

# Institute of Chartered Accountants of India

## National Conference on Issues in Service Tax

**Subject** : Negative List – Is it really negative?

**Date** : Friday, 27<sup>th</sup> December 2013

**Venue** : ICAI Tower, Near Standard Chartered Bank, Bandra Kurla Complex, Bandra (E), Mumbai – 400 051

**Faculty** : CA Naresh K. Sheth

**PREAMBLE  
AND BACKGROUND**

## PREAMBLE

### ➤ Abbreviations:

- The Act – Finance Act, 1994 (Service tax legislation)–amended till date
- The Rule – Service Tax Rules, 1994 – amended till date
- CCR-Cenvat Credit Rules, 2004

### ➤ Presentation deals with :

- Services listed under Section 66D of the Act (popularly known as “Negative List of Services”)
- Its overall impact on service tax liability of assessee
- Issues emanating from Negative List

### ➤ Presentation deals with position on or after 1<sup>st</sup> July,2012

## Definition of “Service” [Section 65B(44)] – Relevant Extract

- Service means:
  - Any activity
  - Carried out by a person for another person
  - For consideration
- It includes declared service
- It does not include any activity which constitutes merely :
  - a transfer of title in:
    - goods ; or
    - Immovable property

By way of sale, gift or any other manner

  - Deemed sale under Article 366 (29A) of Constitution
  - Transaction in money
  - Transaction in actionable claim
  - Provision of service by an employee to an employer in course of or in relation to employment
  - Tribunal and court fees

## Charging Provision – Section 66B w.e.f. 01.07.2012

- There shall be levied a tax ( hereinafter referred to as the service tax)
- At the rate of 12 per cent
- On the value of **all services**
- **Other than those specified in the Negative list**
- Provided or to be provided
- In the taxable territory
- By one person to another person
- Collected in such a manner as prescribed

# Taxation Scheme - Paradigm Shift w.e.f. 01.07.2012

- Shift from “selective” to “comprehensive” approach of taxation
- Selective approach (scheme of taxation upto 30.06.2012):
  - Term “service” not defined
  - Statute listed out taxable services [Section 65(105)]
  - Only listed services were taxable
  - Non-listed services were not taxable
- Comprehensive approach (Scheme of taxation w.e.f. 01.07.2012):
  - Term “service” is defined U/s 65B(44) and it includes “Declared Service” as defined U/s 66E
  - Statute listed out non-taxable services [negative list – Section 66D]
  - All services (including declared services) are taxable except those specified **in negative list**

# Taxation Scheme - Paradigm Shift w.e.f. 01.07.2012

## ➤ Pre 1<sup>st</sup> July,2012 :

- Attempt of the Service Provider to come out of the list [The services Listed in Section 65(105) of the Act]
- Attempt of the Service Tax Authority to drag Service Provider in the list

## ➤ Post 1<sup>st</sup> July,2012 :

- Attempt of the Service Provider to fall in the list[The services listed in Section 66E of the Act]
- Attempt of the Service Tax Authority to drag Service Provider out of the list

# **NEGATIVE LIST OF SERVICES**

**w.e.f. 01.07.2012**



# Negative List – Concept and Rationale

- Service definition is very wide to cover major economic activities
- Purpose of the Negative List to ensure :
  - To exclude Government or Sovereign Services from Tax Levy
  - To exclude essential services or services required by common man from Tax Levy
  - To avoid multiple taxation on same transaction :
    - Service Tax and VAT
    - Service Tax and Entertainment Tax
    - Service Tax and Stamp Duty
    - Service Tax and Excise Duty
    - Service Tax and Luxury Tax

# Negative List – Concept and Rationale

- “Negative listed service”:
  - Negative list is part of the Act
  - It is prime legislation
  - It is a prerogative of Parliament
- “Exempt service” :
  - Exemption is granted by notification
  - It is the subordinate legislation
  - It is prerogative of Finance Ministry / CBEC
- Whether Negative Listed Service is a “service”?
  - Yes – It falls under definition of service as defined u/s 65B(44)

# Negative List – Concept and Rationale

- Is it a “Non-Taxable” Service?
  - Service covered by charging Section is “Taxable Service”
  - Negative list service is specifically excluded from charging section
  - It is “Non-Taxable” Service
- Is it an “Exempt” Service?
  - Exempt Service means :
    - Service chargeable to tax u/s 66B(Taxable Service)
    - Taxable Service exempt through Notification issued U/s 93 of the Act
    - Exemption could be full or partial
    - Negative listed service is not “exempt” through Notification
    - **Negative Listed Service is not an “exempt service”**

# Negative List – Concept and Rationale

➤ Implications- Non- Taxable v/s Exempt Services

<b>Particulars</b>	<b>Applicability of Service Tax Law</b>	<b>Tax Incidence</b>	<b>Cenvat Rule Availability</b>
Transaction- Not a service	No	Nil	?
Non-Taxable Service	Yes	Nil	?
Exempt Service	Yes	Nil/Partial	Yes

➤ For purpose of CCR , negative listed service is an exempt service U/R 2(e)(2) of CCR

## Negative List - Government or Sovereign Services

- Services provided by Government or local authority except for following services to the extent not covered elsewhere [Section 66D(a)]:
  - (i) speed post, express parcel post, life insurance and agency services provided by post department 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.
- Services by the Reserve Bank of India [Section 66D(b)].
- Services by a foreign diplomatic mission located in India [Section 66D(c)].
- Service by way of access to a road or a bridge on payment of toll charges [Section 66D(h)]

## Negative List - Government or Sovereign Services

### ➤ Some issues and FAQ:

- Does services provided to Government, local authority, RBI or foreign diplomatic mission is covered under Negative List?
- Term “Government” is not defined in Finance Act, 1994
- Does it include foreign Government?
- Does the nodal agencies of Government is a Government ?
- Whether Government Company is a Government?
- An assessee paying a rent for Government warehouse. Is it chargeable to tax? If so, whether reverse charge mechanism applies or Government is liable to pay service tax?

## Negative List - Essential Services

- Specified services relating to agriculture or agriculture produce [Section 66D(d)]:
  - (i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or testing;
  - (ii) supply of farm labour;
  - (iii) processes carried out by agricultural farm which do not alter the essential characteristics of agricultural produce but make it only marketable for the primary market;
  - (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;
  - (v) loading, unloading, packing, storage or warehousing;
  - (vi) agricultural extension service ;
  - (vii) services by agricultural produce marketing committee / board or service provided by commission agent for sale or purchase
    - Term “agriculture” and” agriculture produced” defined in the Act.

## Negative List - Essential Services

- Transmission or distribution of electricity by “Electricity Transmission or Distribution Utility” [Section 66D(k)]
- Services by way of [Section 66D(l)]–
  - (i) pre-school education and education up to higher secondary school or equivalent;
  - (ii) education as a part of an approved vocational education course
  - (iii) education as a part of a curriculum for obtaining a qualification recognized by law;
- Services by way of renting of residential dwelling for use as residence [Section 66D(m)];
- Services by way of [Section 66D(n)]–
  - (i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;
  - (ii) inter-se sale / purchase of foreign currency amongst banks or authorized dealers or amongst banks and such dealers;



## Negative List - Essential Services

- Transportation of passengers [Section 66D(o)]
  - (i) a stage carriage;
  - (ii) metro, monorail or tramway;
  - (iii) inland waterways;
  - (iv) metered cabs, radio taxis or auto rickshaws;
  - (iv) public transport in a vessel other than predominantly for tourism purpose between places located in India
  - (v) railways in a class other than –
    - first class; or
    - an air conditioned coach;
- Services by way of transportation of goods [Section 66D(p)]–
  - (i) by road except the services of –
    - a goods transportation agency; or
    - a courier agency;
  - (ii) by an aircraft or a vessel from a place outside India to customs station of clearance
  - (iii) by inland waterways;

## Negative List - Essential Services

- Funeral, burial, crematorium or mortuary services including transportation of the deceased [Section 66D(q)]
- **Some Inconsistencies :**
  - **Whether Negative List is wide enough to cover all essential services?**
    - Charitable activities
    - Non-Economic activities
    - Transactions between mutual associations and its members
    - Telephone services
  - **Export freight is not appearing in negative list**
    - Import Freight is in negative list
    - What is logic behind exclusion of export freight from negative list ?
  - **Health Services is not appearing in negative list**
    - Education Services is appearing in negative list
    - What is logic behind exclusion of health service from negative list?

## Negative List – Essential Services – Some Issues & FAQ's

- Whether polished rice, sugar, jaggery, edible oil, flour, spices, turmeric powder, chili powder, dry fruits etc are “agriculture produce” and whether cargo handling, storage, warehousing, brokerage of such products comes under negative list?
- Leasing of land, equipments etc for agricultural purpose is covered under negative list. Whether leasing of land / equipment to poultry farm is covered under negative list?
- Section 66D(I) covers pre-school education under negative list of services. The term “pre-school education” is not defined in Finance Act, 1994. Whether following are covered under negative list and consequently non-taxable:
  - Nursery
  - Junior K.G.
  - Senior K.G.
  - Play Groups
  - Crèche

## Negative List – Essential Services – Some Issues & FAQ's

- Whether renting of residential apartment to a company for following purposes is covered under negative list?
  - to be used by company's executive for residence
  - to be used by company as its guest house
  - to be used by company as service apartments
  
- Whether interest or bill discounting charges transaction between private parties is covered under negative list?

## Negative List – Avoidance of Overlapping Taxation

- Trading of goods
- Process amounting to manufacture or production of goods
- Selling of space or time slots for advertisements other than advertisements broadcast by radio or television
- Betting, gambling or lottery
- Admission to entertainment events or access to amusement facilities
- **Unresolved Issues :**
  - Overlapping between luxury tax and service tax
  - Hazy position as to taxation of hiring of Tangible goods
  - Overlapping of VAT and Service Tax in respect of Intangibles :
    - Software
    - Franchise
    - Temporary transfer/right to use IPR Services

## Negative List of Services - To Avoid Overlapping Taxation

- Whether job work done for following principal manufacturer is covered under negative list U/s 66D(f) :
- Export oriented unit
  - Unit in excise free zone
  - SEZ Unit
  - Small manufacturing unit under threshold limit

**NEGATIVE LIST**  
**– GENERAL ISSUES AND FAQ's**

## NEGATIVE LIST – GENERAL ISSUES AND FAQ's

- Whether a person providing only negative listed services is liable to take Service Tax Registration and file returns?
- A person is providing Negative Listed Services as well as Taxable Services . Whether such person is liable to declare Negative Listed Services in his return?
- If answer to both the above is 'No', what will be consequences if department later disputes that the service is not falling in Negative List?
- A person is providing Negative Listed Services as well as Taxable Services. Whether such person is liable to include Negative Listed Services for claiming threshold exemption?
- A person was providing non-taxable services till 30.06.2012. His annual receipts for such services were more than 50 lakhs per annum for FY 2011-12. His services became taxable w.e.f. 01.07.2012. His receipts for the period April to June 2012 is Rs.30 Lakhs and from July, 2012 to March 2013 is Rs.70 Lakhs :
  - whether he is entitled to threshold exemption of Rs.10 Lakhs in FY 2012-13?
  - where he is liable to pay service tax on Rs.70 Lakhs or on Rs.60 Lakhs?



## NEGATIVE LIST – GENERAL ISSUES AND FAQ's

- If a person provides Negative Listed Services to a person established outside Taxable Territory and receives consideration in convertible Foreign exchange. Whether such services will be treated as Export of Services entitling Service Provider to claim :
  - Cenvat of Input Services
  - Refund of Input service Tax paid.
- If a person based in India procures Negative Listed Services from abroad, whether he is liable to pay Service Tax under Reverse Charge Mechanism?
- Transfer of title to movable property is excluded from definition of “Service”. Trading is not a service at all as defined U/s.65b(44). Trading is a Negative Listed service U/s 66D(e) of the Act. Under Rule 2(e)(k) of CCR, trading is an “exempt service” for the purpose of Cenvat reversal. What are Cenvat implications of trading?

## NEGATIVE LIST – GENERAL ISSUES AND FAQ's

- Service was Non-Taxable till 30.06.2012. Same was not covered in negative list and hence taxable w.e.f 01.07.2012 :
  - How to calculate the ratio for proportionate reversal under Rule 6(3A) of CCR?
  - Whether Services for the period 01.04.2012 to 30.06.2012 is to be taken as exempt services for reversal purpose?
- Services provided by assessee is taxable w.e.f 01.07.2012. Same were Non-Taxable till 30.06.2012. The revenue stream of assessee started only after 01.07.2012. The service provider has paid huge input service tax prior to 30.06.2012 for services provided on or after 01.07.2012 :
  - Whether Assessee is entitled to Cenvat of Input Services availed prior to 30.06.2012

## Words of Caution

- Views expressed are the personal views of faculty based on his interpretation of law
- Application/implications of various provisions will vary on facts of the case and law prevailing on relevant time
- Contents of this presentation should not be construed as legal or professional advice
- This is an educational meeting arranged with clear understanding that neither Faculty nor ICAI will be responsible for any error, omission, commission and result of any action taken by participant or anyone on the basis of this presentation

**THANK YOU**