

Revised Concept Paper on Taxation of Services based on Negative List

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1.0 Background

1.1 A Concept Paper on the “Taxation of Services Based on a Negative List” was circulated on August 31, 2011 to seek feedback from all stakeholders. Many chambers, service providers’ associations, professional institutes, business entities and individuals have provided valuable inputs.

1.2 The feedback received indicates an overwhelming support for the taxation of services based on a Negative List. It has been mentioned that a long positive list is neither conducive from the point of tax administration nor tax compliance and adds to legal disputes.

1.3 As to the timing for the introduction of the Negative List, the opinion is divided. While some feel that it should be introduced at the time of GST, with a wider Constitutional mandate, there are others who feel that the introduction of Negative List should be done independently of the GST. In fact, it has been added that such introduction at an earlier stage will pave the way for the smooth transition to the GST, and significantly ease the challenges arising out of implementing the GST. It has been further stated that the issues relating to some transactions being considered services by the Central Government and goods or luxury or entertainment by some of the State Governments are independent of the issue whether the taxation is based on positive or negative list.

1.4 Many suggestions have been made on the contents of the negative list also. This revised Concept Paper has been drafted to consider all the relevant issues that may arise if the Negative List is to be introduced either under the existing regime of taxation or at the time of GST.

2. Definition of Service and Taxability

2.1 The earlier Paper had given the definition of service to “mean anything which does not constitute supply of goods, money or immovable property” A number of specific inclusions or exclusions were further elaborated. Suggestions have been made that the “service” should be confined to economic transactions or transactions

for consideration. These suggestions have arisen primarily because the provisions relating to charging section were not indicated in the earlier Paper. Taking note of all the various considerations, it is felt that the definition of “service” need not be revised in any manner and retained.

2.2 However the essence of the suggestions can be captured in the charging section somewhat as follows:

“There shall be levied a tax (hereinafter referred to as service tax) at the rate of ... per cent of the value of services provided or to be provided by a taxable person to another person and collected in such manner as may be prescribed.”

2.3 The above charging section is illustrative in terms of the present scheme of taxation and the same will naturally look quite different if the negative list is introduced alongwith the GST, capturing all the various activities that will be brought within the purview of the GST.

2.4 Taxable person may be defined as: “any person who independently carries out any economic activity, whether or not for a pecuniary profit”.

2.5 Thus the impact of all the proposed charging section will be to confine taxation to transactions in services carried out with another person by a person engaged in an economic activity on his own account.

2.6 A taxable person will not include wage earners as employees or others under a contract to their employers while acting in that capacity as they do not carry out economic activities independently but only on behalf of the organization they work for. This will also exclude members of legislatures likewise, which were covered by a specific exclusion in the previous Concept Paper. It is further clarified that this will apply only in so far as employees are bound to an employer by a contract of employment or by any other legal arrangement creating that relationship. It will in no case stretch to services rendered beyond the demand of the contractual arrangement. Thus an employee agreeing to serve after normal office hours against additional remuneration in terms of another arrangement beyond the terms of employment will not be construed as working in the said contractual relationship e.g. a teacher taking private tuition classes while the additional charges may be paid by the school from the amounts so collected from the students.

2.7 Economic activities are such activities as are carried out for consideration, whether or not the consideration is adequate or provided by the recipient of the service, or leads to profit at the end of a period. The taxable activities will thus exclude transactions carried out free of charge or gratis, without any direct or indirect commercial advantage, or as recreation or hobby. Statutory fines and penalties will also not constitute “economic activities”. However, commercial demurrages, by whatever name called, for extended use of a service will be taxable. Moreover the presence of profit motive is not necessary while carrying out economic activity. Thus the activities of political parties, religious bodies, in so far as they carry out religious activities, decorations and awards for excellence and not as reward in lieu of recognition for services rendered, will fall outside the charging section.

2.8 It is further clarified that by virtue of Article 366 of the constitution certain supplies are deemed to be supply of goods. They will thus be excluded from the definition of “service” but only to the extent of the value of goods.

2.9 As stated in the previous Paper, having regard to its characteristics and with a view to remove any ambiguity, the Central Government shall have powers to declare an activity as a provision of service or otherwise and such activity, notwithstanding anything to the contrary, be considered as a provision of service. The inclusions and exclusions given under the definition of service in the earlier Concept Paper can be clarified under this provision and need not form a part of the main definition.

3.0 Negative List of Services

3.1 The revised Negative List of services is given in the Annexure.

3.2 A number of deletions have been made from the previous Paper and are as follows:

1. Services provided directly in relation to agriculture, horticulture and animal husbandry: These services are largely provided by the small scale sector below the threshold. The words “directly in relation to” are capable of very wide interpretation and thus prone to abuse. However, agriculture and animal husbandry would remain priority sectors for the Government and the impact of taxes on input services, wherever justified, would be considered for neutralization appropriately through other means.

2. Transport of goods to a destination outside India: Same may not be liable to taxation by virtue of the Place of Taxation/Supply rules.
3. Services provided by independent journalists, PTI and UNI and services by individuals serving on government councils and commissions and supply of goods carriage with driver.
4. Services by religious entities, political parties, decorations and awards have also been taken off as they are rendered by persons who may not be engaged in “economic activities”.

3.3 Many other valuable suggestions have been incorporated and are as follows:

1. Taxation of services provided by government in areas where it competes with private sector unquestioningly finds support. However there are significant problems in defining what will comprise such activities. Moreover it will also keep changing over time as private sector gets increasingly involved in rendering services that might today be in the exclusive domain of the government. Taxation of all services provided by government for a fee or surcharge, while resolving this problem, will add administrative costs and could be more appropriately handled by revising user-charges, wherever necessary. It is thus felt that these services could be defined by way of specific entries. However, at the time of GST the issue could be revisited.
2. Exemptions in the financial sector have been expanded to cover transactions and instruments akin to the instruments and transactions indicated in the earlier Negative List.
3. In the case of transport sector, it is proposed to include passenger travel by non-AC second class as also travel in all classes of metro and monorail so as to address the needs of a common man and encourage public transport system.
4. The entry relating to construction has been revisited. It is felt that the tax paid on construction activities is not available as credit under the existing rules except as sub-contractor. Thus a case is made for keeping certain infrastructure projects within the negative list, particularly those that are meant for larger public good. At the same time construction of such projects together with projects meant for social welfare and for non-commercial use of the government will create definitional issues and amount to end-use exemption. Normally construction activities are not included in negative list

worldwide. It is now for public debate to what extent construction should be covered in the negative list.

5. Renting of personal dwellings is included in the negative list only to the extent of Rs.1 lakh per month per dwelling to cover high-end apartments.
6. Option 2 relating to health sector indicated in the earlier Paper is proposed to be kept in the Revised Concept Paper at this stage. The taxability under any other option could be considered under the GST.
7. A new entry is proposed relating to services to own members by way of reimbursement of charges by an exempt entity. This has been done to obviate the burden of taxes in case of unincorporated associations engaged in non-taxable activities which get funded by own members.
8. Advertisements, other than advertisements in newspapers or broadcast on radio or TV, have also been added as this entry is covered under the State List in the Constitution.

4.0 Place of Taxation Rules

4.1 In order to operationalize the Negative List, it will be necessary to move towards Place of Taxation/Supply Rules that will determine the principles for the determination of location at which services shall be deemed to be provided. These are also intended to be released for public debate shortly.

(This Revised Concept Paper is placed in the public domain for the widest possible consultation, extensive debate and to seek views and feedback of all stakeholders. Views expressed here do not reflect the position of the Government of India in any manner. Any comments, suggestions or feedback may be given by December 15, 2011 to Shri Shobhit Jain, OSD (TRU) at shobhit.jain@nic.in, Tel: 011-23095590; Fax: 011-23093037)

Revised Negative List of Services

Sector	S. No.	Negative List
1. By specified persons	1.	All services other than notified services provided by government <u>Proposed notified services:</u> <ol style="list-style-type: none"> 1. Business promotion or <u>business support services</u> 2. Construction/works contract 3. Insurance services 4. Port or airport services 5. Postal services other than under Universal Service Obligations (post card, inland letter and money order) 6. Renting of an immovable property or right to enter or use an immovable property 7. Security 8. Trade fairs and exhibitions 9. Transport of goods and passengers 10. Warehousing
	2.	Services by international bodies and diplomatic missions under diplomatic and consular arrangements as per laid down conditions
2. Social welfare and public utilities	3.	Services by organizations registered as non-profit entities under the Income Tax Act 1961 (DTC 2012) in matters relating to public and social welfare activities substantially at or below the costs (excluding health & education)
	4.	Funeral, burial, crematorium and mortuary services
3. Financial Sector	5.	Sale, purchase or acquisition of securities, debts, mutual funds and actionable claims on principal-to-principal basis excluding (1) services in relation to such transactions and (2) when acquired in lieu of a service
	6.	Interest or discount on cheques, promissory notes, bills of exchange or debt instruments
	7.	Dividend on investments
	8.	Sale and purchase of foreign currency amongst banks and/or authorized dealers of foreign exchange
4. Transport	9	Transport of passengers with accompanied belongings by: <ol style="list-style-type: none"> a) Non-AC second class of passenger travel by railway and any class by metro and mono-rail; b) Public transport buses on a point-to-point basis (except tourist buses) and stage-carriage basis; c) Public transport in ship or vessel of less than 15 net tonnage on a point-to-point basis (except tourist purposes); d) Metered cabs or three-wheeler auto-rickshaw

5. Construction & Real Estate	10	Construction, works-contract, repair, alteration, renovation or restoration of: a) <u>Specified infrastructure for larger public good</u> ; b) Residential building comprising a single dwelling unit
	11	Renting of personal dwellings in excess of Rs 1 lakh per month per dwelling
6. Education	12	Pre-school, school and recognized education** and vocational training recognized by NCVT except placement services and donations or similar charges in relation to admission
7. Health	13	Services by <u>clinical establishments</u> except in relation to health & fitness, weight reduction programmes, health check-up and cosmetic or plastic surgery;
8. Others	14	Copyright services of original literary, dramatic, musical and artistic works.
	15	Services provided by independent journalists, PTI & UNI for providing news
	16	Services provided by sportspersons, as a player, coach or referee/umpire and performing artists in that capacity (excluding as brand ambassadors)
	17	Services provided by a trade union to its members
	18	Representational services provided by an advocate to individuals
	19	Services to own members by an exempt entity by way of reimbursement of charges
	20	Tolls except services in relation to collection of tolls
	21	Betting and gambling except services in relation to promoting, marketing or organizing games of chance, including lottery services
22	Advertisements other than advertisements published in newspapers or broadcast by radio or TV or displayed in other electronic media	

***Government** means the Union, State and local self government and government regulatory bodies established under an act but shall not include any other entity established under the Companies Act 1956 or any other law for the time being in force.

****Recognized education** means education leading to the award of a certificate or degree recognized by a body established by an Indian law.
