



All India Federation of Tax Practitioners

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# AIFTP TIMES

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## FORTHCOMING PROGRAMMES

Date & Month	Programme	Place
1-6-2012	National Executive Committee Meeting	Kolhapur
2, 3-6-2012	National Tax Conference 2012	Kolhapur

## FEDERATION NEWS

Narayan P. Jain, Secretary General

### REPORT OF ONE DAY SEMINAR ON INDIRECT TAXATION HELD ON 15TH APRIL, 2012 AT WESTERN U.P. CHAMBER OF COMMERCE, BOMBAY BAZAR, MEERUT

The Seminar on Indirect Taxation was held by The All India Federation of Tax Practitioners (Northern Zone) jointly with Taxatio Academic & Welfare Forum Association Western Uttar Pradesh, Meerut, a member association of AIFTP on 15th April, 2012 at Western Chamber of Commerce, Meerut, under the theme "Marching Ahead". It was the first seminar in Meerut organised by Northern Zone and 143 delegates from Delhi, Ghaziabad, Modinagar, Hapur, Meerut & Muzaffarnagar participated in the seminar inspite of election of local bodies at Delhi. Such large participation of delegates from various places have made the Seminar a success. For the whole day, the organizers have taken care to provide vegetarian delicious food. The efforts of the organizers in providing warm hospitality to all the guests, paper writers, Chairmen of technical sessions and participants was highly appreciated.

In inaugural function Hon'ble Mr. Justice Pankaj Mithal, Judge, Allahabad High Court as the Chief Guest of the Inaugural Function while Mr. Bharat Ji Agarwal, Sr. Advocate and Past President, AIFTP has presided the session. Mr. P. S. Sarin of Northern Zone, was also present.

Mr. Bharat G. Bhushan, General Secretary - Taxatio Academic Forum welcomed all the dignitaries on the dais and learned paper writers, Co-Chairmen of Technical Sessions and delegates. Function was started with lighting of lamp and Maa Saraswati Vandana. Mr. Arun Jain, Chief Convener of Taxatio Academic Forum welcome all Chief Guest, dignitaries, delegate, guest, press members in the Seminar. Mrs. Prem Lata Bansal, National Vice President has emphasized on importance of seminar & workshop as a refresher

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course for tax professionals. Mr. N.K.Arora, Chairman, AIFTP (NZ) highlighted the activities of AIFTP and importance of professional skill development. Mr. V.P.Gupta, Chairman Educational & Seminar committee (NZ) expressed that as a part of regular educational activity for the benefit of the professional brothers this seminar is organised. A tribute was given to Past Chairman Late Mr. D.K.Jain, who was member of AIFTP since 1978 and A doyen of AIFTP natured it brick to brick and bit by bit. Memento was presented to Mrs. D.K.Jain for his memorable work by Chief Guest.

The First session was on "Section 6A of the CST Act, 1956 and Appeal to Central Sales Tax Appellate Authority" wherein the Hon'ble Justice Mr. Pankaj Mittal Judge of Allahabad High Court was the Chairman of the Session with Mr. P. S. Sarin Advocate Delhi as co-chairman and Mr. Bharat Ji Agarwal as Expert Commentator. The speakers on the subject were Mrs. Nikita Badheka from Mumbai and Mr. H. C. Bhatia from Delhi, who dealt with the subject exhaustively.

While introducing the subject on section 6A, besides explaining the section Mr. Sarin said that section 6A is a unique scheme where a charging section 6(1) and machinery provision like section 9(2) have been subjected to section 6A. Section 6A no doubt occurs in Chapter III (though not part of Chapter II of CST Act ) lays down principles for determining the vexed question as to whether the movement is occasioned by sale or not by prescribing certain mode of proof notwithstanding that it is not a sale. This raised a constitutional validity issue because under Article 269(3) the CST Act 1956 was made and Chapter II thereof lays "Formulation of principles for determining when a sale or purchase of goods takes place in the course of inter- state trade or commerce or outside a State or in the course of import or export." The contention of Mr. Sarin is that we do not find empowerment in the Constitution of India like article 269(3) to enact a provision like section 6A. He further said that prior to Ashok Leyland case there is no single ruling where scope of section 6A was canvassed except incidental reference in Sahni Steel case. In the end he said that this is a food for thought and should be deliberated threadbare.

Smt. Nikita R. Badheka, Advocate, Mumbai analysed all aspects of 6A of CST Act and highlighted the applicability of 6A on movements of goods on Job Work. Shri H.C.Bhatia from Delhi presented his paper and discussed the importance of CSTAA to settle dispute of taxability on Stock Transfer between two states. Mr. Bharat Ji Agarwal, Sr. Advocate has concluded with his expert comments on the issues raised by Mr. P.S.Sarin and recommended to pass and forward a resolution on this ticklish issue and also replied to the queries from delegates.

Hon'ble Mr. Justice Pankaj Mithal, Chief Guest of the function gave a very meaningful speech and message to the participants. He enlightened the delegates with the advantages and value of excellence in performance by tax professionals. The session concluded with Vote of thanks by Mr. B.D.Jain, Advocate and Patron of Taxatio Academic Forum and presentation of Mementoes followed by delicious lunch.

Second Technical session was on "Procedural & Legal aspect of Input Tax Credit under UP VAT Act " wherein the Hon'ble Mr. Mayank Jain, HJS, Member Commercial Tax Tribunal was the Chairman and Mr. Bharat Ji Agarwal, Presided the Session with Mr. Balram Sangal, Advocate Delhi as co-chairman and Mr. Sushil Verma from Delhi as Expert Commentator. In the opening remarks Mr. Balram Sangal, Co-chairman introduced the subject with the theme and objects of Input Tax Credit and cascading effect of tax under Valued Added Taxation system. The speakers on the subject were Mr. Mukul Gupta from Ghaziabad and Mr. Piyush Agarwal from Allahabad, who dealt with the subject elaborately and exhaustively. Both the speakers while presenting their papers highlighted the relevant provisions of VAT Law and its far reaching effect with reference to Input Tax Credit. Mr. Sushil Verma in his expert comments touched all issues. Mr. Bharat Ji Agarwal in his concluding remarks dealt all the practical issues and difficulties in availing Input Tax Credit in Uttar Pradesh.

Hon'ble Mr. Mayank Jain, the Chairman of the session expressed that the paper writer has discussed in-depth all the relevant aspects on the subject and for such detailed discussion he congratulated the paper writers and expert commentator. He expressed his regards to Mr. Bharat Ji Agarwal, Past President AIFTP. The Technical Session was concluded by Mr. Rakesh Agarwal, General Secretary – AIFTP (NZ) with presentation of mementoes and vote of thanks and High Tea.

**N. K. Arora**  
Chairman - NZ

## MEGA SEMINAR ON TAXATION AT SILIGURI

A Mega Seminar on Taxation was successfully organised on 12th May, 2012 at Hotel Orbit, Siliguri by All India Federation of Tax Practitioners (EZ), jointly with Siliguri Tax Bar Association and Siliguri Branch of EIRC of ICAI . Program was inaugurated by lightening the lamp by Shri S.K. Poddar, National President of AIFTP. Shri Poddar highlighted the role and activities of AIFTP.

Speakers in the Seminar were Shri Bharatji Agrawal (Past President, AIFTP), Shri Narayan Jain (Secretary General, AIFTP), Mr. S. Venkatramani, Mr. Arun Agarwal, Mr. Subash Agarwal, Mr. Sujit Basu & CA Manish Goyal. Shri S.K. Poddar, President AIFTP chaired the technical session.

Mr. Narayan Jain elaborated the amendments relating to TDS, TCS, section 68, section 56(2) and other amendments made by the Finance Bill, 2012 while Mr. Sujit Basu dealt with amendments relating to section 40(a)(ia); section 195 and section 201. The technical session on Finance Bill, 2012 was chaired by Shri S.K. Poddar.

Shri Bharatji Agarwal chaired session on VAT and service tax. Mr. S. Venkatramani lucidly explained the recent court decisions relating to works contract and service component as also composite contracts in relation to building construction. Shri Bharatji Agarwal felt that clarifications are still needed to avoid double taxation on same transaction. If a transaction is subjected to VAT, it cannot be taxed by also treating it as a service.

Mr. Subash Agarwal spoke on search and seizure and elaborated the decisions on retraction of statement recorded during search. Chairing the session Mr. Indu Chatrath, Chairman of AIFTP (East Zone) highlighted the problems in search operations and the trend of extracting disclosure.

Mr. Arun Agarwal and Mr. Manish Goyal highlighted the main points of Service Tax on construction services and Mr. Arun Agarwal explained controversial issues in service Tax in detail. The session was nicely chaired by Shri Bharat ji Agrawal.

Co-ordinator Dilip Agarwal, Advocate, President (STBA) and Shri Apurba saha, Secretary (STBA) and their team did wonderful job in making the Seminar a success. The Siliguri Branch of EIRC of ICAI was joint organizer. The efforts put in by CA Sanjeev Agarwal, Chairman and CA Rajesh Agarawal, Secretary of the Siliguri Branch and their team was commendable. The Seminar was attended by 200 delegates. Shri GS Agarwal was the Chairman of the Organising Committee. Mr. ND Saha, Secretary (AIFTP-EZ) delivered Vote of Thanks and urged the delegates to join AIFTP.

### Membership of AIFTP as on 20th May, 2012

#### Life Members

Zone Name	Associate	Individual	Association	Corporate	Total
Central	0	754	22	3	779
Eastern	2	1014	35	3	1052
Northern	0	865	17	0	882
Southern	0	793	13	3	809
Western	4	1614	32	15	1661
<b>Total</b>	<b>6</b>	<b>5040</b>	<b>119</b>	<b>24</b>	<b>5183</b>

### Renewal Subscription to AIFTP Journal and Voluntary Contribution to Palkhivala National Tax Moot Court Competition and Research on Tax

Dear Members,

We have posted bill for renewal subscription of AIFTP Journal, Life Membership Update Form and Palkhivala Foundation on 16th April, 2012. Members are requested to send the DD or Cheque in favour of "All India Federation of Tax Practitioners" payable at Mumbai as early as possible.

Members can also download the subscription, Update form and an Appeal for voluntary contribution from our website; i.e., [www.aiftponline.org](http://www.aiftponline.org) and send us the subscription.

Thanking you,

**For All India Federation of Tax Practitioners**

**NARAYAN P. JAIN**  
Secretary General

## DIRECT TAXES

Ajay R. Singh, Paras S. Savla, Rahul Hakani, & Renu Choudhuri  
Advocates, KSA Legal

### SUPREME COURT

**1. S. 36(1)(iii) : Business expenditure – interest – loan to subsidiary**

The assessee borrowed funds and used it to subscribe to the equity capital of its subsidiary company. The assessee paid interest on the borrowed money and claimed that a deduction under section 36(1)(iii). The Assessing Officer rejected the claim though the CIT (A), Tribunal & High Court (338 ITR 482) allowed it by relying on *S. A. Builders Ltd v. CIT* 288 ITR 1 (SC). It was held that as the assessee, being a holding company had a deep interest in its subsidiary, and hence if the holding company advanced borrowed money to a subsidiary and the same is used by the subsidiary for some business purposes, the assessee would be entitled to deduction of interest on its borrowed loans. On appeal by the department, the Supreme Court held that, *S.A. Builders Ltd. v. Commissioner of Income-Tax (Appeals) and Another*, reported in 288 ITR 1, needs reconsideration.

*ACIT v. Tulip Star Hotels Ltd. (SC)* Source : [www.itatonline.org](http://www.itatonline.org)

**2. S. 271(1)(c) : Penalty – Assessed income Loss – Book profits – S. 115JB**

The Assessee filed ROI declaring loss of ₹ 43.47 crores under normal provisions and book profits of ₹ 3.86 crores under section 115JB. The Assessing Officer assessed a loss at ₹ 36.95 crores and book profits at ₹ 4.01 Crores. Before the High Court it was argued that even if there was a concealment under section 271(1)(c) with respect to normal assessment, the same was not relevant because the assessee's income was assessed under section 115JB. The High court accepted the plea and held that as the section 115JB 'book profits' were by a legal fiction deemed to be the 'total income', the furnishing of wrong particulars had no effect on 'the amount of tax sought to be evaded' as defined in Explanation 4 to 271(1)(c). The supreme court dismissed the SLP filed by the Department.

*CIT v. Nalwa Sons Investment Ltd (SC)* Source : [www.itatonline.org](http://www.itatonline.org)

### HIGH COURTS

**3. S. 234A : Interest – direction not given by A.O. – S. 234B, 234C**

In *CIT v. Ranchi Club Ltd.* 247 ITR 209 (SC) it was held that the order of the Assessing Officer in the assessment order to charge interest has to be specific and clear and the assessee must be made to know that the Assessing Officer after applying his mind has ordered charging of interest. In *Anjum M.H. Ghaswala* 252 ITR 1 (SC), it was held, in the context of whether the Settlement Commission

could waive interest, that the levy was mandatory and could not be waived. Subsequently, in *Insilco Ltd* 278 ITR 1 (SC), the Supreme Court remanded the matter to decide whether the law laid down in *Ranchi Club* had been changed by *Anjum M.H. Ghaswala* or not. *Ranchi Club Ltd* has not been expressly overruled nor has a different view been taken in *Anjum M.H. Ghaswala's* case. There is also no force in the department's argument that even if assessment order or computation sheet does not provide for interest, since interest is mandatory, it can be charged in the demand notice which is signed by the Assessing Officer. Even if a provision of law is mandatory and provides for charging of tax or interest, the view taken in *Ranchi Club Ltd* is that such charge by the Assessing Officer should be specific and clear and assessee must be made to know that the Assessing Officer has applied his mind and has ordered charging of interest. The mandatory nature of charging of interest and the actual charging of interest by application of mind and the mention of the proviso of law under which such interest is charged are two different things. Consequently, if the assessment order is silent, interest under section 234A, 234B & 234C cannot be levied.

*CIT v. Awadh Hotels (P) Ltd. (All.)* Source : [www.itatonline.org](http://www.itatonline.org)

**4. S.195 : Deduction of Tax at source – Fees for technical services – India-Netherlands – DTAA**

Article 12(5) of the DTAA defines "fees for technical services" to mean payments in consideration for the rendering of any technical or consultancy services "which make available technical knowledge, experience, etc or consist of the development and transfer of a technical plan or technical design. To be said to "make available", the service should be aimed at and result in transmitting technical knowledge etc so that the payer of the service could derive an enduring benefit and utilize the knowledge or know-how on his own in future without the aid of the service provider. In other words, to fit into terminology "making available", the technical knowledge, skills" etc must remain with the person receiving the service even after the particular contract comes to an end. It is not enough that the services offered are the product of intense technological effort and a lot of technical knowledge and experience of the service provider has gone into it. The technical knowledge or skills of the provider should be imparted to and absorbed by the receiver so that the receiver can deploy similar technology or techniques in the future without depending upon the provider. On facts, while the Dutch company performed the surveys using substantial technical skills, it has not made available the technical expertise in respect of such collection or processing of data to the assessee, which the assessee can apply independently and without

assistance and undertake such survey independently. Consequently, the consideration is not assessable as "fees for technical services"

*CIT v. De Beers India Minerals Pvt. Ltd. (Karn.)*  
Source : [www.itatonline.org](http://www.itatonline.org)

#### 5. S.147 : Reassessment – Recorded reasons

There is no requirement in sections 147, 148 or 149 that the reasons recorded should also accompany the notice issued under section 148. The requirement in section 149(1) is only that the notice under section 148 shall be issued. There is no requirement that it should also be served on the assessee before the period of limitation. There is also no requirement in section 148(2) that the reasons recorded shall be served along with the notice of reopening the assessment. The only mandatory requirement is that before issuing the notice to reopen the assessment the Assessing Officer shall record his reasons for doing so. After GKN Driveshafts 259 ITR 19 (SC) the Assessing Officer is duty bound to supply the recorded reasons to the assessee after the assessee files the return in response to the section 148 notice. Haryana Acrylic turned on the peculiar facts of that case, where two sets of reasons had been recorded by the Assessing Officer. As the second set of reasons alleging non-disclosure of material facts surfaced for the first time in the affidavit filed by the Revenue before the High Court after the expiry of 6 years, it was held that the reassessment proceedings were invalid. As this is not the fact situation here, the assessee's plea cannot be accepted.

*A. G. Holdings Pvt. Ltd. v. ITO (Delhi)* Source : [www.itatonline.org](http://www.itatonline.org)

### TRIBUNALS

#### 6. S. 254 : Tribunal – Powers

- (i) The assessee's argument that as the ground was taken in the memorandum of appeal, it was not an "additional ground" for which leave was required from the Tribunal is not acceptable because section 253(1) permits an assessee "aggrieved" to file an appeal. A person can be "aggrieved" only if a ground had been raised and it is decided against him. Section 253(1) bars a ground which was not raised and not decided by the CIT(A) because there can be no grievance in respect of a matter which is not raised at all (Pokhraj Hirachand 49 ITR 293 (Bom) followed);
- (ii) On the question whether such a ground can be raised for the first time before the Tribunal, the subject matter of an appeal consist of three elements (a) the grounds taken in the memorandum of appeal, (b) the grounds for which leave is allowed by the Tribunal and (c) grounds taken by the respondent for supporting the order of the CIT(A). The Tribunal is not confined only to issues arising out of the appeal before the CIT(A) but has the discretion to allow a new ground to be raised. If a pure question

of law arises for which facts are on record of the authorities below, the question should be allowed to be raised if it is necessary to assess the correct tax liability. The submission that the ground could not be raised earlier as the assessee did not have the services of an advocate at its command is reasonable and bona-fide (NTPC 229 ITR 383 (SC) followed).

*All Cargo Global Logistics Ltd. v. Dy. CIT (Mumbai Special Bench)* Source : [itatonline.org](http://itatonline.org)

#### 7. S. 14A : Business expenditure – Disallowance - Exempt Income

- (i) The contention of the Revenue that some expenditure, directly or indirectly, is always incurred for earning tax-free income cannot be accepted. The burden is on the Assessing Officer to establish the nexus of the expenditure incurred with the earning of exempt income before making any disallowance under section 14A (Hero Cycles 323 ITR 518 (P&H), Jindal Photo followed)
- (ii) As regards interest, the Assessing Officer has to show the nexus between the borrowed funds and the tax free investments. If that is not done, disallowance of interest is not permissible (K. Raheja Corporation (Bom) followed)
- (iii) As regards admin expenses, section 14A disallowance cannot be made on an ad-hoc basis. It is the department's responsibility to bring material on record to show that expenditure was incurred for earning the exempt income. If this is not done, disallowance is not permissible (Wimco Seedlings followed)

*ACIT v. SIL Investment Ltd. (Delhi)* Source : [itatonline.org](http://itatonline.org)

#### 8. S. 28 : Business income - Foreign PE – DTAA – OECD Model

Article 7 of the DTAA provides that the profits of an enterprise of a Contracting State shall be taxable only in that state of residence unless the enterprise carries on business in other contracting state through a PE situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise "may be taxed" in the other Contracting State but only so much of them as is attributable directly or indirectly to the PE. While the first part gives exclusive taxation right to the State of residency, the second part gives taxation right to the state of residency as well as to the State where the PE is situated. The phrase "may be taxed" shows that the State of source has the non-exclusive right to tax while the State of residence continues to have the inherent right to tax. This interpretation is supported by the OECD Commentary on the Model Convention. P.V.A.L. Kulandagan Chettiar 267 ITR 654 (SC) turned on different facts and does not lay down the proposition that the profits of a foreign PE cannot be taxed in the State of residence of the assessee.

*Telecommunications Consultants India Ltd. v. ACIT (Del)* Source : [itatonline.org](http://itatonline.org)

## KEY FEATURES OF FINANCE BILL, 2012-13 – RELATING TO SERVICE TAX AND ANALYSIS OF DEFINITION OF SERVICE

CA Rajkamal Shah

### Introduction:

The Finance Minister has proposed paradigm shift in service tax law in Union Budget, 2012. From selective approach of levy of service tax on taxable services, this years budget has shifted to negative list of services. Until this year, the service tax was payable on 117 taxable services. Now it is proposed that barring 17 services in negative list, all services will become taxable from the date to be notified upon passage of the bill. A list of exempted services is also proposed. The levy specifically provides for “declared services” and definitions of these services are given. First time after introduction of service tax in 1994, definition of the term, “service” is provided in the law. The Negative List taxation introduced by Service Tax substantially reinvents the law on Service Tax and will have a deep impact on service transactions.

The rate of service tax is increased from 10% to 12%, however, the Education Cess & Secondary and Higher Education Cess remains at the previous level of 2% and 1% of service tax.

Upon increase in tax rates and bringing all services under the tax net. Barring a few, the Government has targeted revenue collection of ₹ 1.24,000 Cr. from the last years budgeted revenue of ₹ 67,000 Cr. and revised budgeted revenue of ₹ 92,000 Cr.

Changes are proposed in Point of Taxation Rules, Valuation Rules and Cenvat Credit Rules. The taxation of export of services and import of service is being replaced by “place of provision of service” and the draft rules are placed for discussion. The ambit of reverse charge mechanism under which the recipient of service is liable to pay tax is widened. Further, changes are expected in Cenvat Credit Rules and certain exclusions may be provided.

By the time, the bill is passed in the Lok Sabha, the Finance Minister has announced certain welcome changes in the Finance Bill.

Exemptions from retrospective effect:

- Repairs of roads.
- Management, maintenance or repair services in relation to non commercial Government buildings.
- Taxable services provided to the authorized operation in SEZ.
- Service provided by an association of dyeing unit in relation to common effluent treatment plants.

### Other changes:

- Time limit enhanced for issuance of show cause notices.
- Waiver of penalty to service providers in respect of Renting of Immovable property service if tax is paid along with interest.
- Powers of Special Audit under specified circumstances.
- Settlement Commission provisions made applicable to service tax.

### The broad new scheme of taxation:

- New section 65B provides for definitions including that of “service”.
- Section 66B levies the charge of service tax.
- Section 66C provides for place of provision of service (rules to be introduced – detailed guidance note issued on draft rules).
- Section 66D contains the negative list of services.
- Section 66E specifies Declared Services (to remove ambiguities).
- Section 66F provides for Principles of Interpretation.
- Rules for Valuation of Services amended.
- Exemptions consolidated in one notification.
- Scheme of Abatements is changed.
- In certain cases, the recipient of service liable to be taxed either wholly or partly

With introduction of new changes, existing S. 65, S. 65A, and S. 66 shall become inoperative from the notified date to be announced upon enactment of the bill.

### Analysis of definition of service:

#### Important ingredients of “service”:

##### a) Any activity,

The word, “activity” is not defined in the Act. Any execution of an act or operation carried out or provision of facility will also be included as the term has very wide connotation. Even a passive activity or forbearance to act, to refrain from an act or to tolerate an act or a situation would be regarded as service.

**b) Carried out by a person for another**

Self service is outside the ambit of taxable service. As per TRU letter, a service provided by one branch of a company to another or to its head office or vice-versa would be regarded as self service. However, as per the Explanation to the definition of "service", an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory shall be treated as distinct persons. Further, unincorporated association or body of persons and members thereof are also to be treated as distinct persons and hence in both later situations, service tax will be applicable.

**c) For a Consideration,**

The term consideration is not defined in the act. However, the definition given in the Indian Contract Act may be adopted. In simple term, the word, "consideration" would mean everything received in return for a provision of service including of monetary or non-monetary nature. Even deferred consideration would also be included. However, free gifts, donations, charities would be outside the scope. Non-monetary considerations shall be valued on the gross amount charged for similar service provided to other person in ordinary course of trade and in case of inability to determine such consideration, the equivalent money value of such consideration, but not less than the cost of provision of service shall be applicable as per Service Tax (Determination of Value Rules, 2006). As per the TRU letter, examples of consideration would be, amount received in settlement of a dispute pertaining to a service, advances forfeited for cancellation of an agreement to provide service, demurrage for use of services beyond the agreed period etc.

It is also be noted that it is not necessary that the consideration should flow from the recipient of service only, as long as there is a link between the provision of service and consideration.

**Definition of service does not cover,****A) Transfer of title in goods or immovable property, by way of sale, gift or in any other manner, or**

Such transfer, delivery or supply of any goods which is deemed to be a sale within the meaning of clause (29A) of Article 366 of the Constitution, or a transaction in money or actionable claim.

**A-1) Transfer of title in goods:**

TRU letter dated 16/03/2012, clarifies that only simpliciter sale of goods are excluded. However, if an element of service is involved, the transaction would not be of a mere sale but it would be a composite activity, such composite activities are governed by the decision of Hon'ble Supreme Court in Bharat Sanchar Nigam Limited v/s. UOI [2006 (2) STR 161]. Accordingly, the liability of service tax shall be determined as follows:

- i) Works Contract: Such contracts can be split and service portion may be charged to service tax. For valuation of service, the mechanism is provided under the Service Tax (Determination of Value) Rules, 2006<sup>1</sup>.
- ii) Catering Contracts: Such contracts may be split or abatement for supply of food or other article of human consumption or any drink is provided, subject to conditions as per Notification No. 13/2012 - ST, dated 17/03/2012.
- iii) Other composite contract in which the service and sale elements are distinct and separate: only service portion can be charged to service tax based on invoice or the terms of the contract.
- iv) Other composite transactions in which the service and sale elements are not distinct and separate: dominant nature test is to be applied and if the dominant nature is of service, then the entire value of the contract would be chargeable to service tax, otherwise the transaction would be regarded as outside the ambit of service tax.

**A-2) Transfer of title in immovable property:**

This remains a grey area. It needs to be clarified that what constitute transfer of title in immovable property. In a case, where property is transferred, say a residential flat, by executing and registering a Sale Deed prior to completion of construction, the same would be treated as "transfer of title" in immovable property. Even in cases involving bank loan, equitable mortgage is created. However, the definition of Works Contract in Declared Service covers such transaction in its ambit and service tax is leviable. The definition of works contract to that extent appears to be controversial.

**A-3) Deemed sale defined in Article 366(29A) of the Constitution : The following six categories of deemed sale are defined<sup>2</sup> -**

- transfer, otherwise than in pursuance of a contract, of property in any goods for cash, deferred payment or other valuable consideration.
- transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract.
- delivery of goods on hire-purchase or any system of payment by installments.
- transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration.

1. Definition of Works Contract amended subsequent to introduction in the Parliament.

- supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration.
- supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply of service, is for cash, deferred payment or other valuable consideration.

Out of the above six type of transactions, hire purchase and leasing (right to use) would be of controversial nature. The operating lease is a deemed sale and surely subject to State VAT, but the financial lease and hire purchase are subjected to dual levy. Service tax is leviable on services provided in relation to delivery of goods on hire purchase. Similarly, the above list of deemed services covers sale of food by a restaurant, however, Declared Services contains such sale as a part of service and allow certain deduction. To this extent, Declared Service can be said to not be consistent with definition of service which may lead to litigation. The clarifications on this by TRU letter in this respect are all the more confusing.

- B) An Explanation has been added to the definition of "service" to the effect that activities relating to the use of money or its conversion by cash or by any other mode, from one form/currency/denomination to another would not constitute a "transaction of money"<sup>3</sup>.  
This amendment is to clarify that the currency transactions amounts to service.
- C) Provision of service by an employee to the employer in the course of or in relation to his employment: Services provided outside the ambit of employment for a consideration would be a service. The question would arise in case of directors getting remuneration from the company.
- D) Certain exclusions are provided in the definition of service like functions performed by Members of Parliament, State Legislatures, Municipalities, Panchayats and other local authorities in performing their official functions. Further, duties performed by any person holding post in pursuance of constitutional provisions and duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Government or local authority who is hitherto not deemed as employee are also excluded.

**Conclusion:**

The definition of service provides greater clarity and a good attempt to begin with. However, the inclusion of "any activity" may create number of complications as any non-economic activities can also be covered like alimony in divorce cases, etc. It is therefore necessary to confine the levy only on economic activity. Further, enough is not done to avoid dual levy of VAT and service tax on the same value of a transaction in certain type of transactions. The controversy relating to leviability of service tax on sale of immovable property prior to completion also needs to be resolved.

2. By way of amendment to the Finance Bill.
3. By way of amendment to Finance Bill.

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