SERVICE TAX REGIME – EFFECTIVE TILL JUNE 30, 2012
Levy of service tax based on a positive list – including 119 specific categories of ‘taxable services’ under the Finance Act, 1994

No definition of “services” - but each taxable category of service specifically defined

Liability to pay service tax was on the service provider except in certain cases

Import of service is governed by Taxation of Services (provided from outside India and received in India) Rules, 2006 (“Import Rules”)

- service tax liability of service recipient is triggered under reverse charge based on category of taxable service

Export of service is governed by Export of Service Rules, 2005 (“Export Rules”)

- exports not liable to service tax subject to fulfillment of conditions based on category of taxable service
NEW SERVICE TAX REGIME – EFFECTIVE JULY 1, 2012
NEGATIVE LIST BASED APPROACH

Complete overhaul of taxation of services
- From Positive list to Negative list approach
- No classification of services required
- Replacement of abatement/ exemptions with new abatement and exemptions
- Only services rendered in taxable territory are taxable
  - Place of Provision of Service Rules, 2012 (‘PPSR’) notified to determine the place of performance of service
  - Import of services and export of services rules rescinded

A detailed ‘Education Guide’ issued to explain the concept of negative list based approach of service taxation
OVERVIEW

Charging section
Section 66B prescribing 12%

“Service”
Defined under section 65B(44)

Negative list
17 specified services provided under section 66D

Declared services
Provided under section 66E

Exemption list
34 specified services provided under exemption notification

Declared services
Provided under section 66E

Interpretation
Principles provided under section 66F

Comprehensive levy on all activities except those excluded from the definition of ‘service’ and those specified in negative list and exemption list
Section 66B – “There shall be levied a tax (hereinafter referred to as the service tax) at the rate of twelve per cent on the value of all services, other than those services specified in the negative list, provided or agreed to be provided in the taxable territory by one person to another and collected in such manner as may be prescribed”

As per Section 65B(52) - “Taxable territory” means the territory to which provisions of Chapter V of Finance Act, 1994 apply i.e. whole of India excluding the State of Jammu & Kashmir

As per Section 66C – The Central Government may by rules determine the place where services are provided or deemed to be provided
DEFINITION OF “SERVICE”

"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
   (ia) 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
   (ii) 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.
DEFINITION OF “SERVICE”

Explanation 2 — 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 3 — 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;
WHAT IS ‘ACTIVITY’?

What is the scope of the term ‘activity’ in the definition of ‘service’ –

- Not defined in the Finance Act 2012
- Para 2.1.1 of Education Guide - “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 the obligation to refrain from an act or to tolerate an act or a situation has also been specified as a declared service under section 66E of the Act.”
Section 67, Explanation (a) remains unchanged and defines ‘consideration’

- “Consideration” includes *any amount* that is payable for the taxable services 
  *provided or to be provided* – inclusive definition dealing with money consideration

- Clarified to include monetary consideration and non-monetary consideration

- Education Guide - Examples for non-monetary consideration can be:
  - Supply of goods or services in return
  - Refraining or forbearing to do an act
  - Tolerating an act or a situation
  - Doing or agreeing to do an act
Would any set of reciprocal promises qualify as a ‘service’ transaction and be liable for service tax?

EU VAT jurisprudence provides the following key test:

- Is there an intent to create a legally enforceable relationship?
DECLARED SERVICES – SECTION 66E

(a) renting 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

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

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

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

(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 installments;

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

(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.
NEGATIVE LIST OF SERVICES – SECTION 66D

(a) services by Government or a local authority excluding the following services to the extent they are not covered elsewhere —

(i) services by the Department of Posts by way of speed post, express parcel post, life insurance and agency services provided 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…. provided to business entities

(b) services by the Reserve Bank of India;

(c) services by a foreign diplomatic mission located in India;
Support services have been defined in section 65B of the Act as 'infrastructural, operational, administrative, logistic marketing or any other support of any kind comprising functions that entities carry out in ordinary course of operations themselves but may obtain as services by outsourcing from others for any reason whatsoever and shall include advertisement and promotion, construction or works contract, renting of movable or immovable property, security, testing and analysis.

Sovereign functions performed by the government (ie where Government does not compete with private players) like grant of telecom license, mining license, etc would not be liable to service tax
NEGATIVE LIST OF SERVICES – SECTION 66D

(d) services relating to agriculture by way of —

(i) agricultural operations directly related to production of any agricultural produce including cultivation, harvesting, threshing, plant protection or seed testing;

(ii) supply of farm labour;

(iii) processes carried out at an agricultural farm including tending, pruning, cutting, harvesting, drying, cleaning, trimming, sun drying, fumigating, curing, sorting, grading, cooling or bulk packaging and such like operations 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 of agricultural produce;

(vi) agricultural extension services;
NEGATIVE LIST OF SERVICES – SECTION 66D

(vii) services by any Agricultural Produce Marketing Committee or Board or services provided by a commission agent for sale or purchase of agricultural produce;

(e) trading of goods;

(f) any process amounting to manufacture or production of goods;

(g) selling of space or time slots for advertisements other than advertisements broadcast by radio or television;

(h) service by way of access to a road or a bridge on payment of toll charges;

(i) betting, gambling or lottery;

(j) admission to entertainment events or access to amusement facilities;
NEGATIVE LIST OF SERVICES – SECTION 66D

(k) transmission or distribution of electricity by an electricity transmission or distribution utility;

(l) services by way of—

(i) pre-school education and education up to higher secondary school or equivalent;

(ii) education as a part of a curriculum for obtaining a qualification recognized by any law for the time being in force;

(iii) education as a part of an approved vocational education course;

(m) services by way of renting of residential dwelling for use as residence;

(n) services by way of—

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;
NEGATIVE LIST OF SERVICES – SECTION 66D

(ii) inter se sale or purchase of foreign currency amongst banks or authorized dealers of foreign exchange or amongst banks and such dealers;

(o) service of transportation of passengers, with or without accompanied belongings, by—

(i) a stage carriage;

(ii) railways in a class other than —

(A) first class; or

(B) an air-conditioned coach;

(iii) metro, monorail or tramway;

(iv) inland waterways;

(v) public transport, other than predominantly for tourism purpose, in a vessel of less than fifteen tonne net; and
NEGATIVE LIST OF SERVICES – SECTION 66D

(vi) metered cabs, radio taxis or auto rickshaws;

(p) services by way of transportation of goods —

(i) by road except the services of —

(A) a goods transportation agency; or

(B) a courier agency;

(ii) by an aircraft or a vessel from a place outside India to the first customs station of landing in India; or

(iii) by inland waterways;

(q) funeral, burial, crematorium or mortuary services including transportation of the deceased
2. **Healthcare services** by clinical establishment, authorized medical practitioner or para-medics

7. Services by way of **technical testing or analysis of newly developed drugs**, including vaccines and herbal remedies, on human participants by a clinical research organization approved to conduct clinical trials by the Drug Controller General of India;

12. Services **provided to the Government, a local authority or a governmental authority** by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration -

   (a) a civil structure or any other **original works** meant predominantly for use **other than for commerce, industry, or any other business or profession**;

   (b) a historical monument, archaeological site or remains of national importance, archaeological excavation, or antiquity specified under Ancient Monuments and Archaeological Sites and Remains Act,
EXEMPTION LIST - IMPORTANT ENTRIES

(c) a structure meant predominantly for use as (i) an educational, (ii) a clinical, or (iii) an art or cultural establishment;

(d) canal, dam or other irrigation works;

(e) pipeline, conduit or plant for (i) drinking water supply (ii) water treatment (iii) sewerage treatment or disposal; or

(f) a residential complex predominantly meant for self-use or the use of their employees or other persons specified in the Explanation 1 to clause 44 of section 65 B of the said Finance Act;

13. Services provided by way of construction, erection, commissioning, installation, completion, fitting out, repair, maintenance, renovation, or alteration of,-

(a) road, bridge, tunnel, or terminal for road transportation for use by general public;
EXEMPTION LIST - IMPORTANT ENTRIES

(b) a civil structure or any other original works pertaining to a scheme under Jawaharlal Nehru National Urban Renewal Mission or Rajiv Awaas Yojana

(c) building owned by an entity registered under section 12 AA of the Income tax Act, 1961(43 of 1961) and meant predominantly for religious use by general public;

(d) pollution control or effluent treatment plant, except located as a part of a factory; or

(e) a structure meant for funeral, burial or cremation of deceased;

14. Services by way of construction, erection, commissioning, or installation of original works pertaining to,-

(a) airport, port or railways, including monorail or metro

(b) single residential unit otherwise as a part of a residential complex;

(c) low-cost houses up to a carpet area of 60 square metres per house in a housing project approved by competent authority
EXEMPTION LIST - IMPORTANT ENTRIES

15. Temporary transfer or permitting the use or enjoyment of a copyright ……relating to original literary, dramatic, musical, artistic works or cinematograph films

29 (h). Sub-contractor providing services by way of works contract to another contractor providing works contract services which are exempt
34. Services received from a provider of service located in a non-taxable territory by -

(a) Government, a local authority, a governmental authority or an individual in relation to any purpose other than commerce, industry or any other business or profession;

(b) an entity registered under section 12AA of the Income tax Act, 1961 (43 of 1961) for the purposes of providing charitable activities; or

(c) a person located in a non-taxable territory

37. Services by way of transfer of a going concern, as a whole or an independent part thereof

(slump sale, etc not liable to service tax but may trigger reversal of credits)
Section 66C – The Central Government may by rules determine the place where services are provided or deemed to be provided

PPS Rules shall replace Export Rules and Import Rules under service tax

PPS Rules also define “location of service provider / service receiver”

PPS Rules may also be relevant for determining services wholly consumed within an SEZ and services provided to/received from J&K
PLACE OF PROVISION OF SERVICE – A SUMMARY

<table>
<thead>
<tr>
<th>S No</th>
<th>Rule</th>
<th>Place of Provision of Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 3</td>
<td>General Rule</td>
<td>Location of service receiver</td>
</tr>
<tr>
<td></td>
<td>If recipient location is not ascertainable in the ordinary course of business</td>
<td>Location of service provider</td>
</tr>
<tr>
<td>Specific Rules</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rule 4</td>
<td>Service provided in respect of goods that are required to be made physically available by the service receiver to the service provider to provide the service</td>
<td>Location where the service is performed</td>
</tr>
<tr>
<td></td>
<td>Provided when such services are provided from a remote location by way of electronic means</td>
<td>Location where the goods are situated at the time of provision of service</td>
</tr>
<tr>
<td></td>
<td>This Rule shall not apply in case of service provided in respect of goods temporarily imported into India for repairs for re-export</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Service provided entirely or predominantly in the physical presence of an individual</td>
<td>Location where the service is performed</td>
</tr>
</tbody>
</table>
## PLACE OF PROVISION OF SERVICE – A SUMMARY

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<thead>
<tr>
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<th>Rule</th>
<th>Place of Provision of Service</th>
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</thead>
<tbody>
<tr>
<td>Rule 5</td>
<td>Immoveable property based services provided directly in relation to an immoveable property (includes grants of right to use immoveable property, services for carrying out or coordination of construction work)</td>
<td>Location or proposed location of immoveable property</td>
</tr>
<tr>
<td>Rule 6</td>
<td>Services in relation to an event</td>
<td>Location of event</td>
</tr>
<tr>
<td>Rule 7</td>
<td>If services referred to in Rule 4,5 or 6 provided in many locations including location in taxable territory</td>
<td>Taxable territory</td>
</tr>
<tr>
<td>Rule 8</td>
<td>Where service provider and service receiver are located in the taxable territory (for eg A India appoints B India to design a hotel in US – taxable)</td>
<td>Location of service receiver</td>
</tr>
<tr>
<td>Rule 9</td>
<td>Services such as specified Banking, Online database, Intermediary services, hiring of means of transport upto one month</td>
<td>Location of service provider</td>
</tr>
<tr>
<td>Rule 10</td>
<td>Transport services in relation to goods</td>
<td>Destination of goods</td>
</tr>
<tr>
<td></td>
<td>Goods transportation agency services</td>
<td>Location of service provider</td>
</tr>
</tbody>
</table>
RULE 2 (f) OF PPSR - INTERMEDIARY

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

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<tr>
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<th>Place of Provision of Service</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rule 11</td>
<td>Passenger transport services</td>
<td>Where the passenger embarks</td>
</tr>
<tr>
<td>Rule 12</td>
<td>Services provided on board a conveyance</td>
<td>First schedule point of departure</td>
</tr>
<tr>
<td>Rule 14</td>
<td>Order of Application of rules</td>
<td>Later Rule to supersede</td>
</tr>
</tbody>
</table>
Provision of any service shall be treated as export of service when

- the provider of service is located in the taxable territory,
- the recipient of service is located outside India,
- the service is not a service specified in the negative list,
- the place of provision of the service as per PPS rules is outside India,
- the payment for such service has been received in convertible foreign exchange, and
- the provider of service and recipient of service are not merely establishments of the same legal entity

Place of provision of service outside India
Versus
Export of services
Other points

Rules of Interpretation – Section 66F

• Unless otherwise specified, reference to a service (ie main service) does not include reference to service used to provide the main service

• Possibility of differential treatment – most specific description preferred over general description

Bundled services

• New concept of bundled services introduced
• Defined as services containing element(s) of two or more services
• Taxability
  • Services which are naturally bundled – Single service based on its essential character
  • Services which are not naturally bundled – Service which attracts the highest amount of service tax
• Manner of determining if the services are bundled naturally or not also provided
# AMENDMENTS IN THE REVERSE CHARGE MECHANISM

<table>
<thead>
<tr>
<th>Type of Input Service</th>
<th>Service Provider Type</th>
<th>% Service Tax payable by service recipient</th>
</tr>
</thead>
<tbody>
<tr>
<td>Insurance Agent</td>
<td>Insurance Business</td>
<td>100%</td>
</tr>
<tr>
<td>Goods Transporter</td>
<td>All</td>
<td>100%</td>
</tr>
<tr>
<td>Sponsorship</td>
<td>All</td>
<td>100%</td>
</tr>
<tr>
<td>Services by arbitration Tribunal</td>
<td>All</td>
<td>100%</td>
</tr>
<tr>
<td>Support services by Govt / Local Authority (except renting and transport of goods)</td>
<td>All</td>
<td>100%</td>
</tr>
<tr>
<td>Services by advocate / law firm</td>
<td>Individual / Law firm</td>
<td>100%</td>
</tr>
<tr>
<td>Vehicle Hiring</td>
<td>Individual/HUF/Firm/AOP</td>
<td>100%</td>
</tr>
<tr>
<td>Supply of Manpower</td>
<td>Individual/HUF/Firm/AOP</td>
<td>75%</td>
</tr>
<tr>
<td>Works Contract</td>
<td>Individual/HUF/Firm/AOP</td>
<td>50%</td>
</tr>
<tr>
<td>From a service provider located in J&amp;K/outside India and received by a person in India</td>
<td>All</td>
<td>100%</td>
</tr>
</tbody>
</table>

**SSI exemption limit of 10 Lac not available in case of reverse charge**
VALUATION RULES
VALUATION RULES

Important inclusions

- amount realized as demurrage

Important exclusions

- interest on delayed payment of any consideration for the provision of services or sale of property
- accidental damages due to unforeseen actions not relatable to the provision of service
- subsidies and grants disbursed by the Government, not directly affecting the value of service
Definition of “works contract” expanded - Section 65B(54) of the Finance Act, 2012):

"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”

The Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 stands withdrawn

AMC contracts for goods also as works contract – entitled for abatement

New valuation rules for works contract prescribed under the Service Tax Valuation Rules
## VALUATION RULES

<table>
<thead>
<tr>
<th>Old Scheme</th>
<th>New Scheme</th>
</tr>
</thead>
<tbody>
<tr>
<td>Composition scheme - Option to pay tax at 4.80% on contract value</td>
<td>▪ No composition scheme wef July 1, 2012</td>
</tr>
<tr>
<td></td>
<td>▪ Identified value for services</td>
</tr>
<tr>
<td></td>
<td>▪ Else, value of service is deemed to be:</td>
</tr>
<tr>
<td></td>
<td>• 40% of gross amount in case of original work</td>
</tr>
<tr>
<td></td>
<td>• 70% of gross amount in case of works contract for maintenance, repair or reconditioning or restoration or servicing of goods</td>
</tr>
<tr>
<td></td>
<td>• 60% of gross amount in all other cases</td>
</tr>
<tr>
<td>Credit restriction of 60% under Composition Scheme for specified services</td>
<td>▪ Full credit now available on all input services</td>
</tr>
</tbody>
</table>
CENVAT SCHEME – RELEVANT CHANGES

- Revision of the definition of “input services” – to streamline with negative list provisions
- “Exempted service” not to include service which is exported as per Rule 6A of ST Rules
- No Cenvat credit utilization for reverse charge payments
- Refund of Cenvat credit on a portion of service on which tax is payable under reverse charge
- In case of removal of capital goods the amount of CENVAT to be reversed shall be:
  - CENVAT credit taken on the said capital goods as reduced by the prescribed percentage; or
  - Duty payable on transaction value;
  whichever is HIGHER
- Interest to be levied only when credit is wrongly taken and utilized
- Conditions imposed for an ISD to transfer input service tax credit to its units
COMPREHENSIVE SERVICE TAX REGIME - SUMMARY

Qualifies as Service:
- Activity
- Consideration
- For another person

Included as a Declared Service

Does not involve
- Sales of goods or immoveable property or deemed sales
- Transaction in money or actionable claim
- Employer / employee

Liable to Service Tax

Place of provision of service shall be in India, based on the PPS Rules

Not included in negative list of services as per new section 66D or not specifically exempted
WAY FORWARD
WAY FORWARD

- Comprehensive overhaul of the service tax law necessitates relook at erstwhile tax positions:
  - taxability / non-taxability of all expense line items
  - taxability / non-taxability of all revenue line items
- Review taxability of import of services & export of services under PPS Rules
- Re-look at transactions in / with J&K
- Re-look at the exemptions, abatements, etc
- Identify all types of composite transactions to determine levy of service tax
- Review situations of reverse charge applicability (may need IT system changes)
- Credit eligibility of new taxable services
- Need for amendment in contracts if any
Abhishek Jain is a Partner at BMR Legal. He has an experience of over 13 years in indirect taxation during which he has been extensively involved in advising multinational and domestic companies across a range of sectors such as Infrastructure, Power, IT, FMCG, Financial Services, Oil and Gas, etc.

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He has been extensively involved in advising multinational and domestic clients on optimizing their supply chain from tax perspective by way of tax modeling including providing strategic inputs on tax controversies.

He advises leading companies like General Electric, Cisco, ITC, Network 18, Coca Cola, Tupperware, Areva, Schneider, GSPL, Petronet LNG Limited, Abhijeet Group, etc.
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Abhishek has played a key role in terms of regular project advisory as well as advocacy with the Government on specific issues for his clients.

Abhishek has been actively involved in advising his clients on the proposed GST regime in India.

He is a regular contributor to many publications, journals and newspapers.

He is a regular speaker at various industry forums, seminars and conferences including the Power Associations, ICAI, CII, etc.
In the realm of EPC contracts, Abhishek has been one of the key speaker for the seminars organized by Infraline for the years 2006, 2007, 2008, 2009, 2010 and 2011

A lawyer by qualification
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