

Seminar on industry wise analysis of indirect tax issues

Media, Entertainment & Software

8 February 2014

Media & Entertainment

Basic Understanding

Basic Understanding

▶ The major segments of the M&E Industry are:

- ▶ Television and Broadcasting
- ▶ Film (production to distribution)
- ▶ Print media
- ▶ Advertising
- ▶ Sports events



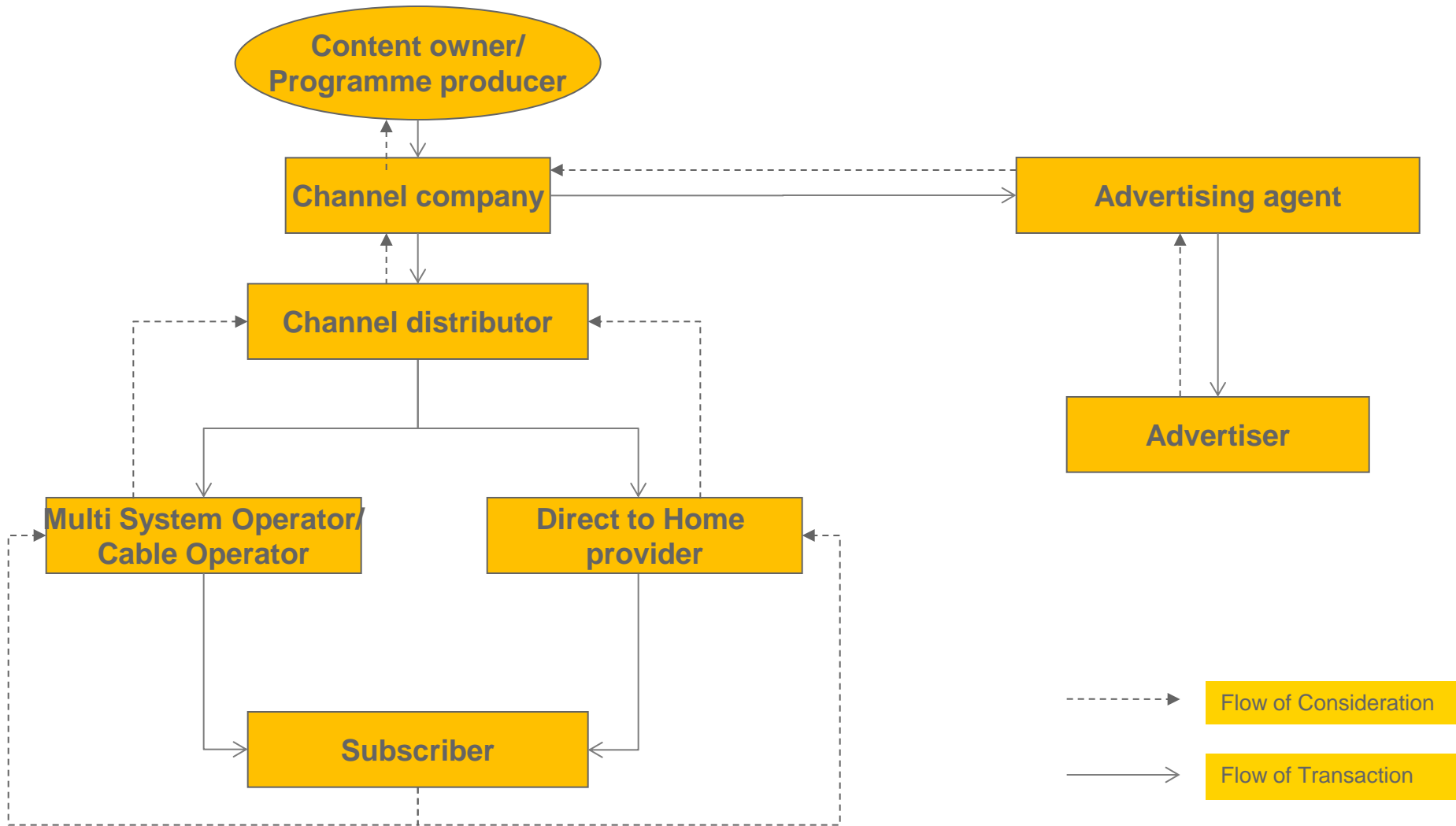
Key area of focus for today's discussion

Television

Television

- ▶ Major participants of Television Industry
 - ▶ Channel Company
 - ▶ Agent in India for a foreign channel company
 - ▶ Channel Distributor
 - ▶ Advertiser
 - ▶ Programme Producer
 - ▶ Cast and Crew

Television – Indirect tax applicability



Television – Key IDT aspects

- ▶ Program producers typically charge service tax for providing line production services
- ▶ Dual taxation risk in case of licensed, where service tax and VAT both may apply
- ▶ Syndication of content could again be liable to both service tax and VAT
- ▶ Channel distribution revenue flows attract only service tax; however, the final leg is also exposed to entertainment tax
- ▶ Advertising revenues also attract service tax; unique set of issues for advertising agencies
- ▶ Special provisions for channel companies located outside India; agent in India deemed to be the “broadcasting agency”
- ▶ Controversy on service tax on agency commission

Television – Key IDT aspects after negative list

- ▶ Concept of deemed “broadcasting agency” removed

- ▶ Explanation 4 added to definition of service to state:

Explanation 4. — A person carrying on a business through a branch or agency or representational office in any territory shall be treated as having an establishment in that territory

- ▶ Resultant interpretation that the Foreign Channel Company to register in India and pay tax as a service provider

- ▶ Agency commission exposed to service tax under the intermediary rule of POPS; case to be made out for coverage under Rule 3 of POPS

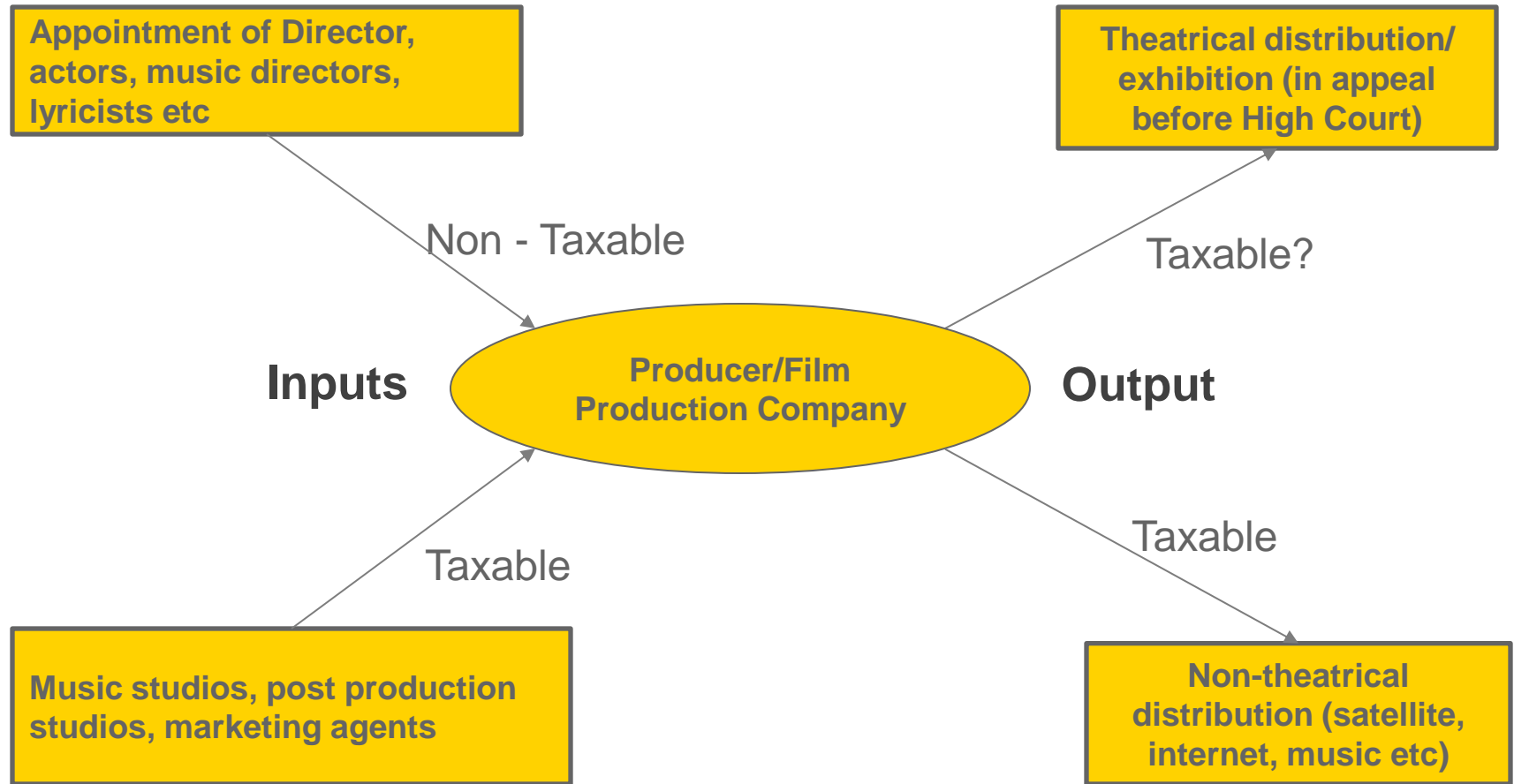
“intermediary” means a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of a service (hereinafter called the ‘main’ service) between two or more persons, but does not include a person who provides the main service on his account;

Film

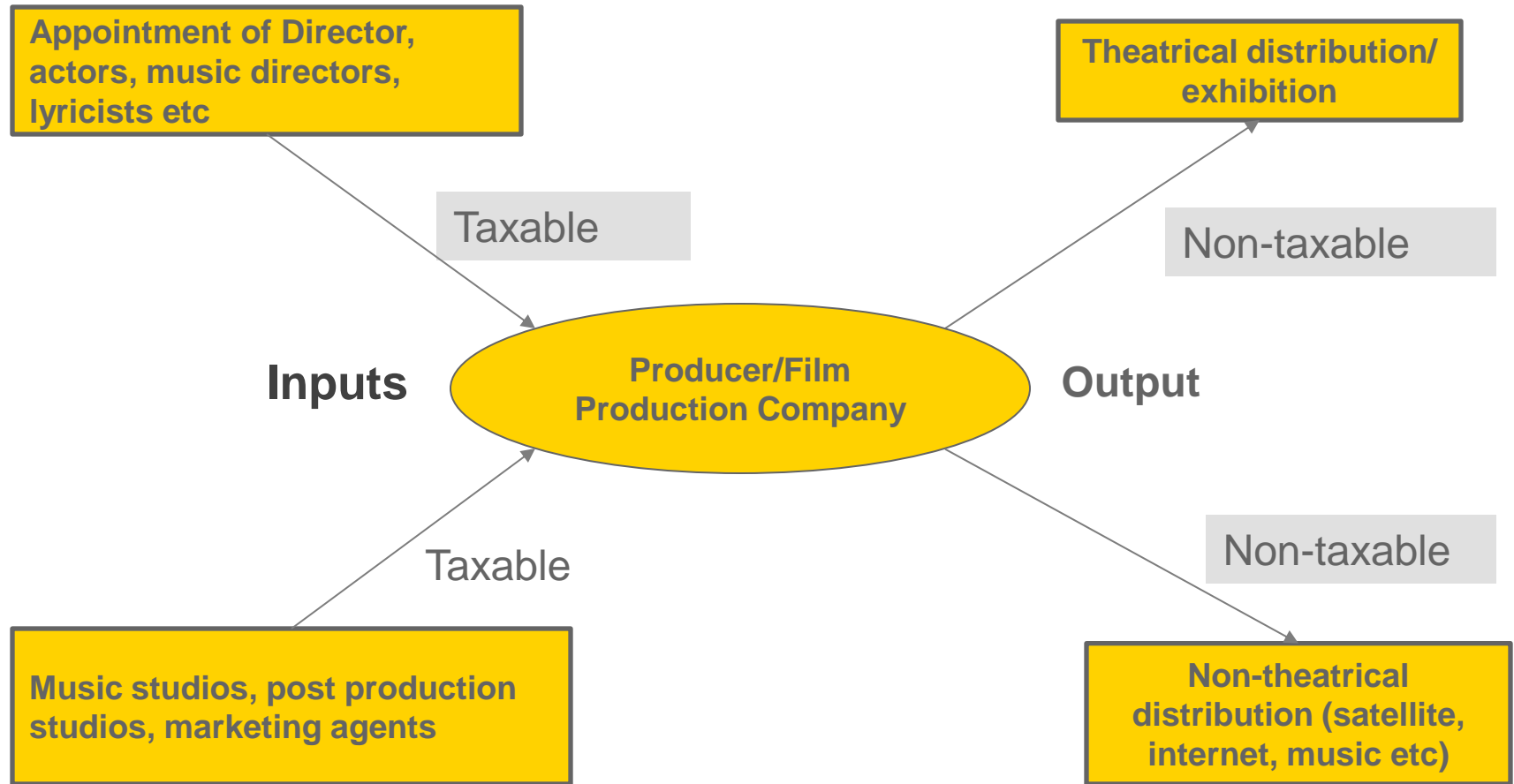
Film Industry

- ▶ Major participants of Film Industry
 - ▶ Right owners of Films
 - ▶ Film Producers
 - ▶ Pre-production and Post – production studios
 - ▶ Artists (Cast and Crew)
 - ▶ Film Distributors

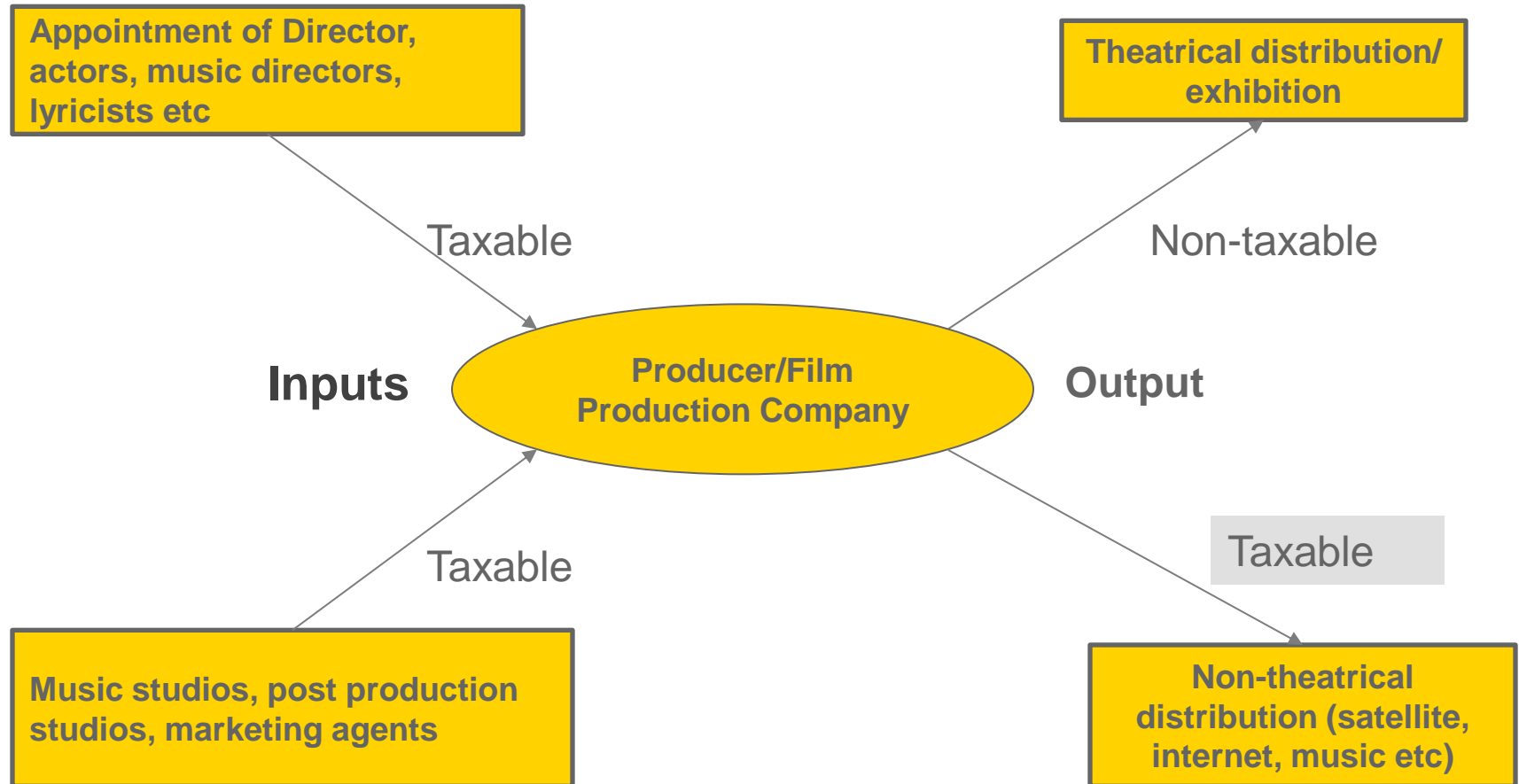
Films – July 2010 to June 2012



Films – July 2012 to March 2013



Films – April 2013 onwards



Film – Other aspects

- ▶ Service tax on production fee charged by Producer Company for managing ground execution of project
 - ▶ Line production fee
 - ▶ Reimbursements and taxability
- ▶ Revenue share concept in this sector
- ▶ Loss of input credits continues (atleast partially!)

Print

Print media – Indirect tax issue

- ▶ Amount received from sale of advertisement space in print media is exempt from payment of service tax
- ▶ The service tax legislation defines ‘print media’ to mean
 - ▶ Newspaper and
 - ▶ Book (*not including business directories, yellow pages, trade catalogues for commercial purpose*)
- ▶ No service tax liability on the print media organizations for the advertising revenue earned
- ▶ No corresponding exemption is provided to services provided to print media organizations
- ▶ Print media owners cannot claim credit of such service tax paid
- ▶ *This results in additional cost to the print media organizations*

Software Industry

Background – Software industry

- ▶ IDT implications on software - Subject matter of much debate and litigation in the past
- ▶ Key reasons for the debate over taxation of software are:
 - ▶ Distinction drawn between actual software and license to use software
 - ▶ This is also recognized in Customs / Excise Tariff where there are separate entries for IT software and Documents conveying right to use IT software
 - ▶ Delivery of multi-user software whereby same software copy can be used by multiple users
 - ▶ Delivery of software and licenses through electronic means
 - ▶ Supply of packaged software i.e. software capable of being sold off-the-shelf, and customized software

Background – Software industry

- ▶ Various categories of software transactions such as:
 - ▶ Single user software on media i.e. packaged software in shrink wrapped form where the media and license comes together - Typically meant for retail sale
 - ▶ Multi-user software on media i.e. packaged software where the media and license are separate - Typically meant for organizations / enterprises
 - ▶ Electronic download of single user software
 - ▶ Electronic download of multi-user software where licenses are separate - software may be downloadable by a key contained in a scratch card / product key card
- ▶ In transactions of customized software, the developer develops and designs the software as per end user needs and typically transfers it to the end user

Sale / Supply of Software – Relevant Provisions

- ▶ Under erstwhile service tax regime, taxable service category of ‘information technology software service’ included within its ambit:
 - ▶ Providing right to use software for commercial exploitation including right to reproduce, distribute and sell
 - ▶ Providing right to use software supplied electronically
- ▶ Under the Negative List based regime, the definition of ‘service’ excludes ‘deemed sale’. Also, the following entries are relevant:
 - ▶ Development, design, programming, customization, adaptation, upgradation, enhancement, implementation of IT software
 - ▶ Temporary transfer or permitting the use or enjoyment of any intellectual property right

Single user software on media – Shrink wrapped software

- ▶ For purpose of excise duty / customs duty, software manufactured / imported in pre-packaged form and meant for retail sale is subject to MRP based valuation with abatement of 15%
- ▶ CVD @ 12% / Excise duty @ 12.36% is levied on import / manufacture of such software respectively
- ▶ On domestic sale of shrink wrapped software – VAT/CST is levied
- ▶ No service tax is levied – clarified in the CBEC Education Guide where single user software is mentioned as ‘goods’ and no service tax to be levied

Multi-user software on media

- ▶ In multi user software, customs / excise duty valuation to be computed based on respective Valuation Rules
- ▶ On media value (typically a small portion), CVD @ 12% / excise @ 12.36% to be levied on import / manufacture
- ▶ On value pertaining to license / right to use software, service tax @ 12.36% will be levied
 - ▶ Specific customs / excise exemption on consideration for right to use software not subject to MRP based valuation, hence no customs / excise on value of license (Notification no. 14/2011-CE and Notification no. 25/2011-Cus)
- ▶ On domestic supply of shrink wrapped software – issue of whether VAT/ service tax to be levied (discussed in subsequent slide)

Multi-user software on media – VAT or service tax on license value

- ▶ In the Education Guide it has been clarified that
 - ▶ As per TCS judgment, software is ‘goods’ and accordingly supply of pre-packaged software would be in the nature of sale of goods
 - ▶ Whether a license to use software constitutes ‘transfer of right to use’ has to be seen in terms of whether the license interferes with free enjoyment of software (i.e. whether the contract satisfies conditions of SC judgment in case of BSNL)
- ▶ Limited clarity on what constitutes transfer of right to use and license to use especially in case of software
- ▶ Conflicting decisions in the context of “software” i.e. whether license to use software is liable to VAT or service tax

Multi-user software on media – VAT or service tax on license value

- ▶ TCS and Infosys judgments holds that software is goods, whereas ISODA and AP High Court in BSNL judgment veers towards the view that certain software transaction qualify as ‘service’
- ▶ Software always supplied under a license and as a copyrighted article, accordingly control and possession appears to be passed on in each transaction
- ▶ No clarity on basis to be used to determine whether conditions of BSNL judgment are satisfied i.e. whether there is transfer of right to use or not

Electronic download of software

- ▶ Education Guide suggests that Electronic download of software constitutes a 'service'. However, there is no proper basis for the same
- ▶ Certain judgments suggest that electronic download of software tantamount to 'service':
 - ▶ For instance ISODA judgment provides that if software is sold through the medium of internet in the form of a downloadable, it should not qualify as 'goods'
 - ▶ In AP High Court judgment of BSNL, it is held in the context of 'value added services' that these are not recorded in physical medium and should not be 'goods'

Electronic download of software

- ▶ Arguments in favour of ‘services’
 - ▶ Software in electronic form is merely messages carried by means of electro-magnetic waves and is not on any tangible medium
 - ▶ Transfer of software is not in the same form, since only a link is given to the end user at the time of agreement of transfer of right to use
 - ▶ Exclusive use of the software is not provided
- ▶ Arguments in favour of ‘goods’
 - ▶ Software in electronic form also satisfies the conditions of ‘goods’ laid down in TCS judgment i.e. utility, marketability, and capability of being transferred, transmitted, stored and possessed
 - ▶ Change in mode of transfer should not impact the nature of transaction
- ▶ VAT authorities likely to dispute the view provided in the Education Guide

Customized software – Whether VAT or Service Tax

- ▶ Under Negative list regime, development, design, programming and customization of software has been included as a declared service
- ▶ In the judgment of Infosys it was held that customized software would qualify as 'goods'. Similar view is taken by High Court in ISODA judgment that customized software put up on media can be goods and should attract VAT
- ▶ Clarity required on whether supply of customized software will be liable to VAT or service tax
- ▶ On a case to case basis, an analysis may be required to determine applicability of VAT or service tax on customized software

Thank you