes amounting to manufacture or production of goods
- **Selling of space** or time slots for advertisement other than advertisements broadcast by radio or television
- **Transmission or distribution of electricity** by an electricity transmission or distribution utility
- Services by way of **renting of residential dwelling** for use as residence

NEGATIVE LIST – KEY SERVICES

- **Education** - Services by way of way of –
  i. pre –school education and education up to a higher secondary school or equivalent;
  ii. education as a part of a curriculum for obtaining a qualification recognized by law;
  iii. education as a part of an approved vocational education course
- **Financial Services** - Services by way of-
  i. extending deposit ,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 authorized dealers of foreign exchange or amongst banks and such dealers

NEGATIVE LIST – KEY SERVICES

- 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 up to the customs station of clearance in India; or

  iii. by inland waterways

MEGA EXEMPTION AND ABATEMENT

MEGA EXEMPTION – KEY SERVICES

- **Health care services** by a clinical establishment, an authorized medical practitioner or para-medics;
- Services by an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) by way of **charitable activities**;
- Services provided by-

(a) an **arbitral tribunal** to –

i. any person other than a business entity; or

ii. a business entity with a turnover up to rupees ten lakh in the preceding financial year;

(b) an individual as an **advocate** or a partnership firm of advocates by way of legal services to,-

(i) an advocate or partnership firm of advocates providing legal services ;

MEGA EXEMPTION – KEY SERVICES

ii. any person other than a business entity; or

iii. a business entity with a turnover up to rupees ten lakh in the preceding financial year; or

c) a person represented on an arbitral tribunal to an arbitral tribunal;

- 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;

- Services **provided to the Government**, a local authority or a governmental authority by way of <u>construction, erection, Commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration</u> of –

a) a **civil structure** or any other **original works** meant predominantly <u>for use other than for commerce, industry, or any other business or profession</u>;

MEGA EXEMPTION – KEY SERVICES

b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958);

c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

d) canal, dam or other irrigation works;

e) pipeline, conduit or **plant** for (i) water supply (ii) water treatment, or (iii) sewerage treatment or disposal; or

f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Act;

MEGA EXEMPTION – KEY SERVICES

- Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

a) a road, bridge, tunnel, or terminal for road transportation **for use by general public**;

b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana;

c) a building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for **religious use by general public**;

d) a **pollution control or effluent treatment plant**, except located as a part of a factory; or

e) a structure meant for funeral, burial or cremation of deceased;

MEGA EXEMPTION – KEY SERVICES

- Temporary transfer or permitting the **use or enjoyment of a copyright** covered under clause (a) or (b) of sub-section (1) of section 13 of the Indian Copyright Act, 1957 (14 of 1957), relating to original literary, dramatic, musical, artistic works or cinematograph films
- Services by way of **renting of a hotel**, inn, guest house, club, campsite or other commercial places meant for residential or lodging purposes, having declared tariff of a unit of accommodation below rupees one thousand per day or equivalent;
- Services provided in relation to **serving of food or beverages by a restaurant**, eating joint or a mess, other than those having (i) the facility of air-conditioning or central air-heating in any part of the establishment, at any time during the year, and (ii) a licence to serve alcoholic beverages;

MEGA EXEMPTION – KEY SERVICES

- Services provided by a **goods transport agency** by way of transportation of:
  a) fruits, vegetables, eggs, milk, food grains or pulses in a goods carriage;
  b) goods where gross amount charged for the transportation of goods on a consignment transported in a single goods carriage **does not exceed one thousand five hundred rupees**; or
  c) goods, where gross amount charged for transportation of all such goods for a single consignee in the goods carriage **does not exceed rupees seven hundred fifty**;
- Services by way of **vehicle parking to general public** excluding leasing of space to an entity for providing such parking facility
- Services by way of **transfer of a going concern**, as a whole or an independent part thereof

MEGA EXEMPTION – KEY SERVICES

- Services provided by the following person in respective capacities –

  a) sub-broker or an authorized person to a stock broker;

  b) authorized person to a member of a commodity exchange;

  c) mutual fund agent to a mutual fund or asset management company;

  d) distributor to a mutual fund or asset management company;

  e) selling or marketing agent of lottery tickets to a distributer or a selling agent;

  f) selling agent or a distributer of SIM cards or recharge coupon vouchers;

  g) business facilitator or a business correspondent to a banking company or an insurance company, in a rural area; or

  h) **sub-contractor** providing services **by way of works contract** <u>to another contractor providing works contract services</u> which are exempt

MEGA EXEMPTION – KEY SERVICES

- Carrying out an **intermediate production process** as **job work** in relation to

a) ………………

b) …………………..

c) any goods on which appropriate duty is payable by the principal manufacturer; or

- Services received from a provider of service **located in a non- taxable territory** by–

a) **Government**, a local authority, a governmental authority or an **individual** in relation to any

b) purpose other than commerce, industry or any other business or profession;

c) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or

d) a **person located in a non-taxable territory**;

ABATEMENT - NOTIFICATION 26/2012

Sl. No.	Description of taxable service	Percentage	Conditions
1	Services in relation to financial leasing including hire purchase	10	Nil.
2	Transport of passengers by air, with or without accompanied belongings	40	CENVAT credit on inputs and capital goods, used for providing the taxable service, has not been taken under the provisions of the Cenvat Credit Rules, 2004.
3	Renting of hotels, inns, guest houses, clubs, campsites or other commercial places meant for residential or lodging purposes.	60	Same as above
4	Services of goods transport agency in relation to transportation of goods.	25	CENVAT credit on inputs, capital goods and input services, used for providing the taxable service, has not been taken under the provisions of the Cenvat Credit Rules, 2004

ABATEMENT - NOTIFICATION 26/2012

Sl. No.	Description of taxable service	Percentage	Conditions
5	Renting of any motor vehicle designed to carry passengers	40	Same as above.
6	Construction of a complex, building, civil structure or a part thereof, intended for a sale to a buyer, wholly or partly except where entire consideration is received after issuance of completion certificate by the competent authority	25	(i) CENVAT credit on inputs used for providing the taxable service has not been taken under the provisions of the Cenvat Credit Rules, 2004 (ii)The value of land is included in the amount charged from the service receiver.

ABATEMENT - NOTIFICATION 26/2012

Explanation. –

For the purposes of exemption **at Serial number 1 –**

- (i) The amount charged shall be an amount, forming or representing as interest, i.e. the difference between the installments paid towards repayment of the lease amount and the principal amount contained in such installments;
- (ii) the exemption shall not apply to an amount, other than an amount forming or representing as interest, charged by the service provider such as lease management fee, processing fee, documentation charges and administrative fee, which shall be added to the amount calculated in terms of (i) above.

ABATEMENT - NOTIFICATION 26/2012

For the purposes of exemption at **Serial number 6 –**

- The amount charged shall be the sum total of the amount charged for the service including the **fair market value of all goods and services** <u>supplied by the recipient(s)</u> in or in relation to the service, whether or not supplied under the same contract or any other contract, after deducting-
  1. the amount charged for such goods or services supplied to the service provider, if any; and
  2. the value added tax or sales tax, if any, levied thereon:
- Provided that the fair market value of goods and services so supplied may be determined in accordance with the generally accepted accounting principles.

POINT OF TAXATION

POINT OF TAXATION

General Rule

Determination of Point of Taxation – Earliest of the following events

- **Date of invoice** (where invoice is issued within 30 days and payment is received later)
- Where invoice is not issued within 30 days of completion, **date of completion of service**
- **Date of receipt of payment** including receipt of advance, if any

POINT OF TAXATION

- Rule 4 determines the point of taxation in case of change in the rate of tax as below

Date of provision of service	Date of invoice	Date of payment	Point of taxation	Effective rate of tax
(a) For services provided before change in effective rate of tax				
Before	After	After	Date of issuance of invoice or date of payment, whichever is earlier	New rate
Before	Before	After	Date of issuance of invoice	Old rate
Before	After	Before	Date of payment	Old rate
(b) For services provided after change in effective rate of tax				
After	Before	Before	Date of issuance of invoice or date of payment, whichever is earlier	Old rate
After	Before	After	Date of payment	New rate
After	After	Before	Date of issuance of invoice	New rate

POINT OF TAXATION

- Rule 5 – Payment of tax in case of new services – as effective from April 1, 2012

Date of provision of new service	Date of invoice	Date of payment	Taxability
Not relevant	Before	Before	No tax shall be payable
	After	Before	Taxable
	Before	After	Taxable
Not relevant	Issued within 14 days	Before	No tax shall be payable
	Issued within 14 days	After	Taxable
	Issued after 14 days	Before	Taxable
	Issued after 14 days	After	Taxable

POINT OF TAXATION

Reverse charge

Determination of Point of Taxation – In case of reverse charge

- **Date of payment to the service provider**
- If the payment is not made within six months the point of taxation shall be determined as per general rule

POINT OF TAXATION

Introduction of Best Judgment Assessment effective from April 1, 2012

Point of taxation in other cases

- Where date of payment or date of invoice or both are not available
- The Central Excise Officer, may determine the point of taxation to the best of his judgment based on
  - available accounts, documents or other evidence as available and
  - after giving an opportunity to be heard to the assessee

POINT OF TAXATION

Definition of “continuous supply of services” amended wef from April 1, 2012

Rule 2(c)

- “continuous supply of service” means any service which is provided, or to be provided continuously or on recurrent basis, under a contract, for a period exceeding three months with the obligation for payment periodically or from time to time, or where the Central Government, by a notification in the Official Gazette, prescribes provision of a particular service to be a continuous supply of service, whether or not subject to any condition
- To capture the concept in more wholesome manner

POINT OF TAXATION

Definition of "date of payment" introduced effective from April 1, 2012

Rule 2A - Date of Payment

- Date of payment shall be earlier of the following dates:
  - Date of entry in the books of accounts
  - Date of credit in the bank account
- Exceptions - date of credit in bank to be date of payment

POINT OF TAXATION

Exceptions - date of credit in bank to be date of payment in cases

- when change in rate of tax

  OR

- service is taxed first time

  anytime between the entry in books of account and its credit in the bank account

- credit in the bank is after 4 working days from the change
- the amount is credited through a banking instrument

POINT OF TAXATION

Other amendments effective from April 1, 2012

- Amendment in Rule 3 for increasing time limit for issuance of invoice from 14 days to 30 days (linked with Service Tax Rules)
- Rule 6 dealing with continuous supply of service merged with rule 3 as the criteria in both the rules were same
- Rule 4 (effective rate of tax) and 5 (introduction of new taxable services) shall now be applicable to continuous supply of services

POINT OF TAXATION

- In case of small advances received upto Rs 1000 over and above the invoice value service provider has the option to pay service tax on the basis of invoice instead of date of payment
  - To cover situations of excess payments in case of telecommunication, credit card agencies

POINT OF TAXATION

Issues to be dealt

- If a service becomes taxable for the first time under reverse charge – Rule 5 or Rule 7
- If the payment to the non-resident service provider is not made within six months - Rule 5 or Rule 3
- No service tax is payable by the service receiver under new domestic reverse charge If point of taxation of the service provider is before July 1, 2012
- It is clarified that once a point of taxation is determined chargeability is decided; subsequent change will not change the chargeability

PLACE OF PROVISION OF SERVICES

PLACE OF PROVISION OF SERVICE RULES

A recap

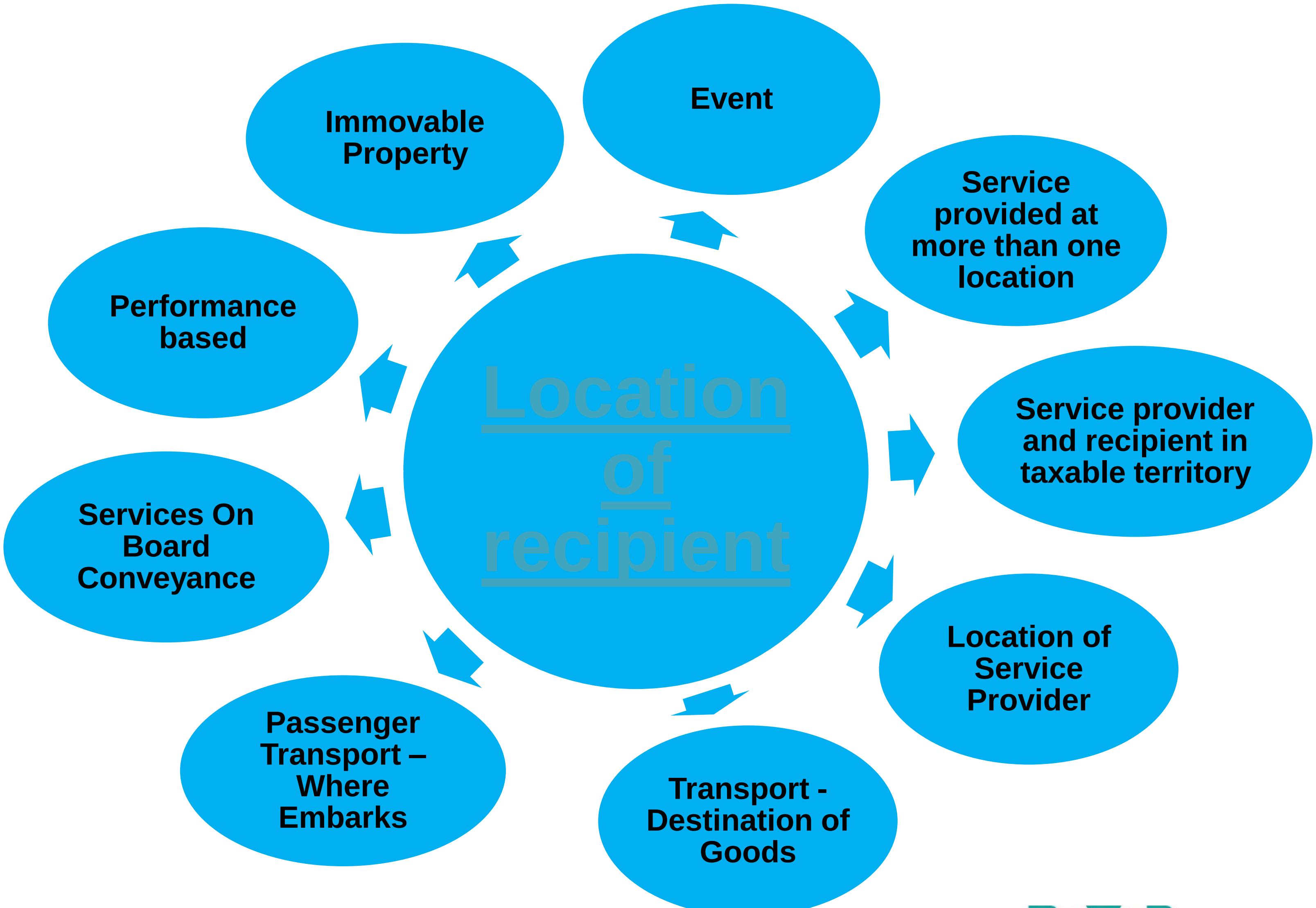
- PPS Rules notified vide Notification No. 28/2012 ST dated June 20, 2012 effective **July 1, 2012**
- **PPS Rules determines place from where services are provided or deemed to be provided, thus determining taxability based on <u>location of provision of services</u>**
- PPS Rules has replaced Export of Services, Rules, 2005 ("Export Rules") and Taxation of Services (Provided from outside India and received in India) Rules, 2006 ("Import Rules")
- **PPS Rules also relevant for determining services wholly consumed within an SEZ;** services provided to/ received from **J&K;**
- **For summary of the PPS Rules –** Pls refer annexure

PPS Rules appear to be modeled around the EU VAT Place of Supply Rules with suitable modifications

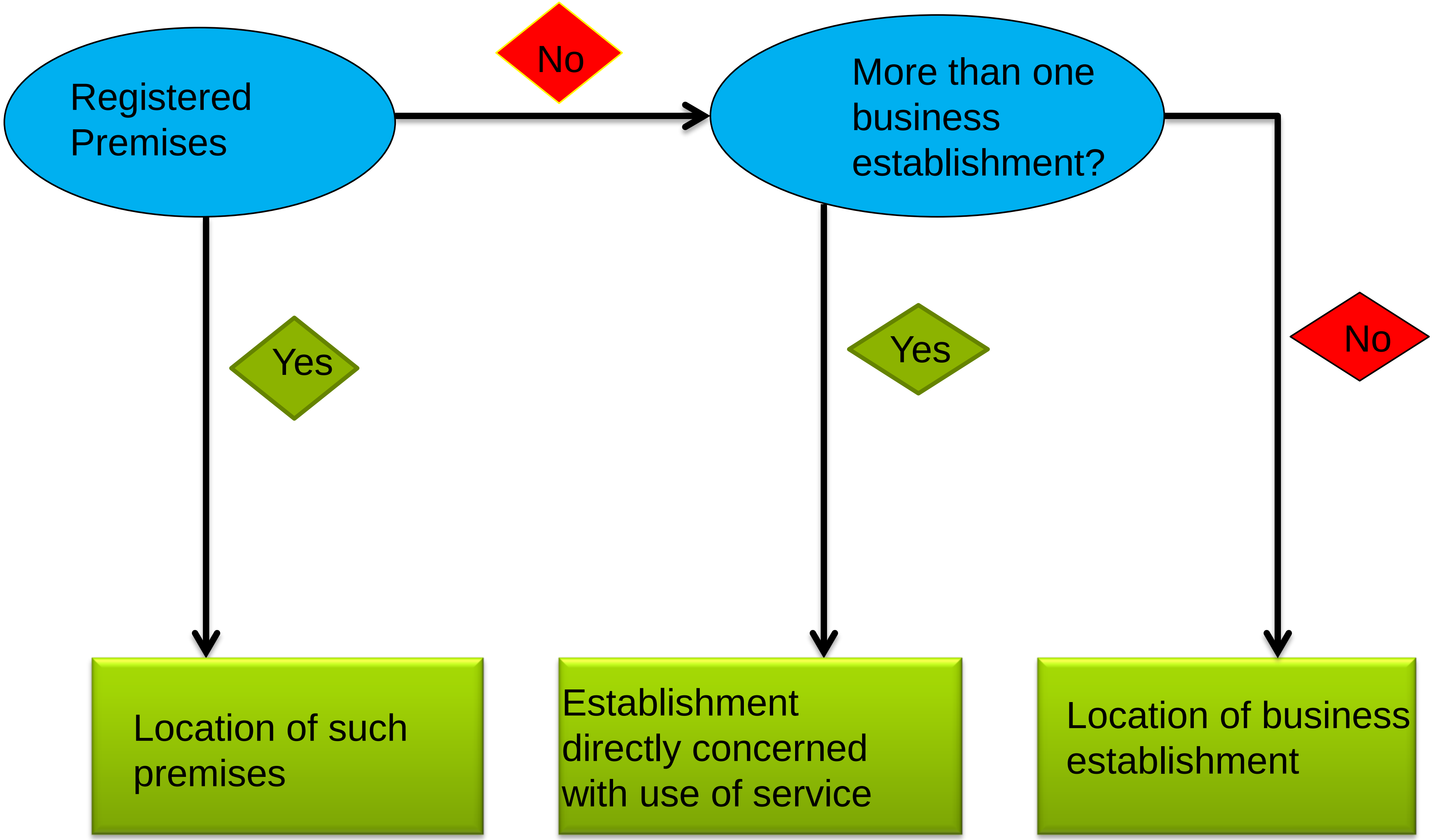
TAXATION OF EXPORT AND IMPORT OF SERVICES

Exports	
Under Earlier provisions	**Under Current provisions**
▪ Taxable services ▪ Option not to pay tax as per Rule 4 of Export Rules, in case conditions for “export” are satisfied	▪ Not taxed as per section 66B read with the PPS Rules ▪ No option to pay tax on export as there is no levy if PPS is in the non taxable territory ▪ Impact of Rule 6A of ST Rules, which prescribes conditions for export, like forex, recipient located outside India etc
Imports	
▪ Taxed under section 66A read with the conditions prescribed under the Import Rules	▪ Taxed as per section 66B read with the PPS Rules

DETERMINE PPS



RULE 3 – LOCATION OF SERVICE RECIPIENT



RULE 4 –PERFORMANCE BASED SERVICES

Performance based service	Place of provision	Illustrations
Performance of services in case services directly in relation to goods made available by service recipient	Place of actual performance	Repair, reconditioning, testing and inspection certification, courier, storage and warehousing
Performance of service from a remote location by electronic means	Place of location of goods	Remote maintenance and testing should qualify as export when the goods under maintenance or testing is located abroad
Services provided to individual or representative of recipient by the provider in the physical presence of individual	Place of performance	Gym membership, beauty treatment, cosmetic surgery, internet café, photography, commercial training – however online training shall be under Rule 3

RULE 5- SERVICES RELATING TO IMMOVABLE PROPERTY

- PPS - Where immovable property is located or intended to be located
- Land related services included – Specific reference under TRU
  - Real estate agent, architect, engineers, interior decorators, surveyors, etc
  - Renting of immovable property
  - Services supplied in the course of construction, reconstruction, alteration, demolition, repair or maintenance (including painting and decorating) of any building or civil engineering work.
  - Services connected with oil/gas/mineral exploration or exploitation, survey relating to specific sites of land or the seabed
- Not a mere Indirect or incidental connection or relation to an immovable property
- May not cover Legal services, Advisory services wrt taxability, etc

RULE 6 AND RULE 7

- **Rule 6 – Place of provision of services relating to events**
  - ‘Admission to’ or ‘organization of’ and ‘services ancillary to admission’ - place of provision to be the place where event is held
  - Tickets to concerts etc taxable – interplay with entertainment tax – Federal vs State levy
- **Rule 7 – Services provided at more than one location**
  - Services covered under Rule 4, 5 and 6 performed at more than one location
  - Place of provision to be *location in the taxable territory* (where greatest proportion of the service is provided)
  - Example in Education Guide - Testing services carried out in Maharashtra (20%), Kerala (25%), and an international location (say, Colombo 55%). Notwithstanding the fact that the greatest proportion of service is outside the taxable territory, the place of provision will be the place in the taxable territory where the greatest proportion of service is provided, in this case Kerala.

RULE 8

- **Service provider and service recipient located in the same territory**
  - Place of provision to be the location of the service receiver
  - Export benefit not available even if entirely performed outside India - *Currently transactions between residents and foreign exchange paid – Export benefit allowed*

RULE 9- SPECIFIED SERVICES

- Location of the service provider in case of specified services
  - Banks **to account holders** *(only interest bearing accounts – current account not covered)*
  - **Online information** and database access or retrieval services – Online training?? – Normal Training covered under Rule 4 not taxable if performed outside India
  - **Hiring of means of transport**, upto a period of one month
  - **Intermediary** services

RULE 9- SPECIFIED SERVICES

Intermediary Services

- No longer exports as PPS is in India

Foreign Agents – No reverse charge

- PPS is outside India

Intermediary services for goods??

DOMESTIC REVERSE CHARGE

DOMESTIC REVERSE CHARGE - CRITERIA

S No	Type of service	Category of person	% of tax payable	Remarks
1	Services provided by goods transport agency (“GTA”)	All types of persons	100%	Service receiver liable to reverse charge is the person who is liable to pay freight
2	Sponsorship services	All types of persons	100%	
3	Services by Arbitration Tribunal	All types of persons	100%	
4	Support services by Government or Local Authority	All types of persons	100%	Support services defined to include security, testing/ analysis, administrative services, infrastructural services etc
5	Legal services from individual advocates or firm of advocates	Individual advocate or firm of advocates	100%	
6	Manpower supply services	Individual/ HUF/ firm/ LLP/ AOP	75%	Service tax on 25% of the value would be paid by the service provider

DOMESTIC REVERSE CHARGE - CRITERIA

S No	Type of input service	Category of person	% of tax payable	Remarks
7	Services of renting of motor vehicles for carrying passengers	Individual/ HUF/ firm/ LLP/ AOP	100% on abated value	If no service tax is charged – 100% on abated value ie, 12.36% on 40% of value of service
8			40% on non-abated value	If service tax is charged on 60% of value of service – service tax on balance 40% is to be paid by recipient
9	Works contract services	Individual/ HUF/ firm/ LLP/ AOP	50%	Service tax on 50% of the value would be paid by the service provider Recipient would be free to choose any valuation method irrespective of method adopted by service provider

Companies required to capture the list of service providers pertaining to the above categories and ensure that the appropriate portion of service tax is paid on reverse charge basis by them

DOMESTIC REVERSE CHARGE – IMPLICATIONS

Domestic Reverse Charge

- Services provided before July 1, 2012 – whether recipient liable?
- Current contracts inclusive of taxes - to be amended?
- Cenvat credit not to be utilised for payment of reverse charge (not output service)
- Invoice – To contain Service recipient's liability also?
- Works Contract - Recipient can adopt his valuation
- GTA – Abatement of 75 percent available (declaration for no Cenvat?)
- Partnership firm – whether includes LLP?

- ***These provisions would result in additional compliances for Companies***
- ***AP team to be sensitized about intimating the tax team for payment of appropriate tax liability as well as educate vendors on appropriate tax proportion to be charged by them***

IMPACT OF AMENDMENTS TO CENVAT CREDIT RULES

***Changes made vide Notification No 18/2012 – Central Excise (NT)** (effective from April 1, 2012 unless otherwise specified)*

***and Notification No 28/2012 – Central Excise (NT)** (effective from July 1, 2012)*

DEFINITIONS – EXEMPTED SERVICE

- **Rule 2 (e) definition of** "exempted service" changed

Before July 1, 2012	After July 1, 2012
"exempted services" means taxable services which are exempt from the whole of the service tax leviable thereon, and includes services on which no service tax is leviable under section 66 of the Finance Act", and taxable services whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken. *Explanation.* - For the removal of doubts, it is hereby clarified that "exempted services" includes trading.	"exempted service" means a (1) taxable service which is exempt from the whole of the service tax leviable thereon; or (2) service, on which no service tax is leviable under section 66B of the Finance Act; or (3) taxable service whose part of value is exempted on the condition that no credit of inputs and input services, used for providing such taxable service, shall be taken; but shall not include a service which is exported in terms of rule 6A of the Service Tax Rules, 1994.

DEFINITIONS – IMPACT

- Exempted service now includes
  - services exempted by mega exemption notification and other notifications
  - services listed in negative list of service
  - Services provided outside the taxable territory
  - services on which conditional abatement is provided
  - specifically excludes export of service
  - Whether exempted service include activities which are not a service ?

DEFINITIONS – OUTPUT SERVICE

- **Rule 2 (p)** "output service" means any service provided by a provider of service located in the taxable territory but shall not include a service -

  (1) specified in section 66D of the Finance Act; or

  (2) where the whole of service tax is liable to be paid by the recipient of service.

- **Impact of the change**
  - Services specified in the negative list are not output service
  - Services where the service recipient is liable to pay on the 100 percent are not output service for the service provider and cenvat credit availed by such service provider will not be allowed.
  - Services on which part service tax amount is paid by service provider and part amount is paid by service recipient (like works contract service) are output service and cenvat credit can be availed by such service provider

RULE 3(5) – IMPACT

- Under erstwhile provisions,
  - For removal of used capital goods as capital goods, there was only reversals as prescribed;
  - For removal of used capital goods as scrap or waste, duty was payable on transaction value
- Rates for credit reversals remain same
- **Now** - reversal of credit or duty leviable on the transaction value – whichever is higher

RULE 7 – MANNER OF DISTRIBUTION OF CREDIT BY ISD

Rule 7 - The input service distributor may distribute the CENVAT credit in respect of the service tax paid on the input service to its manufacturing units or units providing output service, subject to the following condition, namely

a) the credit distributed against a document referred to in rule 9 does not exceed the amount of service tax paid thereon; or

b) credit of service tax attributable to service used in a unit exclusively engaged in manufacture of exempted goods or providing of exempted services shall not be distributed.

c) **credit of service tax attributable to service used wholly in a unit shall be distributed only to that unit; and**

d) credit of service tax attributable to service used in more than one unit shall be distributed *pro rata* on the basis of the turnover during the relevant period of the concerned unit to the sum total of the turnover of all the units to which the service relates during the same period

RULE 7 – MANNER OF DISTRIBUTION OF CREDIT BY ISD

Explanation 1.- For the purposes of this rule, unit, includes the premises of a provider of output service and the premises of a manufacturer including the factory, whether registered or otherwise.

Explanation 2.- For the purposes of this rule, the total turnover shall be determined in the same manner as determined under rule 5.

Explanation 3. - (a) The relevant period shall be the month previous to the month during which the CENVAT credit is distributed.

(b) In case if any of its unit pays tax or duty on quarterly basis as provided in rule 6 of Service Tax Rules, 1994 or rule 8 of Central Excise Rules, 2002 then the relevant period shall be the quarter previous to the quarter during which the CENVAT credit is distributed.

(c) In case of an assessee who does not have any total turnover in the said period, the input service distributor shall distribute any credit only after the end of such relevant period wherein the total turnover of its units is available.”

WORKS CONTRACT

WORKS CONTRACT

- Service portion in execution of a Works Contract ("WCT") has been specifically included in the list of 'Declared Services'
- Section 65B(54) – "works contract" means 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 <u>construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, alteration of any</u> **moveable or immovable property** or for carrying out any other similar activity or a part thereof in relation to such property
- Composition scheme for payment of Works Contract Tax has been done away with vide Notification 35/2012 dated June 20, 2012
- Domestic reverse charge for WCT would be payable at the rate of 50% by the service recipient in case the service provider is Individual/HUF/Firm/AOP

WORKS CONTRACT - VALUATION

- Value of service portion in works contract shall be
  - Gross amount charged for the works contract *less* value of property transferred in goods transferred in the execution of works contract
  - Explanation (c)

    *Where value added tax or sales tax has been paid or payable on **the actual value** of property in goods transferred in the execution of the works contract, then, such value adopted for the purposes of payment of value added tax or sales tax, shall be taken as the value of property in goods transferred in the execution of the said works contract for determination of the value of service portion in the execution of works contract under this clause*

WORKS CONTRACT - VALUATION

- *Where the value has not been determined under clause (i) the person liable to pay tax on the service portion involved in the execution of the works contract shall determine the service tax payable in the following manner, namely*

Options	Value	Credits
Works contracts entered into for execution of original works	40% of the total amount charged for the works contract	No Credits on inputs – Credits can be claimed on input services and capital Goods
Works contract entered into for maintenance or repair or reconditioning or restoration or servicing of any goods	70% of the total amount charged for the works contract	
Other works contracts (not covered above), including maintenance, repair, completion and finishing services such as glazing, plastering, floor and wall tiling, installation of electrical fittings of an immovable property	60% of the total amount charged for the works contract	

WORKS CONTRACT - VALUATION

- "Original works" has been defined to mean the following:

  (i) all new constructions;

  (ii) all types of additions and alterations to abandoned or damaged structures on land that are required to make them workable;

  (iii) erection, commissioning or installation of plant, machinery or equipment or structures, whether pre-fabricated or otherwise;

- "Total amount" has been defined to mean the sum total of the gross amount charged for the works contract and the fair market value of all goods and services supplied in or in relation to the execution of the works contract, whether or not supplied under the same contract or any other contract, after deducting the following:

  (i) the amount charged for such goods or services, if any; and

  (ii) the value added tax or sales tax, if any, levied thereon

  Provided that the fair market value of goods and services so supplied may be determined in accordance with GAAP

- Cenvat Credit available on materials to receiver but not to service provider

ANNEXURES

INDIA AND TAXABLE TERRITORY

Section 65B(27) - "**India**" means,—

a. the territory of the Union as referred to in clauses (2) and (3) of article 1 of the Constitution;
b. its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976; (z80 of 1976.)
c. the seabed and the subsoil underlying the territorial waters;
d. the air space above its territory and territorial waters; and

INDIA AND TAXABLE TERRITORY

e. the installations, structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof;

Section 65B(52) - "**taxable territory**" means the territory to which the provisions of this Chapter apply

PERSON

Section 65B (37) "person" includes,—

i. an individual,

ii. a Hindu undivided family,

iii. a company,

iv. a society,

v. a limited liability partnership,

vi. a firm,

PERSON

vii. an association of persons or body of individuals, whether incorporated or not,

viii. Government,

ix. a local authority, or

x. every artificial juridical person, not falling within any of the preceding sub-clauses;

GOODS AND INTEREST

(25) "**goods**" means every kind of movable property other than actionable claim 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 the contract of sale

(30) "**interest**" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) but does not include any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised

RENTING

(41) "**renting**" means allowing, permitting or granting access, entry, occupation, use 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

WORKS CONTRACT

(54) "**works contract**" means 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 movable or immovable property or for carrying out any other similar activity or a part thereof in relation to such property

SUPPORT SERVICES

(49) "**support services**" means infrastructural, operational, administrative, logistic, marketing or any other support of any kind <u>comprising functions</u> that <u>entities carry out in ordinary course of operations themselves</u> but may obtain as services by <u>outsourcing from others</u> for any reason whatsoever and shall include **advertisement** and promotion, **construction** or works contract, **renting** of immovable property, **security**, **testing and analysi**s

PROCESS AMOUNTING TO MANUFACTURE

(40) "**process amounting to manufacture or production of goods**" means a <u>process on which duties of excise are leviable</u> under section 3 of the Central Excise Act, 1944 or any process amounting to manufacture of **alcoholic liquors** for human consumption, opium, Indian hemp and other narcotic **drugs and narcotics** on which duties of excise are leviable under any State Act for the time being in force

Job work covered - No transfer of title in goods

WHAT IS 'ACTIVITY'?

- What is the scope of the term 'activity' in the definition of 'service' –
  - Not defined in the Finance Act 2012
  - *Para 2.1.1 of Education Guide - "the word activity would include an **act** done, a **work** done, a **deed** done, an **operation carried out**, **execution** of an act, **provision of a facility** etc. It is a term with **very wide connotation**…Activity could be **active or passive** and would also include **forbearance to act**. Agreeing to the obligation to refrain from an act or to tolerate an act or a situation has also been specified as a declared service under section 66E of the Act."*
- EU VAT jurisprudence provides the following key test: -
  - Is there an **intent to create a legally enforceable relationship**?

"FOR CONSIDERATION"

- Section 67, Explanation (a) remains unchanged and defines 'consideration'
  - *"Consideration" includes* ***any amount*** *that is payable for the taxable services provided or to be provided* – inclusive definition dealing with money consideration
- Clarified to include monetary consideration and **non-monetary** consideration
- Para 2.2.4 of Education Guide - Examples for non-monetary consideration can be:
  - Supply of goods or services in return
  - Refraining or forbearing to do an act
  - Tolerating an act or a situation
  - Doing or agreeing to do an act

A agrees to dry clean B's clothes ***B agrees to click A's photograph*** **– a service transaction as per Education Guide**

“FOR CONSIDERATION”

- Whether contractual relationship is required?
- Activities without consideration
- Payment without activities
- Would any set of reciprocal promises qualify as a ‘service’ transaction and be liable for service tax?
- Fine or penalty for violation of a provision of law clarified not to be a consideration for an activity
- Donation with and without conditions
- Adjustment between Government undertakings
- Recharges between MNCs

"FOR CONSIDERATION"

Nature of payment	Whether "consideration" for service?
Amount received in settlement of dispute	Per se the amount are not consideration unless it represents a portion of the consideration for an activity that has been carried out
Advances for performance of service	Yes, Consideration for the agreement to perform service
Deposits returned on cancellation of an agreement to provide a service	Nature of returned consideration. If the tax is already paid on deposits tax payer would be entitled to refund
Advance forfeited for cancellation of an agreement to provide a service	Represent consideration for the agreement that was entered into the provision of service
Security deposit returnable on completion of provision of service	Normally security deposit are not consideration except in cases where used as colorable devices. Deposit in lieu of advance are consideration
Deposits forfeited for damages by recipient	Accidental damages – Not Consideration
Excess payment in mistake	If not returned - Consideration
Demurrages for excess use of services	Consideration

‘CARRIED OUT’ & ‘FOR ANOTHER’

“CARRIED OUT”

- What is the meaning of the term ‘**carried out**’ in the definition of ‘service’ and how is it different from ‘**carried on**’?
- Whether **‘carried out’** means and includes a one time act as opposed to **‘carried on’**, which suggests continuity?

“FOR ANOTHER”

- What is the meaning of the terms ‘**for another**’ in the definition of ‘service’?
- **‘For’** generally signifies under instructions or as per the scope envisaged by one person for another or ‘**on behalf of’** another

DECLARED SERVICE

<u>Definition of Declared Services [section 65B(22)]:</u>

“Declared service" means any activity carried out by a person for another person for consideration and declared as such under section 66E;

The following are declared services provided in section 66E:

a) renting of immovable property;

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

c) temporary transfer or permitting the use or enjoyment of any intellectual property right;

DECLARED SERVICE

e) development, design, programming, customization, adaptation, upgradation, enhancement, implementation of information technology software;

f) agreeing to the obligation to refrain from an act, or to tolerate an act or a situation, or to do an act;

g) transfer of goods by way of hiring, leasing, licensing or in any such manner without transfer of right to use such goods;

h) (g) activities in relation to delivery of goods on hire purchase or any system of payment by installments;

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

j) (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.

DECLARED SERVICE

Issues to be dealt

- Renting of property to an education body?
- Further sale of flats by the transferee before obtaining completion certificate?
- Service tax liability on BOT Projects?
- IPR temporarily transferred to be registered in India?
- License to use canned software?
- Customised software delivered to client in CD?
- Electronic supply of packaged software – whether goods or service?
- Non Compete Fee?

DECLARED SERVICE

Issues to be dealt

- Financial Leases and Capital Leases?
- Double taxation on a portion of the transaction due to difference in abatement – VAT and Service tax?

PPS RULES – LOCATION OF SERVICE RECEIVER

Location of the service receiver means

(A) Where the service receiver has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;

(B) Where the service receiver is not covered under (A):

(i) The location of his business establishment; or

(ii) Where services are received at a place other than the business establishment, that is to say, a fixed establishment elsewhere, the location of such establishment; or

(iii) where services are received at more than one establishment, whether business or fixed, the establishment most directly concerned with the use of the service; and

(iv) in the absence of such places, the usual place of residence of the service receiver.

Explanation: For the purposes of above clauses, “usual place of residence” in case of a body corporate means the place where it is incorporated or otherwise legally constituted

Explanation 2: For the purpose of this clause, in the case of telecommunication service, the usual place of residence shall be the billing address

PPS RULES – A SUMMARY

Description	Place of Provision of Service
General Provision	• **Location of Service Recipient** • Location of Service Provider *(if location of service receiver not ascertainable)*
Performance based Services	• Location of actual performance of services viz. ✓ Services provided in respect of goods to be made physically available by service receiver *(Exception - services remotely provided electronically and imported goods for repair and re-export)* ✓ Services provided in the physical presence of the individual
Services Relating to Immovable Property	• Place where immovable property is located or intended to be located
Services Relating to Events	• Place where the event is actually held/ conducted
Specified Services (Specified Banking, Intermediary , Online database etc)	• Location of service provider
Specified services provided at more than one location	• Location in the taxable territory where greatest proportion of service is provided
Where both service provider and service recipient in taxable territory	• **Location of the Service Recipient**

PPS RULES – CONCEPT OF INTERMEDIARY

Definition of "intermediary"

- **"Intermediary" defined to mean**
  - a broker, an agent or ***any other person***, by whatever name called
  - who ***arranges*** or ***facilitates***
  - a **provision of service** (hereinafter called the 'main' service)
  - between two or ***more*** persons
  - but does not include a person who ***provides the main service*** on his account
- **Rule 9 specifies place of provision for "intermediary services" to be location of the provider of service**

Where the services received by ABC Ltd from its associated enterprises outside India qualify as "intermediary services" – such services shall be deemed to be performed at the location of the service provider and therefore not taxable in India

PPS RULES – CONCEPT OF INTERMEDIARY

Meaning of "intermediary"

[Examples](#)

Meaning of "Intermediary" is clarified in the guidance note :

- Intermediary should be for **provision of service** (not goods) & includes a commission agent for services
- Intermediary is a person who cannot alter the nature or value of the service that is facilitated
- Principal could authorize the intermediary to negotiate the price
- Principal should know the exact value at which the service is supplied/ obtained
- Service provided by the intermediary and its value is clearly identifiable from the main service
- Value of intermediary's service is generally based on agreed percentage of the sale or purchase price is often referred to as "commission"
- Documentary evidence/ authorization to act as intermediary

- ***The principles contained in the guidance note could act as a basis to determine whether a person would qualify as an "intermediary" or otherwise***

PPS RULES – CONCEPT OF INTERMEDIARY

Concept of "intermediary"

Based on definition and international judicial principles, the following could be the characteristics of an intermediary:

- There should be atleast two persons and the intermediary should facilitate provision of service between the two or more persons
- Intermediary should actively participate in the introduction, negotiation, finalization/ conclusion of the contract
- Activities of the intermediary should result in provision of service by the service provider to the service receiver
- Remuneration of the intermediary may be an agreed percentage of sale or purchase price or on a fixed fee basis

- ***Globally intermediary services are understood to be not mere "selling and marketing services" but something more than that which results in an active introduction or conclusion of the contract***
- ***Consequently, services such as brand promotion, road shows, information dissemination, etc provided on a stand alone basis not likely to qualify as intermediary services***

PPS RULES – INTERMEDIARY SERVICES

Examples of "intermediary"

- ✓ Travel agent
- ✓ Tour operator
- ✓ Commission agent for a service
- ✓ Freight forwarding agent for shipping lines
- ✓ Stock broker
- ✓ Mutual fund agent