Indirect Taxes By CA. CK.Bajpai

Cost Accounting, Financial Management

and

Indirect Taxes by

CA C.K. Bajpai

.. 15years experience in various industries (Banking, Power, Fertilizers and Chemicals industries;

• Deep experience in academic field as faculty since 1998 and worked as part time examiner/observer professional bodies.

• Visiting faculty of institute of computer (ICA)

• Vast experience of representation with tax authorities (income tax, excise, and service tax)

• Conceptual clarity of the subject with emphasis on practical and theory equally.

Service Tax

Governing provisions-The provisions pertaining to service tax are given in Chapter V and VA of Finance Act 1994 and supported by :-

- Service Tax Rules 1994;
- Cenvat Credit Rules 2004;
- Export of Service Rules 2005;
- Service Tax (Registration of Special Category of Persons) Rules 2005;
- Service Tax (Determination of Value) Rules 2006;
- Point of Taxation Rules 2011
- Place of Provision of Services Rules
- Taxation of Services (Provided from outside India and received in India) Rules 2006
- Works Contract (Composition Scheme for Payment of Service Tax) Rules 2007;
- Service Tax (Advance Rulings) Rules 2003;
- Service Tax (Publication of Names) Rules 2008;
- Service Tax (Provisional attachment of property) Rules 2008

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Territorial Jurisdiction of Service Tax

- By section 64(1), the Act extends to the whole of India "except the state of Jammu and Kashmir", and
- Vide section 64(3), the levy applies to all "taxable services provided".

Thus

1	Service provided **IN** J & K **Not liable** for Ser Tax	As per sec 64(1) ,It does not apply to J&K .Further any Act of parliament applies to J&K with concurrence of State Government which has not been obtained so far
2	Service provided **FROM** J&K to other part of India , **Liable** for Ser Tax	Under Service Tax regime , Location where service provided is relevant and if location falls in taxable territory, service would be taxable

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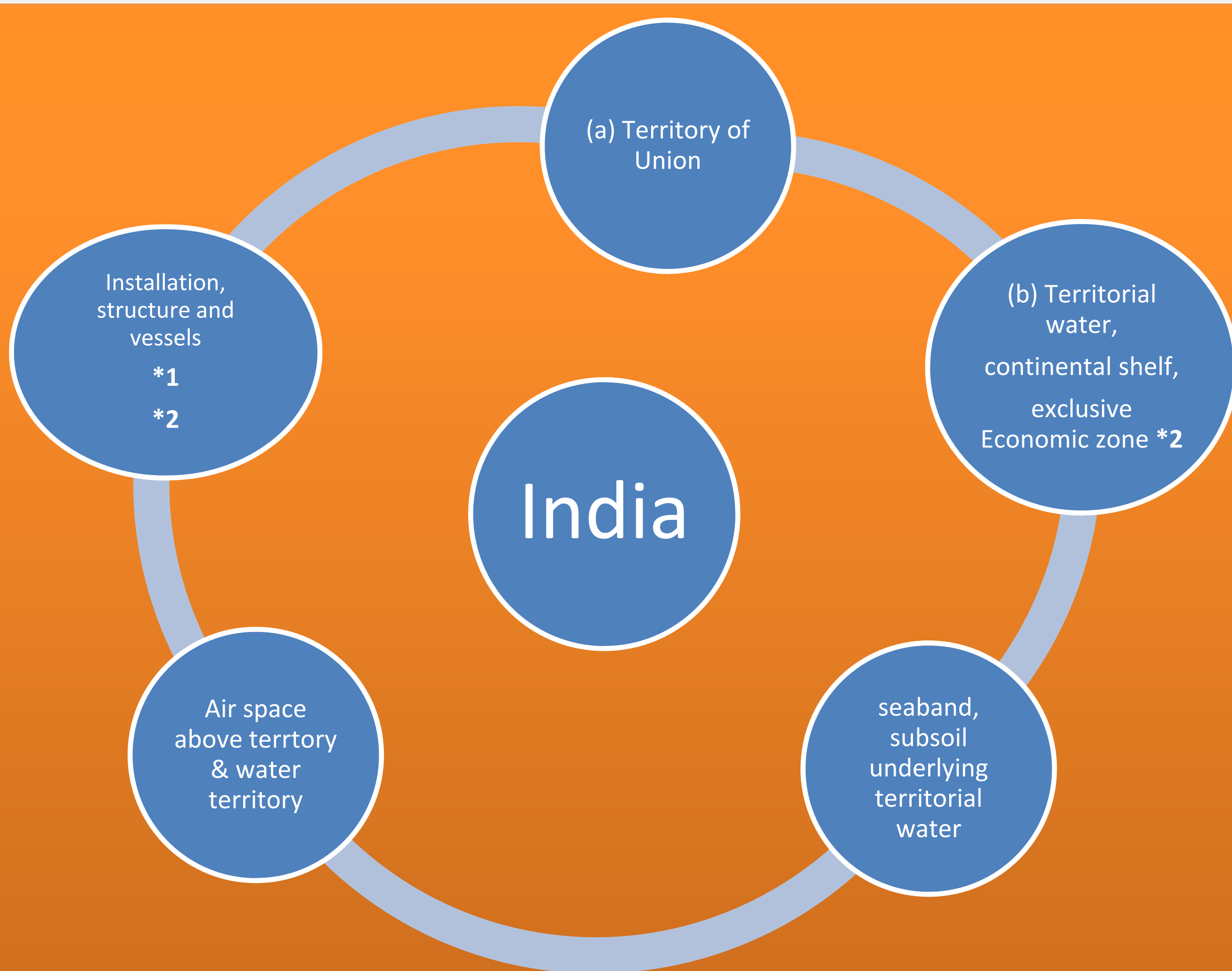

Section 66B-Charging section

There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve percent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed.

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1	**There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve percent**	**Rate**
2	on the value of	Valuation
3	All services	Definition of service
4	other than those services specified in the negative list	Negative List
5	provided or agreed to be provided	Point of taxation
6	in the taxable territory	Place of provision of Services
7	by one person to another and..	Mutuality principle
8	collected in such manner as may be prescribed.	From who tax be collected & when

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Service

- Means
  - Any activity
    - Carried by One person for another
      - For Consideration
- Includes
  - Declared Services
- Shall not include (i.e. Excludes)
  - any activity which constitute merely
    - transfer of title in goods or immovable property
    - transfer which is deemed to be sale
    - transaction in money or actionableclaims
  - service by employee to employer
  - fee taken by court or tribunal

Activity

It include :-

- an act done,
- a work done,
- a deed done,
- an operation carried out,
- execution of an act,
- provision of a facility
- forbearance to act
- Agreeing to an obligation
  - (a) to refrain from an act or
  - (b) to tolerate an act or a situation

Thus activity could be active or passive

By one person to another

1. There must be two distinct Entities, **Exception:- Services between**

(a) An establishment in taxable territory and other in Non-Taxable territory

(b) An unincorporated AOP/BOI and its members

Individual,
HUF,
Firm,
LLP,
AOP or BOI whether incorporated or not,
Company,
co-op society,
Government (Central/State),
a local authority, or
every artificial juridical person not falling within any of the preceding sub clauses.

Service by JV or Profit sharing arrangement

Are services provided by persons who have formed unincorporated joint ventures or profit-sharing arrangements liable to be taxed?

The services provided, both by the so constituted JV or profit sharing association of persons (AOP), as well as by each of the individual persons constituting the JV/AOP will be liable to be taxed separately, subject of course to the availability of the credit of the tax paid by independent persons to the JV/AOP and as otherwise admissible under Cenvat Rules.

JV-> Joint venture

Government

As per clause (23) of section 3 of the General Clauses Act, 1897 ‘

It includes both Central Government and any State Government.

As per clause (8) of section 3 of the said Act ‘Central Government’, in relation to anything done or to be done after the commencement of the Constitution, mean the President.

As per article 53 of the Constitution the executive power of the Union shall be vested in the President and shall be exercised by him either directly or indirectly through officers subordinate to him in accordance with the Constitution.

Further, in terms of article 77 of the Constitution all executive actions of the Government of India shall be expressed to be taken in the name of the President.

Similarly as per clause (60) of section 3 of the General Clauses Act, 1897 ‘State Government’, as respects anything done after the commencement of the Constitution, shall have been, in a State the Governor, and in Union Territory the Central Government.

Further as per article 154 of the Constitution the executive power of the State shall be vested in the Governor and shall be exercised by him either directly or indirectly through officers subordinate to him in accordance with the Constitution.

Further, as per article 166 of the Constitution all executive actions of the Government of State shall be expressed to be taken in the name of Governor. Thus State Government means the Governor or the officers subordinate to him who exercise the executive power of the state vested in the Governor and in the name of the Governor.

Local authority (Clause (31) of section 65B)

- A Panchayat as referred to in clause (d) of article 243 of the Constitution
- A Municipality as referred to in clause (e) of article 243P of the Constitution
- A Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund
- A Cantonment Board as defined in section 3 of the Cantonments Act, 2006
- A regional council or a district council constituted under the Sixth Schedule to the Constitution
- A development board constituted under article 371 of the Constitution, or
- A regional council constituted under article 371A of the Constitution.

Are all local bodies constituted by a State or Central Law local authorities?

No. only those bodies which fall in the definition comprise 'local authorities' as defined above

A statutory body, corporation or an authority constituted under an Act passed by the Parliament or any of the State Legislatures?

- These are normally created by the Parliament or a State Legislature in exercise of the powers conferred under article 53(3)(b) and article 154(2)(b) of the Constitution respectively.
- It is a settled position of law Government (*Agarwal* v. *Hindustan Steel* AIR 1970 Supreme Court 1150) that the manpower of such statutory authorities or bodies do not become officers subordinate to the President under Article 53(1) of the Constitution.
- Such a statutory body, corporation or an authority as a juristic entity is separate from the state and cannot be regarded as Central or State Government and also do not fall in the definition of 'local authority'.

Some queries?

(1) Would services provided by one department of the Government to another Department of the Government be taxable?

(2) Would service provided by a Central Government department to a State Government department or vice versa be taxable?

(3) Would service provided by a State to another State Government be taxable?

(4) Would service provided by a Government to an autonomous body be taxable?

For Consideration

"consideration" includes any amount that is payable for the taxable services provided or to be provided (Explanation (a) to section 67 of the Act)

consideration' as given in section 2 (d) of the Indian Contract Act, 1872 as follows-

"When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing, something, such act or abstinence or promise is called a consideration for the promise"

In simple terms, 'consideration' means everything received or recoverable in return for a provision of service which includes monetary payment and any consideration of non-monetary nature or deferred consideration as well as recharges between establishments located in a non-taxable territory on one hand and taxable territory on the other hand.

Activity for Consideration ???

It involves 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.

Thus An activity done without such a relationship i.e. without the 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.

e.g.

(1) an award received in consideration for contribution over a life time or even a singular achievement carried out independently or without reciprocity to the amount to be received will not comprise an activity for consideration. (No activity for consideration)

(2) An artist performing on a street does an activity without consideration even though passersby may drop some coins in his bowl kept after feeling either rejoiced or merely out of compassion. (No activity for consideration)

(3) On the other hand if the same person is called to perform on payment of an amount of money then the performance becomes an activity for a consideration.

Activity for Consideration

activities without consideration :-

Provisions of free tourism information,
access to free channels on TV and
a large number of governmental activities for citizens.

Consideration without activity

grant of pocket money,
a gift or reward,
amount paid as alimony for divorce

Activity for consideration:-

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 imposition of a fine or a penalty for violation of a provision of law be a consideration for the activity of breaking the law making such activity a 'service'?

No. To be a service an activity has to be carried out for a consideration. Therefore fines and penalties which are legal consequences of a person's actions are not in the nature of consideration for an activity.

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S. No.	A	B .
	Nature of payment	Whether consideration for service?
1.	Amount received in settlement of dispute.	Would depend on the nature of dispute. Per se such amounts are not consideration unless it represents a portion of the consideration for an activity that has been carried out. If the dispute itself pertai ns to consideration relating to service then it would be a part of consideration.
2.	Amount received as advances for performance of service.	Such advances are consideration for the agreement to perform a service.
3.	Deposits returned on cancellation of an agreement to provide a service.	Returned deposits are in the nature of a returned consideration. If tax has already been paid the tax payer would be entitled to refund to the extent specified and subject to provisions of law in this regard.
4.	Advances forfeited for cancellation of an agreement to provide a service.	Since service becomes taxable on an agreement to provide a service such forfeited deposits would represent consideration for the agreement that was entered into for provision of service.

5.	Security deposit that is returnable on completion of provision of service.	Returnable deposit is in the nature of security and hence do not represent consideration for service. However if the deposit is in the nature of a colorable device wherein the interest on the deposit substitutes for the consideration for service provided or the interest earned has a perceptible impact on the consideration charged for service then such interest would form part of gross amount received for the service. Also security deposit should not be in lieu of advance payment for the service.
6.	Security deposits forfeited for damages done by service receiver in the course of receiving a service	If the forfeited deposits relate to accidental damages due to unforeseen actions not relatable to provision of service then such forfeited deposits.
7.	Excess payment made as a result of a mistake	If returned it is not consideration If not returned and retained by the service provider it becomes a part of the taxable value.
8.	Demurrages payable for use of services beyond the period initially agreed upon e.g. retention of containers beyond the normal period.	This will be consideration and is covered by clause (x) of sub -rule (1) to Rule 6 of the Valuation Rules.

Can a consideration for service be paid by a person other than the person receiving the benefit of the service?

Yes. The consideration for a service may be provided by a person other than the person receiving the benefit of service as long as there is a link between the provision of service and the consideration. For example, holding company may pay for services that are provided to its associated companies.