

**WORKSHOP ON SERVICE TAX & VAT ORGANISED BY  
THE INDIRECT TAXES COMMITTEE OF ICAI & YOUNG  
MEMBERS EMPOWERMENT COMMITTEE**

**SEMINAR ON SERVICE TAX  
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**Topics :**

- 1) *Opportunities in Service Tax***
- 2) *Service – definition***
- 3) *Declared Services***

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# *OPPORTUNITY IN SERVICE TAX*

*Levy of service tax was introduced in 1994. Since then, the scope of levy of service tax has expanded substantially. As per speech of Finance Minister in parliament, while introducing Finance Bill 2013, there are more than 17 lakhs assessee all over India and around 7 lakh assessee have not filed their return. Therefore Encouragement of Voluntary Compliance Scheme was introduced. This itself shows non-compliance level of assessee. Thus there is a great opportunity for professionals to assist trade and industry in compliance with various provisions.*

*The Chartered Accountants are well versed with business of the organization and have continuous education in the form of seminar, study circle meeting, group discussion etc. To understand the law. This helps them to understand new law more perfectly and guide the business organization. Continuous education in the form of seminars, study circle meeting, group discussions etc gives confidence to Chartered Accountants to enter into new line of practice. There is no such mechanism in other profession and therefore service tax or GST to be introduced present great opportunity for Chartered Accountant practitioners.*

*Definition of service as given in  
Section 65B(44)*

*(44) "service" means any activity carried out by a person for another for consideration, and includes a declared service, but shall not include—*

*(a) an activity which constitutes merely,—*

*(i) a transfer of title in goods or immovable property, by way of sale, gift or in any other manner; or*

*(ii) 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*

*(iii) a transaction in money or actionable claim;*

*(b) a provision of service by an employee to the employer in the course of or in relation to his employment;*

*(c) fees taken in any Court or tribunal established under any law for the time being in force.*

Explanation 1.— For the removal of doubts, it is hereby declared that nothing contained in this clause shall apply to,—

- (A) the functions performed by the Members of Parliament, Members of State Legislative, Members of Panchayats, Members of Municipalities and Members of other local authorities who receive any consideration in performing the functions of that office as such member; or
- (B) the duties performed by any person who holds any post in pursuance of the provisions of the Constitution in that capacity; or
- (C) the duties performed by any person as a Chairperson or a Member or a Director in a body established by the Central Government or State Governments or local authority and who is not deemed as an employee before the commencement of this section.

*Explanation 2.* —*For the purpose of this clause, transaction in money shall not include any activity relating to the use of money or its conversion by cash or by any other mode, from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.*

*Explanation 3*— *For the purposes of this Chapter, —*

- (a) an unincorporated association or a body of persons, as the case may be, and a member thereof shall be treated as distinct persons;*
  
- (b) an establishment of a person in the taxable territory and any of his other establishment in a non-taxable territory shall be treated as establishments of distinct persons.*

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;

## *Guidance Note 2 – What is Service?*

- *2.1.1 What does the word ‘activity’ signify?*

*‘Activity’ has not been defined in the Act. In terms of the common understanding of 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 an obligation to refrain from an act or to tolerate an act or a situation has been specifically listed as a declared service under section 66E of the Act.*

- *2.2.1 The phrase ‘consideration’ has not been defined in the Act. What is, therefore, the meaning of ‘consideration’?*

*As per Explanation (a) to section 67 of the Act “consideration” includes any amount that is payable for the taxable services provided or to be provided.*

*Since this definition is inclusive it will not be out of place to refer to the definition of ‘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 to 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.*

- *2.2.3 What is the meaning of monetary consideration?*

*Monetary consideration means any consideration received in the form of money. 'Money' has been defined in section 65B and includes not only cash but also cheque, promissory note, bill of exchange, letter of credit, draft, pay order, traveler's cheque, money order, postal or electronic remittance or any such similar instrument.*

- *2.2.4 What is non-monetary consideration?*

*Non-monetary consideration essentially means compensation in kind such as the following:*

- *Supply of goods and services in return for provision of service*
- *Refraining or forbearing to do an act in return for provision of service*
- *Tolerating an act or a situation in return for provision of a service*
- *Doing or agreeing to do an act in return for provision of service*

## Illustrations

| If.....                                                 | And in return...                                                        |
|---------------------------------------------------------|-------------------------------------------------------------------------|
| A agrees to dry clean                                   | B's clothes B agrees to click A's photograph                            |
| A agrees not to open dry clean shop in B's neighborhood | B agrees not to open photography shop in A's neighborhood               |
| A agrees to design B's house                            | B agrees not to object to construction of A's house in his neighborhood |
| A agrees to construct 3 flats for B on land owned by B  | B agrees to provide one flat to A without any monetary consideration    |

## Then

*For the services provided by A to B, the acts of B specified in 2nd column are non- monetary consideration provided by B to A. Conversely, for services provided by B to A, similar reasoning will be adopted.*

- *2.2.5 Is the value of non-monetary consideration important?*

*Yes. The non-monetary consideration also needs to be valued for determining the tax payable on the taxable service since service tax is levied on the value of consideration received which includes both monetary consideration and money value of non-monetary consideration.*

- *2.2.6 How is the money value of non-monetary consideration determined?*

*The value of non-monetary consideration is determined as per section 67 of the Act and the Service Tax (Determination of Value) Rules 2006, which is equivalent money value of such consideration and if not ascertainable, then as follows:-*

- *On the basis of gross amount charged for similar service provided to other person in the ordinary course of trade;*
- *Where value cannot be so determined, the equivalent money value of such consideration, not less than the cost of provision of service.*

- *2.2.7 Are research grant with counter obligation on researcher to provide IPR rights on outcome of a research a consideration?*

*In case research grant is given with counter obligation on the researcher to provide IPR rights on the outcome of research or activity undertaken with the help of such grants then the grant is a consideration for the provision of service of research. General grants for researches will not amount to a consideration.*

- *2.3 Activity for a consideration*

*The concept 'activity for a consideration' 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. 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.*

*Thus 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.*

*There can be many activities without consideration. 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. They are, however, under no obligation to pay any amount for listening to him nor have they engaged him for his services. 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.*

*Provisions of free tourism information, access to free channels on TV and a large number of governmental activities for citizens are some of the examples of activities without consideration.*

*Similarly there could be cases of payments without an activity though they cannot be put in words as being “consideration without an activity”. Consideration itself pre-supposes a certain level of reciprocity. Thus grant of pocket money, a gift or reward (which has not been given in terms of reciprocity), amount paid as alimony for divorce would be examples in this category. However 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 be a consideration for such service. Thus amount paid in cases where people at large are invited to contribute to open software development (e.g. Linux) and getting an amount if their contribution is finally accepted will be examples of activities for consideration.*

- *2.3.2 Would the payments in the nature as explained in column A of the table below constitute a consideration for provision of service?*

| Sr. 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 pertains to consideration relating to service then it would be a part of consideration. |
| 2.      | Amount received in 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 returned consideration. If tax has already been paid the tax,                                                                                                                                                                                          |

| Sr. No. | A                                                                         | B                                                                                                                                                                                                                |
|---------|---------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|         | Nature of payment                                                         | Whether consideration for 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.                       |

| Sr. No. | A                                                                                                     | B                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
|---------|-------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|         | Nature of payment                                                                                     | Whether consideration for 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 would not be a consideration in terms of clause (vi) of sub-rule (2) of rule 6 of the valuation Rules.                                                                                                                                                                                                                                                           |

| Sr. No. | A                                                                                                                                     | B                                                                                                                                 |
|---------|---------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------|
|         | <b>Nature of payment</b>                                                                                                              | <b>Whether consideration for service?</b>                                                                                         |
| 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.                         |

- *2.4.1 What is the significance of the phrase 'carried out by a person for another'?*

*The phrase 'provided by one person to another' signifies that services provided by a person to self are outside the ambit of taxable service. Example of such service would include a service provided by one branch of a company to another or to its head office or vice-versa.*

- *2.4.2 Are there any exceptions wherein services provided by a person to oneself are taxable?*

*Yes. Two exceptions have been carved out to the general rule that only services provided by a person to another are taxable. These exceptions, contained in Explanation 2 of clause (44) of section 65B, are:*

- *an establishment of a person located in taxable territory and another establishment of such person located in non-taxable territory are treated as establishments of distinct persons. [Similar provision exists presently in section 66A (2)].*
- *an unincorporated association or body of persons and members thereof are also treated as distinct persons. [Also exists presently in part as explanation to section 65].*

*Implications of these deeming provisions are that inter-se provision of services between such persons, deemed to be separate persons, would be taxable. For example, services provided by a club to its members and services provided by the branch office of multinational company to the headquarters of the multi-national company located outside India would be taxable provided other conditions relating to taxability of service are satisfied*

- *2.4.3 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..*

- *2.4.5 Are Government and local authorities also liable to pay tax?*

*Yes. However, most of the services provided by the Government or local authorities are in the negative list.*

- *2.6 Activity to be taxable should not constitute only a transfer in title of goods or immovable property by way of sale, gift or in any other manner*
- *Mere transfer of title in goods or immovable property by way of sale, gift or in any other manner for a consideration does not constitute service.*
- *Goods has been defined in section 65B of the Act as 'every kind of moveable property other than actionable claims 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 contract of sale'.*
- *Immovable property has not been defined in the Act. Therefore the definition of immovable property in the General Clauses Act, 1897 will be applicable which defines immovable property to include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth.*

- **2.6.1 What is the significance of the phrase 'transfer of title'?**

*'Transfer of title' means change in ownership. Mere transfer of custody or possession over goods or immovable property where ownership is not transferred does not amount to transfer of title. For example giving the property on rent or goods for use on hire would not involve a transfer of title.*

- **2.6.2 What is the significance of the word 'only' in the said exclusion clause in the definition of 'service'?**

*The word 'only' signifies that activities which constitute only:*

- *transfer of title in goods or immovable property; or*
- *transfer , supply or delivery which is deemed to be a deemed sale of goods or constitute; or*
- *a transaction in money or an actionable claim-are outside the definition of service.*

*A transaction which in addition to a transfer of title in goods or immovable property involves an element of another activity carried out or to be carried out by the person transferring the title would not be outrightly excluded from the definition of service. Such transactions are liable to be treated as follows-*

- If two transactions, although associated, are two discernibly separate transactions then each of the separate transactions would be assessed independently. In other words the discernible portion of the transaction which constitutes, let's say, a transfer of title in goods, would be excluded from the definition of service by operation of the said exclusion clause while the service portion would be included in the definition of service. For example a builder carrying out an activity for a client wherein a flat is constructed by the builder for the client for which payments are received in instalments and on completion of the construction the title in the flat is transferred to the client involves two elements namely provision of construction service and transfer of title in immovable property. The two activities are discernibly separate. The activity of construction carried out by the builder would, therefore, be a service and the activity of transfer of title in the flat would be outside the ambit of service.*

- *In cases of composite transactions, i.e. transactions involving an element of provision of service and an element of transfer of title in goods in which various elements are so inextricably linked that they essentially form one composite transaction then the nature of such transaction would be determined by the application of the dominant nature test laid down by the Supreme Court in BSNL's case. The judgment has been explained in detail in point no 2.6.3. Although the judgment was given in the context of composite transactions involving an element of transfer in title of goods by way of sale and an element of provision of service, the ratio would equally apply to other kind of composite transactions involving a provision of service and transfer in title in immovable property or actionable claim.*

- *2.6.7 What are the implications of inclusion of 'securities' as 'goods'?*

*The definition of 'goods' has essentially been borrowed from the Sale of Goods Act, 1930 with the only variation that in the inclusion clause of the said definition the phrase 'stocks and shares' been replaced with 'securities'. In effect, therefore, activities that are in the nature of only transfer of title by way of sale, redemption, purchase or acquisition of securities on principal-to-principal basis, excluding services of dealers, brokers or agents in relation to such transactions, are outside the ambit of 'services. However activities which are not in the nature of transfer of title in securities (for example a person agreeing not to exercise his right in a security for a given period of time for a consideration) would not be included in this exclusion clause to the definition of 'service.*

- *2.7.1 What are 'deemed sales' defined in article 366(29A)?*

*The six categories of deemed sales as defined in article 366(29A) of the Constitution are –*

- *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*
- *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 or service, is for cash, deferred payment or other valuable consideration.*

- *2.8.7 What are actionable claims?*

*As per section 3 of the Transfer of Property Act, 1893 actionable claims means a claim to any debt, other than a debt secured by mortgage of immovable property or by hypothecation or pledge of movable property or to any beneficial interest in movable property not in the possession, either actual or constructive, of the claimant, which the Civil Courts recognize as affording grounds for relief, whether such debt or beneficial interest be existent, accruing, conditional or contingent.*

*Illustrations of actionable claims are –*

- *Unsecured debts*
- *Right to participate in the draw to be held in a lottery.*

- *2.8.12 Would recharge vouchers issued by service companies for enabling clients/ consumers to avail services like mobile phone communication, satellite TV broadcasts, DTH broadcasts etc be 'actionable claims?'*

*No. Such recharge vouchers do not create a 'beneficial interest' in a moveable property but only enable a person to enjoy a particular service.*

- *2.9.1 Are all services provided by an employer to the employee outside the ambit of services?*

*No. Only services that are provided by the employee to the employer in the course of employment are outside the ambit of services. Services provided outside the ambit of employment for a consideration would be a service. For example, if an employee provides his services on contract basis to an associate company of the employer, then this would be treated as provision of service.*

- *2.9.3 Would amounts received by an employee from the employer on premature termination of contract of employment be chargeable to service tax?*

*No. Such amounts paid by the employer to the employee for premature termination of a contract of employment are treatable as amounts paid in relation to services provided by the employee to the employer in the course of employment. Hence, amounts so paid would not be chargeable to service tax. However any amount paid for not joining a competing business would be liable to be taxed being paid for providing the service of forbearance to act.*

- *2.10 Explanations to the definition of 'service'*
- *Explanation 1 clarifies that 'service' does not cover functions or duties performed by Members of Parliament, State Legislatures, Panchayat, Municipalities or any other local authority, any person who holds any post in pursuance of the provisions of the Constitution or any person as a Chairperson or a Member or a Director in a body established by the Central or State Governments or local authority and who is not deemed as an employee.*
- *Explanation 2 clarifies that transaction in money does not include any activity in relation to money by way of its use or conversion by cash or by any other mode ,from one form, currency or denomination to another form, currency or denomination for which a separate consideration is charged.'*(please refer to point n 2.8.5 for further guidance on this)

- *Explanation 3* creates two exceptions, by way of a deeming provision, to the general rule that only services provided by a person to another are taxable. As per these deeming provisions establishment of a person located in taxable territory and establishment of such person located in non-taxable territory are deemed to be establishments of distinct persons. Further an unincorporated association or body of persons and members thereof are also deemed as separate persons. For implications please see point no 2.4.2 of this Guide.
- *Explanation 4* explains that a branch or an agency of a person through which the person carries out business is also an establishment of such person.

# *DECLARED SERVICE*

❖ *The following services have been declared as taxable services under section 66E(b)*

*(a) renting of immovable property;*

*Renting is defined under Section 65B(41) as follows: -*

*(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;*

*(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.*

*Explanation.—For the purposes of this clause :*

*(I) the expression “competent authority” means the Government or any authority authorized to issue completion certificate under any law for the time being in force and in case of non-requirement of such certificate from such authority, from any of the following, namely:—*

*(A) architect registered with the Council of Architecture constituted under the Architects Act, 1972; or*

*(B) chartered engineer registered with the Institution of Engineers (India); or*

*(C) licensed surveyor of the respective local body of the city or town or village or development or planning authority;*

*(II) the expression “construction” includes additions, alterations, replacements or remodelling of any existing civil structure;*

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

*(d) development, design, programming, customisation, adaptation, upgradation, enhancement, implementation of information technology software;*

### **Section 65E(28)**

*'information technology software' means any representation of instructions, data, sound or image including source code and object code, recorded in a machine readable form, and capable of being manipulated or providing interactivity to a user, by means of a computer or an automatic data processing machine or any other device or equipment.*

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

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

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

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

**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 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;*

❖ *Prior to 01.07.2012 taxable service was defined in Section 65(105) (zzzza) as follows:-*

*“(zzzza) to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.*

***Explanation.** — For the purposes of this sub-clause, “works contract” means a contract wherein, —*

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and*
- (ii) such contract is for the purposes of carrying out, —*

*(a)erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators;  
or*

*(b)construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or*

*(c) construction of a new residential complex or a part thereof; or*

*(d)completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or*

*(e)turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;*

*The earlier definition of taxable service did not specifically specified that taxable service is only service portion in execution of works contract. Therefore Hon'ble Tribunal in case of S. V. Jiwani 2014(35) STR 351 (Tri. Ahmd) has held that the service provider providing works contract service can pay the service tax on gross amount (including value of material) in case the service provider chooses to avail the credit of excise duty paid on input like Cement Steel etc.*

*(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.*

- *6.3.2 Is the IPR required to be registered in India? Would the temporary transfer of a patent registered in country outside India also be covered under this entry?*

*Since there is no condition regarding the law under which an intellectual right should be registered, temporary transfer of a patent registered outside India would also be covered in this entry. However, it will become taxable only if the place of provision of service of temporary transfer of intellectual property right is in taxable territory.*

- *6.4.1 Would sale of pre-packaged or canned software be included in this entry?*

*No. It is a settled position of law that pre-packaged or canned software which is put on a media is in the nature of goods [Supreme Court judgment in case of Tata Consultancy Services v/s State of Andhra Pradesh [2002(178) ELT 22(SC) refers]. Sale of pre-packaged or canned software is, therefore, in the nature of sale of goods and is not covered in this entry.*

- *6.4.2 Is on site development of software covered under this entry?*

*Yes. On site development of software is covered under the category of development of information technology software.*

- *6.4.3 Would providing advice, consultancy and assistance on matters relating to information technology software be chargeable to service tax?*

*These services may not be covered under the declared list entry relating to information technology software. However, such activities when carried out by a person for another for consideration would fall within the definition of service and hence chargeable to service tax if other requirements of taxability are satisfied.*

- *6.4.5 In case contract is given for customized development of software and the customized software so developed is delivered to the client on media like a CD then would the transaction fall in this declared entry or would it be covered by the TCS Judgment?*

*In such a case although the software is finally delivered in the form of goods, since the contract is essentially for design and development of software it would fall in the declared list entry. Such a transaction would be in the nature of composite transaction involving an element of provision of service, in as much as the contract is for design and development of software and also an element of transfer of title in goods, in as much as the property in CD containing the developed software is transferred to the client. However, the CD remains only a media to transmit or deliver the outcome of which is essentially and predominantly a contract of service. Therefore, such a transaction would not be excluded from the ambit of the definition of 'service' as the transaction does not involve 'only' transfer of title in goods and dominant nature of the transaction is that of provision of service.*

- *6.5.2 What is the scope of the phrase 'delivery of goods on hire-purchase or any system of payment by installments'?*

*Section 2 of the Hire Purchase Act, 1972 defines a "hire purchase agreement" as 'an agreement under which goods are let out on hire and under which the hirer has the option to purchase them in accordance with the terms of the agreement and includes an agreement under which-*

- (i) possession of goods is delivered by the owner thereof to a person on condition that such person pays the agreed amount in periodical installments, and*
- (ii) the property in the goods is to pass to such person on the payment of the last of such installments, and*
- (iii) such person has a right to terminate the agreement at any time before the property so passes.'*

*As per the Sales of Goods Act by Mulla (Seventh Edition. Page 14) delivery is 'voluntary dispossession in favour of another' and that 'in all cases the essence of deliverer is that the deliverer, by some apt and manifest act, puts the delivery in the same position of control over thing, either directly or through a custodian, which he held himself immediately before the act'.*

*The nature of such arrangements has been explained by the Supreme Court in the case of Association of Leasing & Financial Service Companies Vs Union Of India [2010 (20) S.T.R. 417 (S.C.)]. The relevant extract in Para 20 of the said judgment is reproduced below:*

*"20. According to Sale of Goods Act by Mulla [6th Edition] a common method of selling goods is by means of an agreement commonly known as a hire-purchase agreement which is more aptly described as a hiring agreement coupled with an option to purchase, i.e., to say that the owner lets out the chattel on hire and undertakes to sell it to the hirer on his making certain number of payments."*

- *Key ingredients of the deemed sale category of 'delivery of goods on hire-purchase or any system of payment by installments', therefore are-*
- *Transfer of possession (and not just of custody)*
- *The hirer has the option or obligation to purchase the goods in accordance with the terms of the agreement.*

- *6.5.5 If delivery of goods on hire purchase or any system of payment on installment is deemed to be sale of goods what are the activities in relation to such delivery which are covered in the declared service?*

*It has been held by Supreme court in the case of Association Of Leasing & Financial Service Companies Vs Union Of India[2010 (20) S.T.R. 417 (S.C.)] that in equipment leasing/hire purchase agreements there are two different and distinct transactions, viz., the financing transaction and the equipment leasing/hire-purchase transaction and that the financing transaction, consideration for which was represented by way of interest or other charges like lease management fee, processing fee, documentation charges and administrative fees, which is chargeable to service tax. Therefore, such financial services that accompany a hire purchase agreement fall in the ambit of this entry of declared services.*

- *6.5.6 Is service tax leviable on the entire quantum of interest and other charges received in relation to a hire purchase?*

*No. In terms of the exemption notification relating to such activities, service tax is leviable only on 10% of the amount representing interest plus other charges explicitly charged as mentioned above.*

- *6.6.1 What is the meaning and scope of the phrase 'transfer of right to use such goods'?*

*Transfer of right to use goods is a well recognized constitutional and legal concept. Every transfer of goods on lease, license or hiring basis does not result in transfer of right to use goods. 'Transfer of right of goods' involves transfer of possession and effective control over such goods in terms of the judgment of the Supreme Court in the case of State of Andhra Pradesh vs Rashtriya Ispat Nigam Ltd [Judgment dated 6/2/2002 in Civil Appeal no. 31 of 1991]. Transfer of custody along with permission to use or enjoy such goods, per se, does not lead to transfer of possession and effective control.*

- *The test laid down by the Supreme Court in the case of Bharat Sanchar Nigam Limited vs Union of India [2006(2)STR161(SC)] to determine whether a transaction involves transfer of right to use goods, which has been followed by the Supreme Court and various High Courts, is as follows:*
- *There must be goods available for delivery;*
- *There must be a consensus ad idem as to the identity of the goods;*
- *The transferee should have legal right to use the goods – consequently all legal consequences of such use including any permissions or licenses required therefore should be available to the transferee;*

- *For the period during which the transferee has such legal right , it has to be the exclusion to the transferor – this is the necessary concomitant of the plain language of the statute, viz., a ‘transfer of the right to use’ and not merely a license to use the goods;*
- *Having transferred, the owner cannot again transfer the same right to others.*

*Whether a transaction amounts to transfer of right or not cannot be determined with reference to a particular word or clause in the agreement. The agreement has to be read as a whole, to determine the nature of the transaction.*

- *6.7.1 Would non-compete agreements be considered a provision of service?*

*Yes. By virtue of a non-compete agreement one party agrees, for consideration, not to compete with the other in any specified products, services, geographical location or in any other manner. Such action on the part of one person is also an activity for consideration and will be covered by the declared services.*

# THANK YOU

*BALANCED VIEW*

*PRESENTED BY*

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