

New Definition of 'service' could lead to big time confusion and litigation – 16, Mar 2012

New Definition of 'service' could lead to big time confusion and litigation MARCH 16, 2012 By S Sivakumar, CA IN terms of the proposed Section 65(B) 9 (44) of the Finance Act, 1994, contained in Page 50 of the Finance Bill 2012, here is the definition of what would constitute a 'service': "(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) 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 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 establishments 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". If we read this in conjunction with the proposed Section 65B(66D) specifying the negative list of services, on which, Section 65B(66B) which states that, no service tax shall be levied on the negative list of services and Section Section 65B(66E) which defines 'declared services', here is what I get....

++ In terms of the new definition, 'service' can mean only an activity carried out for a consideration. One can see a lot of similarity between this new definition for 'service' and the one that we have for 'sale' under the VAT laws, which also talks of 'consideration'. There is no definition of 'consideration' in the new Finance Act, 1994, as I can see. This would mean that, any activity which is not undertaken for a 'consideration' cannot be a service, notwithstanding the machinery provisions contained in the Valuation Rules, etc. In my strong view, the recent Circular No. 151/2/2012-ST dated February 10, 2012, issued by the Board on the levy of service tax on joint development contracts, etc. would fall flat, under the new definition of 'service'.

++ Taking the discussion forward... in my view, any activity which is not represented by 'consideration' cannot constitute a service. Under the sales tax/VAT law, we have numerous case laws which have dealt with 'consideration' and the widely accepted view is that, consideration has to be cash or any other equivalent concept'. Per se, consideration cannot include non-monetary consideration.

++ 'Declared service', in terms of Section 65B(66E) means, inter alia, service portion in the execution of a works contract and the service portion wherein goods in the form of food are supplied for human consumption. I am not able to see the reference to the 'service portion' in respect of the other services like Information Technology services, transfer of right to use IP rights, etc. This would mean that, service, as per the new definition would include the 'sale portion' representing the value of goods which are subject to the levy of VAT/sales tax under the State laws, except when there is a specific reference to the 'service portion' as in the case of a works contract.

Some of the immediate examples which come to my mind are the licensing of software products, transfer of intellectual property, etc. which would be subject to the levy of service tax and VAT, at the same time.

++ In terms of the new definition, 'service' would not include an activity which constitutes merely, a transfer of title in goods or immovable property... This is an example of very bad drafting, whether done on an intentional or an unintentional basis. Who will determine whether the activity or transaction is a 'mere transaction' of transfer of title in goods. If a seller sells goods on the basis of a free warranty service, let's say, for 3 years, can this be treated as not a sale of mere transfer of title in goods'. Before concluding..

++ Given the fact that the definition of 'service' is rather loosely worded, we should expect a lot of confusion and the consequent litigation to arise. ++ What would have been better is to define 'service' as an economic transaction, which is not a 'sale' and to include the 'service portion' of transactions treated as 'works contracts' under the VAT law. We still have issues on what constitutes a 'sale', even after decades of the law being in force.

++ About the new definition of 'service', the lesser said, the better it is. (The Author is Director, S3 Solutions Pvt Ltd, Bangalore)

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