

Analysis of Negative List

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INTRODUCTION

In terms of Section 66B of the Act, service tax will be leviable on all services provided in the taxable territory by a person to another for a consideration other than the services specified in the negative list. Meaning thereby that except these 17 Services, all Services will be taxable under Service tax. In all, there are seventeen heads of services that have been specified in the negative list.

The scope and ambit of these is explained in paragraphs below:-

1. Services provided by Government or local authority

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, other than services covered under clauses (i) to (iii) above, provided to business entities;

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Analysis

a) What is the exact meaning of Government or local authority?

Government

Government has not been defined in the Finance Act, 1994 or the rules made thereunder. As per clause 23 of section 3 of the General Clauses Act, 1897, Government shall include both the Central Government and any State Government.

It would include various departments and offices of the Central or State Government or the Union Territory Administrations which carry out their functions in the name and by order of the President of India or the Governor of a State.

Local authority

Local authority is defined in clause (31) of section 65B and means the following:-

- A Panchayat as referred to in clause (d) of article 243 of the Constitution
- A Municipality as referred to in clause (e) of article 243P of the Constitution
- A Municipal Committee and a District Board, legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund
- A Cantonment Board as defined in section 3 of the Cantonments Act, 2006
- A regional council or a district council constituted under the Sixth Schedule to the Constitution
- A development board constituted under article 371 of the Constitution, or
- A regional council constituted under article 371A of the Constitution.

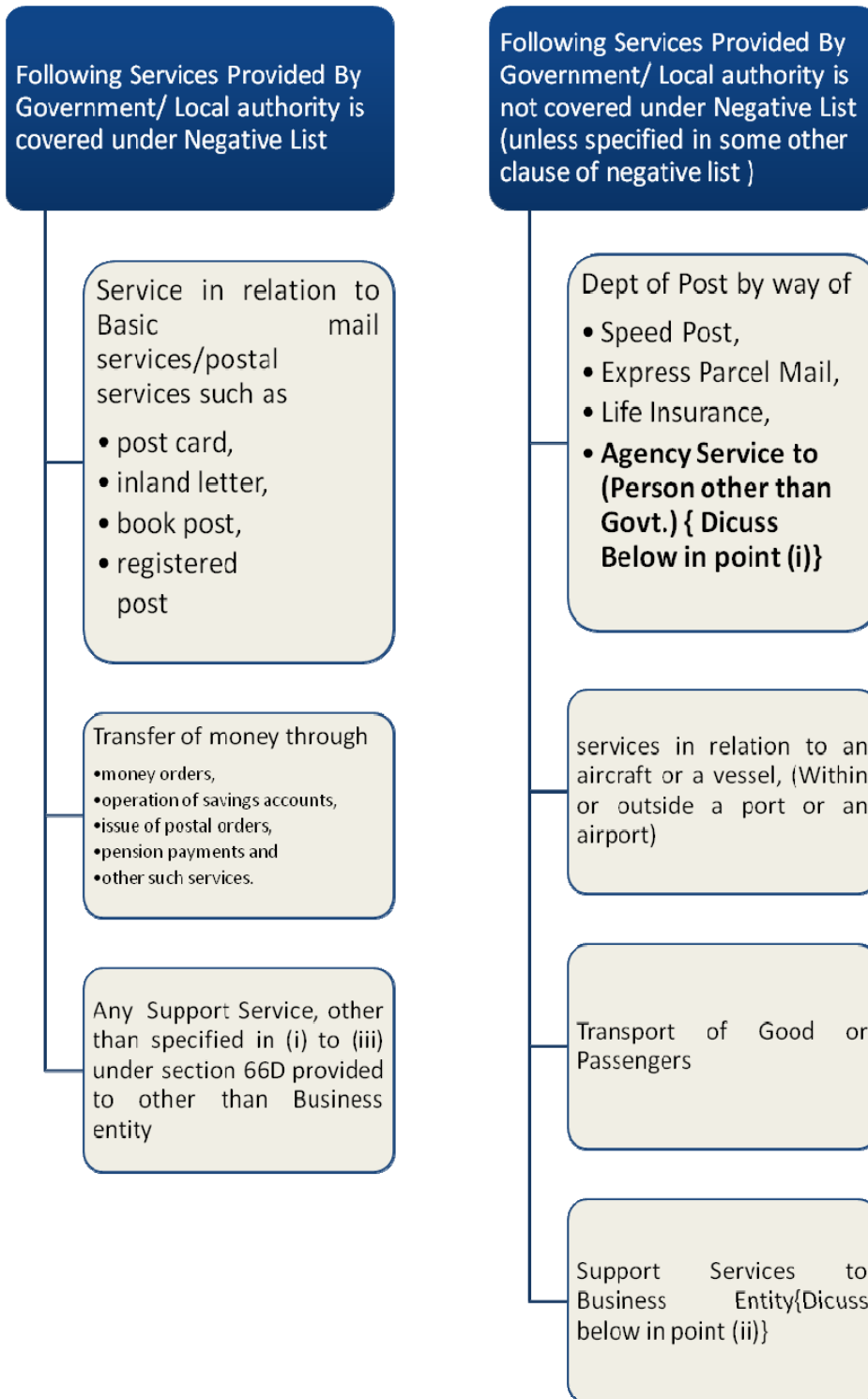
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b) What are the Services covered in this Rule?



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(i) **Agency or intermediary services** on commission basis (distribution of mutual funds, bonds, passport applications, collection of telephone and electricity bills), which are provided by the Department of Posts to non-government entities are liable to service tax because these are Agency services carried out on payment of commission on non-government business.

(ii) As Per clause 49 of Section 65 B "**support services**" means

- 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 immovable property,
- security,
- testing and analysis;"

(iii) **Sovereign right shall be treated as non-taxable**

Thus services which are provided by government in terms of their sovereign right to business entities, and which are not substitutable in any manner by any private entity, are not support services.

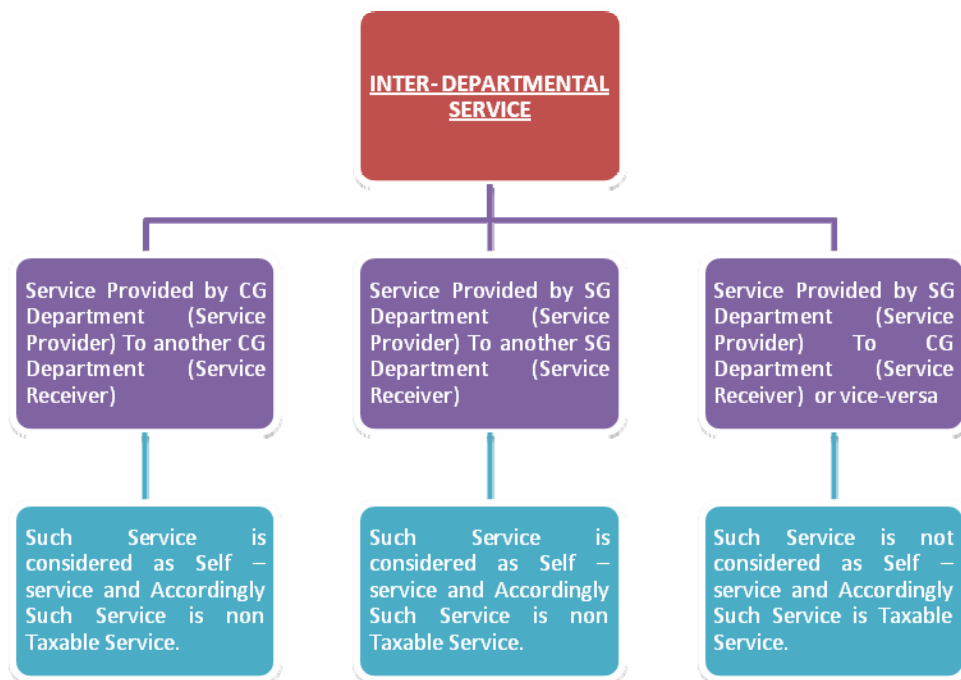
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Examples

- Grant of mining or licensing rights or
- Audit of government entities established by a special law, which are required to be audited by CAG under section 18 of the Comptroller and Auditor-General's (Duties, Powers and Conditions of Service) Act, 1971 (such services are performed by CAG under the statute and cannot be performed by the business entity themselves and thus do not constitute support services.)

(iv) INTER- DEPARTMENTAL SERVICE



2. Services by the Reserve Bank of India

Analysis

- All services provided by the Reserve Bank of India are in the Negative list.
- But services provided to the Reserve Bank of India are not in the negative list and would be taxable unless otherwise covered in any other entry in the negative list.

As Per clause 42 of section 65B of finance Act,1994 - "Reserve Bank of India" means the bank established under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934.).

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3. Services by a foreign diplomatic mission located in India

- Any service that is provided by a diplomatic mission of any country located in India is in the negative list.
- This entry does not cover services, if any, provided by any office or establishment of an international organization.

4. Services relating to agriculture or agricultural produce by way of —

(i) Agriculture' has been defined in the Act as cultivation of plants and rearing or breeding of animals and other species of life forms for foods, fiber, fuel, raw materials or other similar products but does not include rearing of horses. **Activities like breeding of fish (pisciculture), rearing of silk worms (sericulture), cultivation of ornamental flowers (floriculture) and horticulture, forestry included in the definition of agriculture.**

(ii) Agricultural produce has also been defined in Section 65B of the Act which means any produce of agriculture on which either no processing is done or such processing is done as is usually done by a cultivator or producer which does not alter its essential characteristics but makes it marketable for primary market. It also includes specified processes in the definition like tending, pruning, grading, sorting etc. which may be carried out at the farm or elsewhere as long as they do not alter the essential characteristics. The following activity will be covered under Agriculture produce:-

- a) **Plantation crops like rubber, tea or coffee.**
- b) **Cleaning of wheat carried out outside the farm, Since this activity do not alter essential character of Wheat**

Whereas, the following activity will not qualify as Agriculture Produce

- a) **Preparation Potato chips or tomato ketchup**
- b) **Operations like shelling of paddy**
- c) **Processes of grinding, sterilizing, extraction packaging in retail packs of agricultural products which make the agricultural products marketable in retail market**

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

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- (iv) renting or leasing of agro machinery or vacant land with or without a structure incidental to its use;

leasing of vacant land with a green house or a storage shed meant for agricultural produce will also be covered in the negative list.

- (v) loading, unloading, packing, storage or warehousing of agricultural produce;
(vi) agricultural extension services;

Agricultural extension services have also been defined in Section 65B of the Act as application of scientific research and knowledge to agricultural practices through farmer education or training.

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

Agricultural Produce Marketing Committees or Boards are set up under a State Law for purpose of regulating the marketing of agricultural produce. Such marketing committees or boards have been set up in most of the States and provide a variety of support services for facilitating the marketing of agricultural produce by provision of facilities and amenities like shops, sheds, water, light, electricity, grading facilities etc. They also take measures for prevention of sale or purchase of agricultural produce below the minimum support price. APMCs collect market fees, license fees, rents etc. Services provided by such Agricultural Produce Marketing Committee or Board are covered in the negative list.

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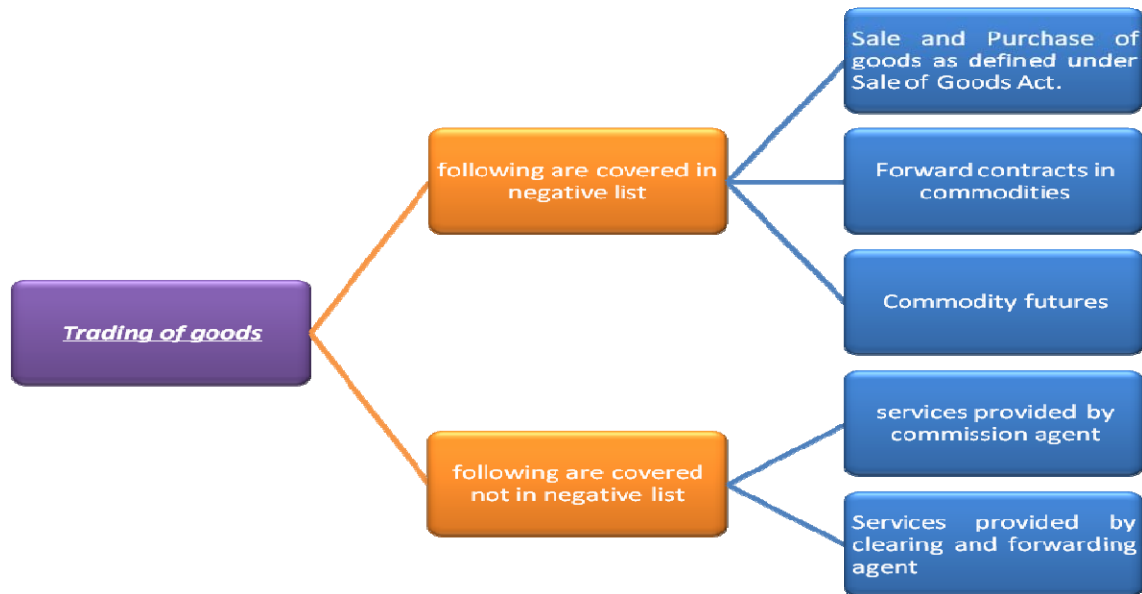
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5. Trading of goods

Transfer of title of goods is one of the essential conditions for a transaction to come under the ambit of trading of goods. However, the services supporting or ancillary to the trading of goods would not come under the above item of Negative List.



6. Any process amounting to manufacture or production of goods

Processes amounting to manufacture or production of goods has been defined in Section 65B of the Act

A process on which duties of excise are leviable under section 3 of the Central Excise Act, 1944 . Even if such process in nil rated or exempted in Excise .

A processes under the Medicinal and Toilet Preparations (Excise Duties) Act, 1955

Any process amounting to manufacture of alcoholic liquors for human consumption, opium, Indian hemp and other narcotic drugs and narcotics on which duties of excise are leviable under any state.

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7. Selling of space or time slots for advertisements other than advertisements broadcast by radio or television

Analysis

(i)

<u>S.No.</u>	<u>Not Covered Under Negative List</u>	<u>Covered Under Negative List</u>
1.	<i>Sale of space or time for advertisement to be broadcast on radio or television.</i>	<i>Sale of space for advertisement in print media.</i>
2.	<i>Sale of time slot by a broadcasting organization.</i>	<i>Sale of space for advertisement in bill boards, public places, buildings, conveyances, cell phones, automated teller machines, internet.</i>
3.	<i>Commission amount received</i>	<i>Aerial advertising</i>
4.	<i>Making or preparing advertisements</i>	
5.	<i>Canvassing advertisement for publishing on a commission basis</i>	

Aerial advertising is a form of advertising that incorporates the use of aircraft, balloons or airships to create, transport, or display, advertising media. The media can be static, such as a banner, logo, lighted sign or sponsorship branding. It can also be dynamic, such as animated, lighted or audio.

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(ii) Other important points

a. How would the Service Tax liability be determined when an advertisement agency raises bill towards its commission and sale of space charges?

IF SEPARATELY BILL RAISED

Charges received by advertisement agency towards its commission are not covered by the negative list entry. Consideration received towards sale of space or time slots for advertisements other than advertisements broadcast by radio or television would not be liable to service tax if contracted and amount invoiced separately.

IF COMPOSITE BILL RAISED

This would be a case of bundled services taxability of which has to be determined in terms of the principles laid down in section 66F of the Act.

When Section 66F of finance Act, 1994 is applicable

➤ Bundled services have been defined in the said section as provision of one type of service with another type or types of services.

Treatment

➤ If such services are bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle.

➤ If such services are not bundled in the ordinary course of business then the bundle of services will be treated as consisting entirely of such service which attracts the highest liability of service tax.

b. Discuss (in above A point) answer is similar, in the case, when an advertisement agency raises bill towards its preparation and sale of space charges.

c. Whether printing and publishing of yellow pages or business directory is liable to service tax?

Printing and publishing of yellow pages and business directory is not in the nature of sale of space or time for advertisement and hence are liable to service tax.

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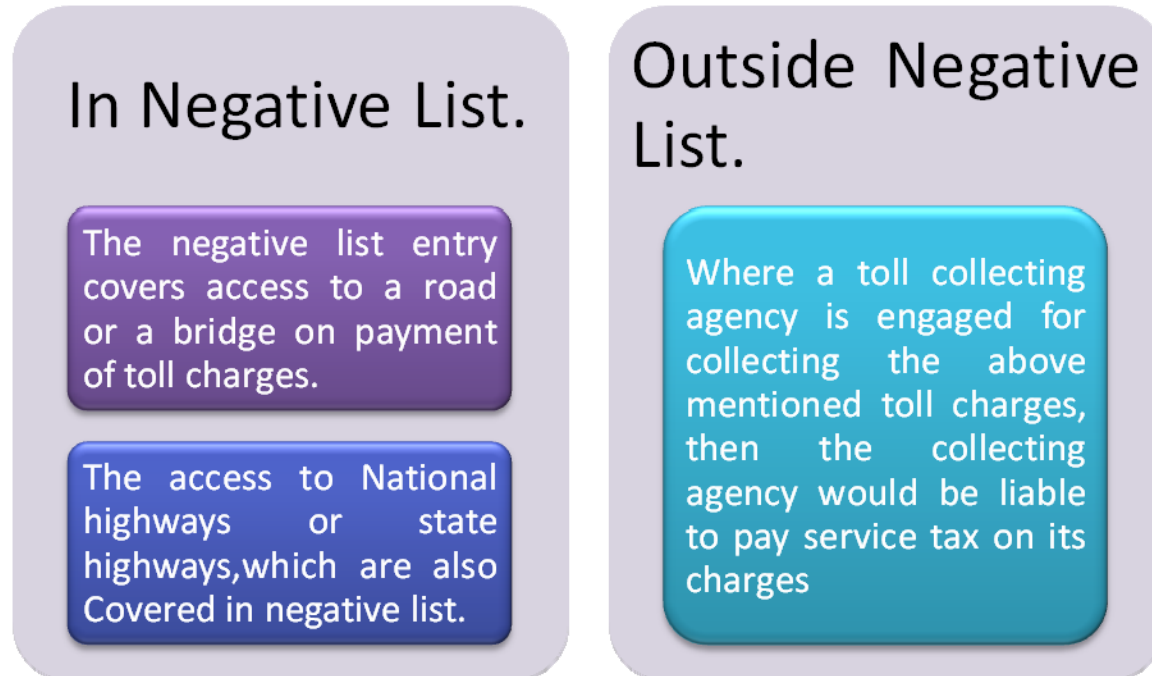
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8. service by way of access to a road or a bridge on payment of toll charges

A toll charge is a fixed charge or tax for a privilege, especially for passage across a bridge or along a road.



9. Betting, gambling or lottery

Analysis

(i) Only amount which is involved in the betting is covered under this entry. So that I would like to discuss that meaning of "betting or gambling" which has been defined in Section 65B of finance Act, 1994.

"Betting or gambling" means where following are three condition are filled

- There should be something on stake of value
- There should be hope of gain on the outcome of a game or a contest
- The result may be determined by chance or accident, or on the likelihood of anything occurring or not occurring'

(ii) Following are the services is not covered under this entry

(a) Auxiliary services used to provide betting/ gambling

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(b) Any support services rendered by the Club and certain amount collected from the members.

10. **Admission to entertainment events or access to amusement facilities**

Analysis

(i) Entertainment events' has been defined in section 65B of the Act

Means an **event** or a **performance** which is intended to provide recreation, pass time, fun or enjoyment,

Such as

- | | | |
|--|-----------------------------|---------------|
| (a) exhibition of cinematographic films, | (b) circus, | (c) concerts, |
| (d) Sporting events, | (e) fairs, | (f) pageants, |
| (g) award functions, | (h) dance performances, | |
| (i) Musical performances, | (j) theatrical performances | |

including cultural programs, drama, ballets or any such event or programme'.

(ii) Amusement facility' has been defined in Section 65B of the Act

Means a facility where fun or recreation is provided by means of

- rides, gaming devices or bowling alleys in amusement parks, amusement arcades, water parks, theme parks or such other places

but does not include a place within such facility where other services are provided'.

(iii) Other Important aspects

(a) Cultural Programme, Drama Or A Ballet Held In An Open Garden And Not In A Theatre Qualifies As An Entertainment Event?

Yes, the words used in the definition are 'theatrical performances' and not 'performances in theatres'.

(b) Standalone ride set up in a mall qualifies as an amusement facility?

Yes, a standalone amusement ride in a mall is also a facility in which fun or recreation is provided by means of a ride.

(c) Entry to video parlors exhibiting movies played on a DVD player and displayed through a TV screen covered in the entry?

Yes, such exhibition is an exhibition of cinematographic film.

(d) Would membership of a club qualify as access to an amusement facility?

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No. A club does not fall in the definition of an amusement facility.

(e) Would auxiliary services provided by a person, like an event manager, for organizing an entertainment event or by an entertainer for providing the entertainment to an entertainment event organizer be covered in this entry?

No. Such services are in the nature of services used for providing the service specified in this negative list entry and would not be covered in the ambit of such specified service by operation of the rule of interpretation contained in clause (1) of section 66F of the Act.

11. Transmission or distribution of electricity by an electricity transmission or distribution utility

Analysis

CASE 1 when transmission or distribution of electricity by following Service Provider

which are defined in clause 23 of Section 65B of the Finance Act, 1994

- The Central Electricity Authority
- a State Electricity Board
- the Central Transmission Utility (CTU)
- a State Transmission Utility (STU) notified under the Electricity Act, 2003 (36 of 2003)
- a distribution or transmission licensee licensed under the said Act
- any other entity entrusted with such function by the Central or State Government

In Such Case, transmission or distribution of electricity service is covered under Negative List.

CASE 2 when transmission or distribution of electricity by private contractors

The above entry does not cover transmission or distribution of electricity service is provided by private contractors.

CASE 3 when developer is collected charges for distribution of electricity within a residential complex.

Charges collected by a developer of a housing society for distribution of electricity within a residential complex are not covered in the Negative List. But as per recent judgement, if developer purchase electricity (i.e. invoice in the name of developer) and collect charge for distribute of electricity within a residential complex then such transaction is treated as “good” due to Electricity is specified “goods” in the First Schedule of Central Excise Tariff Act, 1985. Therefore, would not be liable to service tax.

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12. Services by way of—

(i) pre-school education and education up to higher secondary school orequivalent:

- Services provided by international schools giving certifications like IB (International Baccalaureate) are also covered in this entry.
- Private tuitions are NOT covered in this entry. Hence, they are also liable to pay service tax if their aggregate values of taxable services exceed the threshold exemption.
- Boarding schools provide service of education coupled with other services like providing dwelling units for residence and food. This may be a case of bundled services if the charges for education and lodging and boarding are inseparable. Their taxability will be determined in terms of the principles laid down in section 66F of the Act. Such services in the case of boarding schools are bundled in the ordinary course of business. Therefore the bundle of services will be treated as consisting entirely of such service which determines the dominant nature of such a bundle. In this case since dominant nature is determined by the service of education other dominant service of providing residential dwelling is also covered in a separate entry of the negative list, the entire bundle would be treated as a negative list service.

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

- Education as a part of curriculum for obtaining a qualification recognized by law means that only such educational services are in the negative list as are related to delivery of education as 'a part' of the curriculum that has been prescribed for obtaining a qualification prescribed by law. It is important to understand that to be in the negative list the service should be delivered as part of curriculum. Conduct of degree courses by colleges, universities or institutions which lead grant of qualifications recognized by law would be covered. Training given by private coaching institutes would not be covered as such training does not lead to grant of a recognized qualification.
- In order to be covered in the negative list, a course should be recognized by an Indian law Services provided by way of education as a part of a prescribed curriculum for obtaining a qualification recognized by a law of a foreign country are NOT covered in the negative list entry.
- If a course in a college leads to dual qualification only one of which is recognized by law, service in respect of each qualification would, therefore, be assessed separately. Provision of dual qualifications is in the nature of two separate services as the curriculum and fees for each of such qualifications are prescribed separately. If an artificial bundle of service is created by clubbing two courses together, only *one* of which leads to a qualification recognized by law, then by application of the rule of determination of taxability of a service which is not bundled in the ordinary course of business contained in section 66F of the Act it is liable to be treated as a course which attracts the highest liability of service tax. However incidental auxiliary courses provided by way of hobby classes or extra-curricular activities in furtherance of overall well being will be an example of naturally bundled course. One relevant consideration in such cases will be the amount of extra billing being done for the unrecognized component viz-a-viz there recognized course.

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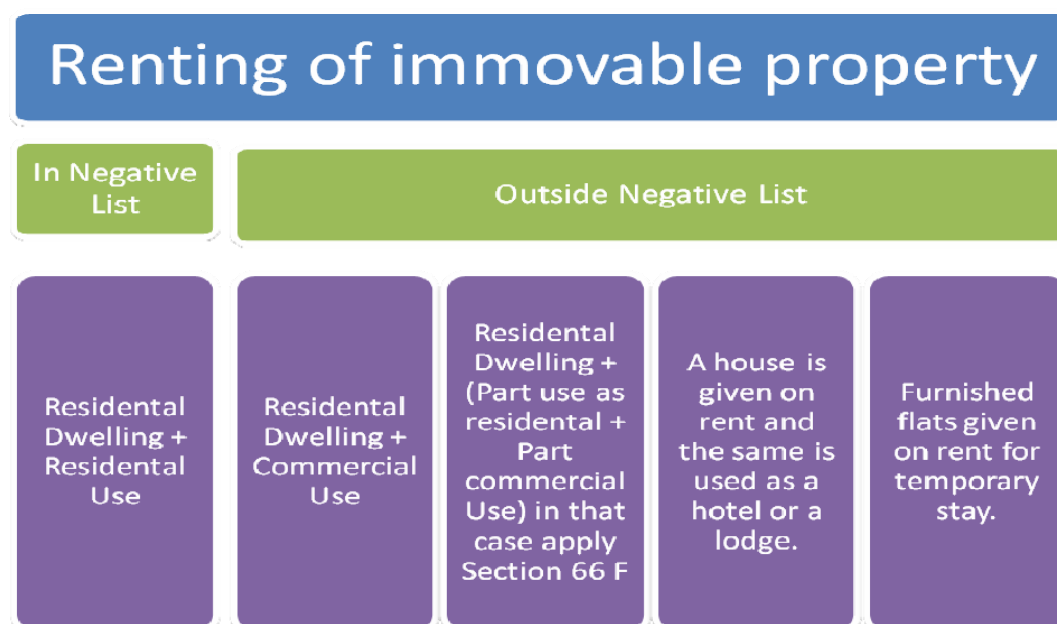
(iii) education as a part of an approved vocational education course

As Per clause 11 of section 65B of finance Act, 1994 "approved vocational education course" means,-

- (i) a course run by an industrial training institute or an industrial training center affiliated to the National Council for Vocational Training offering courses indesignated trades notified under the Apprentices Act, 1961 (52 of 1961.); or
- (ii) a Modular Employable Skill Course, approved by the National Council of Vocational Training or State Council for Vocational Training , run by a person registered with the Directorate General of Employment and Training, Union Ministry of Labour and Employment

13. Services by way of renting of residential dwelling for use as residence

- 'Renting' has been defined in section 65B of Finance Act, 1994 as "allowing, permitting or granting access, entry, occupation, usage 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 othersimilar arrangements in respect of immovable property".
- 'Residential dwelling' means residential accommodation, but does not include hotel, motel, inn, guest house, camp-site, lodge, house boat, or like places meant for temporary stay."
- Explain with diagram



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14. Services by way of—

(i) extending deposits, loans or advances in so far as the consideration is represented by way of interest or discount;

Analysis

The services of loans, advances or deposits are in the list in so far as the consideration is represented by way of interest or discount. Any charges or amounts collected over and above the interest or discount amounts would represent taxable consideration.

Covered Under Negative List

- ***Extending deposits, loans or advances to the Extent consideration is interest or discount (For Example)***
 - Fixed deposits or saving deposits or any other such deposits
 - Mortgages or loans with a collateral security to the extent consideration is represented by way of interest.
 - Providing a loan or overdraft facility or a credit limit facility
 - Corporate deposits to the extent consideration is represented by way of interest or discount
 - Invoice discounting / Bill discounting
 - Repos/Reverse Repos Service with RBI
 - trading in Commercial Paper (CP) or Certificates of Deposit (CD)

Not Covered in Negative List

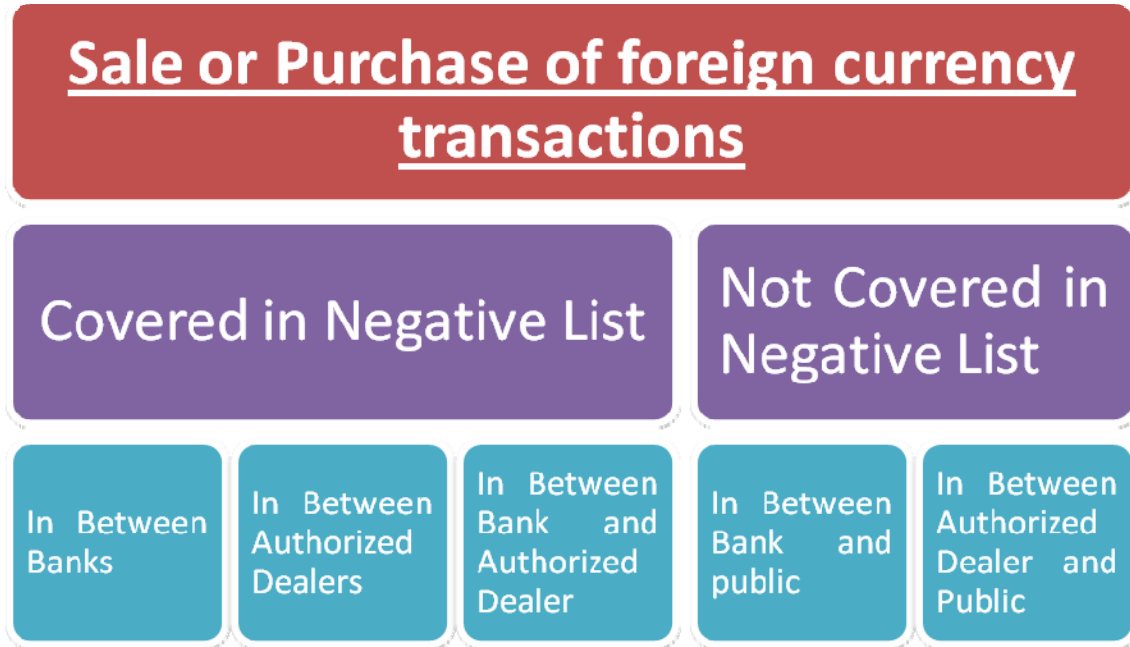
- ***Extending deposits, loans or advances to the Extent consideration is other than interest or discount (For Example)***
 - If any service charges or administrative charges or entry charges are recovered in addition to interest or discount
 - service charges or service fees or documentation fees or broking charges

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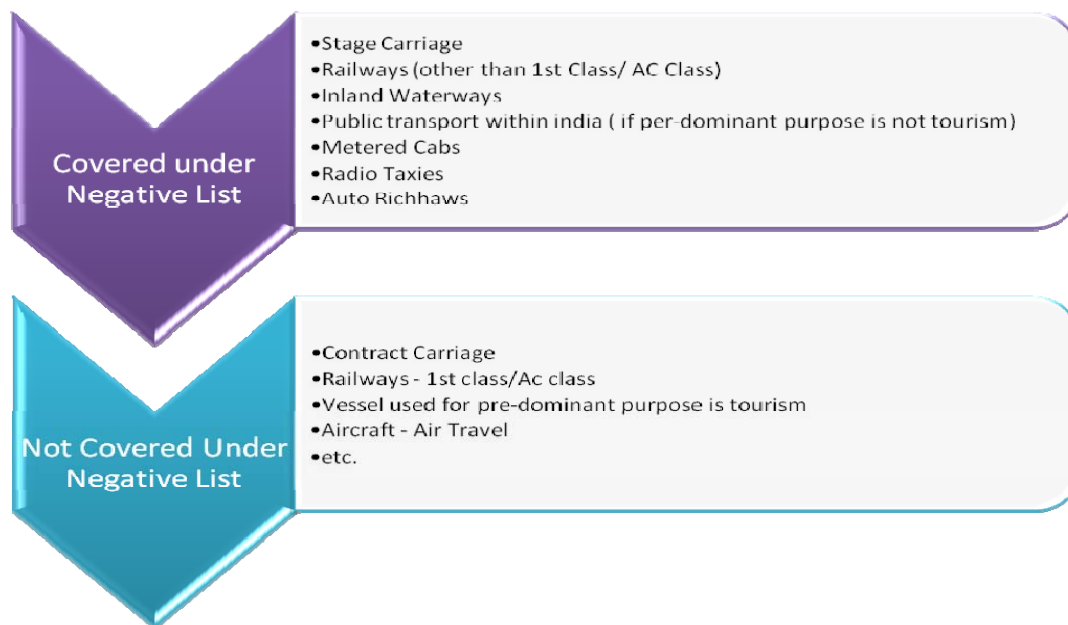
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(ii) inter se sale or purchase of foreign currency amongst banks or authorized dealers of foreign exchange or amongst banks and such dealers

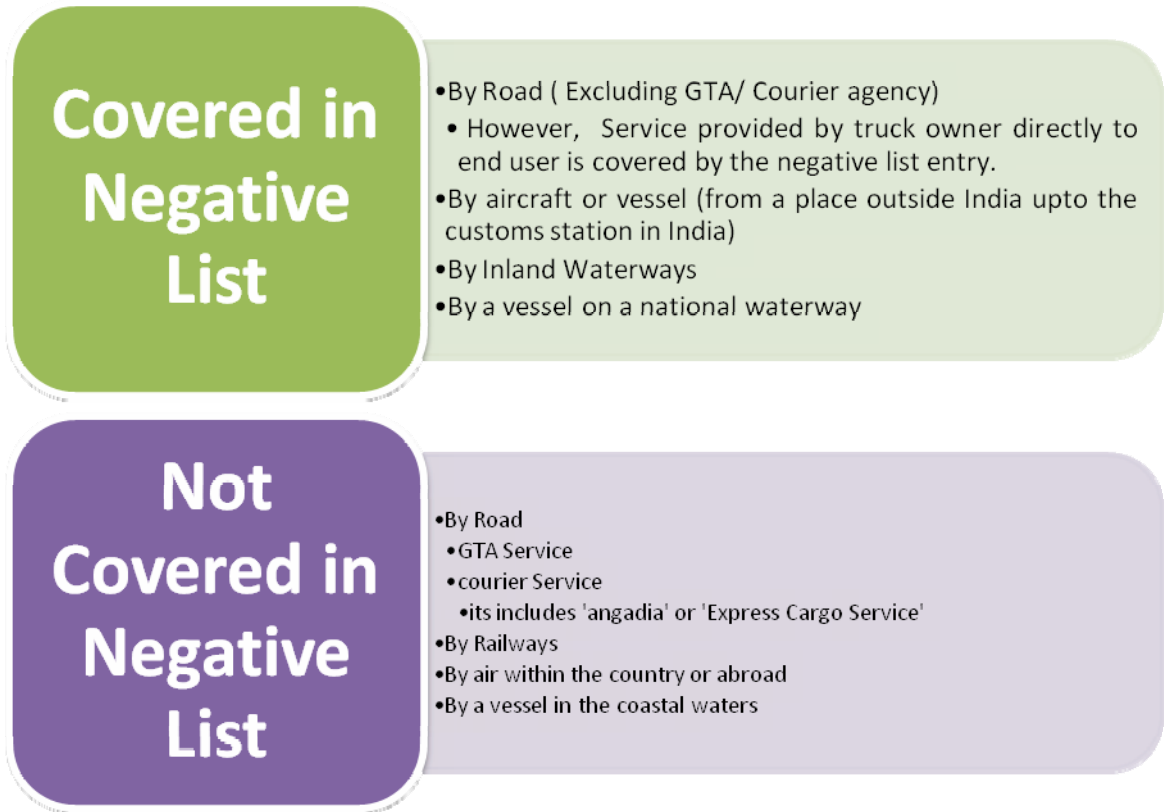
Analysis



15. **Service of transportation of passengers, with or without accompanied belongings, by—**



16. Service by way of transportation of goods—



17. Funeral, burial, crematorium or mortuary services including transportation of the deceased

