
**PLACE OF PROVISION OF SERVICE RULES AND ISSUES IN
CROSS BORDER TRANSACTIONS**

Shri A.R.Krishnan
Chartered Accountant

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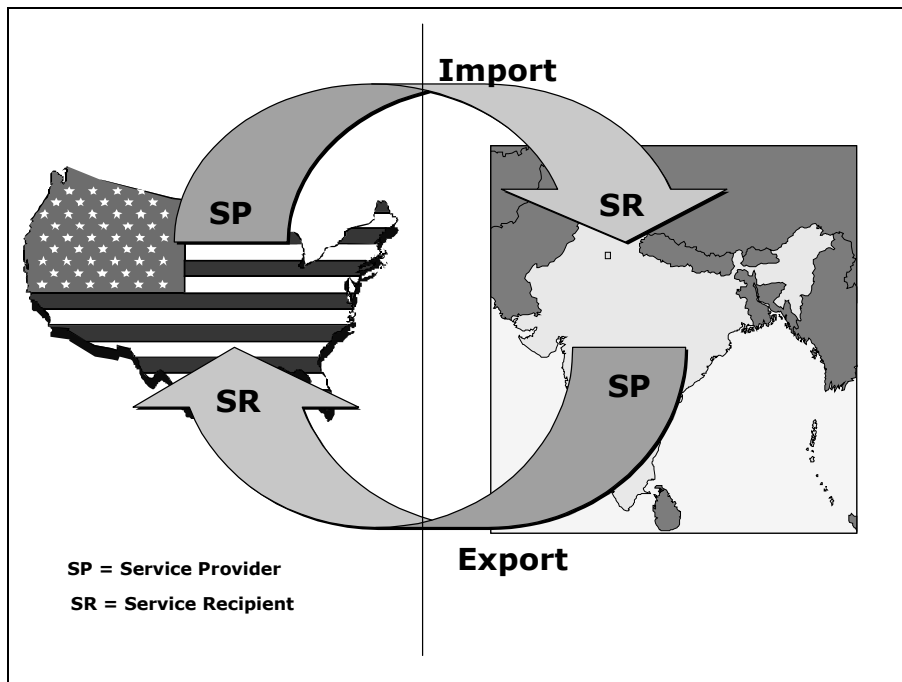
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A.R.Krishnan
Chartered Accountant

1 Introduction & Taxable Territory

Introduction

1.1 Simply put, a transaction¹ across the borders of a country involving another country would be considered as a cross-border transaction. In the context of services a typical cross-border transaction maybe represented pictorially as under :



1.2 The service may emanate from a country outside India, say USA, where the service provider (SP) is situated and received by a service receiver (SR) in India or vice versa. The former would be termed as ‘import’ of services and the latter would be considered as ‘export’ of services. Thus,

¹ In a lighter vein a *cross* border transaction is a transaction due to which both the departments (Income tax and Excise) would be *cross* with you and you would have to search for the *Holy Cross* !

a study of service tax in a cross border transaction would cover essentially a study of import and export of services. However, the study of import and export of services is peculiar, unique and quite distinct from import and export of goods. Services unlike goods are intangible and their supply is not characterised by physical movement to clearly demarcate and indicate when and where a service is imported or exported. Further services are diverse in nature and different rules are necessary to determine the situs of services. Hence specific rules need to be made to determine the situs of supply of services popularly known as the 'Place of Supply Rules' in order to determine whether a service is liable for service tax in a country. In India recently the place of supply rules have been issued known as 'Place of Provision of Service Rules, 2012' ('PoP Rules) effective from 1.7.2012 which are analysed below.

Taxable Territory

- 1.3 The new charging section 66B of Chapter V of the Finance Act, 1994 (hereinafter referred to as the 'Act'), which is the law governing service tax, provides that there shall be levied a tax @12% of *'the value of all services other than those specified in the negative list provided or agreed to be provided in the taxable territory, by one person to another...'*. Thus, section 66B clearly provides that the taxable event i.e. the 'service' must happen in the 'taxable territory'. The term 'taxable territory' has been defined in section 65B(52) as *'the territory to which the provisions of this Chapter apply'*. By section 64(1) Chapter V of the Finance Act, 1994 (i.e. the law governing service tax) extends to the whole of '**India**' except the State of Jammu & Kashmir. The term 'India' has been defined in section 65B(27) and on a reading of which it can be

inferred that, broadly speaking taxable territory means India *minus* Jammu & Kashmir.

2 Place of Provision of Service Rules – General

Preliminary

- 2.1 The Central Government has been empowered u/s. 66C to enact rules to determine when would the service be considered as provided in the taxable territory i.e. ***rules to determine the place of provision of service***. The Place of Provision of Services Rules, 2012 [“PoP Rules”] is notified vide notification no. 28/2012-ST dated 20.6.2012 which is effective from 1.7.2012. *The PoP Rules would be effective for the first time in India.* Prior to 1.7.2012, there were separate rules for determining ‘import of services’ [Taxation of Services (provided from outside and received in India) Rules, 2006] and ‘export of services’ [Export of Services Rules, 2005] but no rules to determine the place of provision of services. However, w.e.f. 1.7.2012, the PoP Rules has been enacted to determine when the services would be considered as provided in the taxable territory and when it would not. Thus, the present PoP Rules is neutral to Imports and Exports. With the introduction of the PoP Rules, the import and export rules² have been rescinded. The only requirement would be whether a service is provided in the taxable territory (pursuant to place of provision of service rules). If yes – liable, if no – not liable. The Central Board of Excise & Customs (CBEC) has issued ‘*Taxation of Services – An Education Guide*’ dated 20.6.2012, *inter alia* giving detailed explanation on the Place of Provision of Service Rules, 2012 (“PoP Rules) in Guidance Paper 5 - “Place of Provision of Service Rules, 2012”. The analysis of the PoP Rules in this paper draws heavily from the said

² The Export of Services Rules, 2005 and the Taxation of Services (Provided from Outside India and Received in India) Rules, 2006.

Education Guide. References have been made to paragraph numbers of the Education Guide in the foot notes and in the text in italics.

In this regard, it is to be noted that various issues have been analysed with the limitations arising due to the PoP Rules being just in place w.e.f. 1.7.2012. Hence there is a total absence of precedents. The limitations may be overcome by the passage of time as the law gets evolved.

Basic philosophy

- 2.2 The Place of Provision of Service Rules [“PoP Rules”] provide where a service is deemed to have been provided. If the place of provision of service is in the taxable territory it will be liable for service tax. If the place of provision of service is not within the taxable territory it will not be liable for service tax.
- 2.3 The essence of the PoP Rules is that service is to be taxed in the jurisdiction of the place of consumption of service. In practice, the “*place of consumption*” i.e. the place where a service is used may not often be very easy to ascertain and may often lead to controversies. Hence the PoP Rules have been formulated specifically fixing the place of consumption by legislation. Further, the *Education Guide* clarifies ‘*nearest ‘proxies’ are adopted to provide specificity in the interpretation as well as application of the law.*’
- 2.4 The basic rule is that the place of provision of service shall be the location of the service receiver. However, exceptions have been provided in case of performance based services, immovable property based services, certain specified services and transportation service etc. where other criteria such as location of service provider, location of

performance of service, etc. are relevant. Services being intangible, the provision thereof is volatile and transient. Determining the location of the service provider and service recipient maybe possible with better precision as against the place of provision of service. Hence the location of the service provider and service recipient are used as proxies. Further, location of the service provider and service recipient determined pursuant to the PoP Rules and Explanation 3(b) to section 65B(44) is very crucial to determine the place of provision of the service. Infact in many cases it would be where the service provider or service recipient is located and not where the service is provided or utilised. The location of service provider and location of service recipient are sought to be defined separately – a write up of which is given in the **Annexure A**.

Purpose

- 2.5 The PoP Rules are intended to be relevant for the following³:
- (i) Taxation of cross-border transactions in services.
 - (ii) Transactions with service providers and service recipients in the state of Jammu & Kashmir and the rest of India. If service is provided in Jammu & Kashmir – not liable, if provided in rest of India – liable.
 - (iii) Service providers operating within India with multiple locations and without centralized registration – the PoP Rules would be relevant in determining the jurisdiction applicable for their operations.
 - (iv) Determination as to when a service is ‘wholly consumed’ in a Special Economic Zone (“SEZ”) to avail outright exemption.

3 Place of Provision of Service Rules – specific rules

³ *Para 5.1.2 of the Education Guide.*

General Rule – location of service recipient [rule 3]

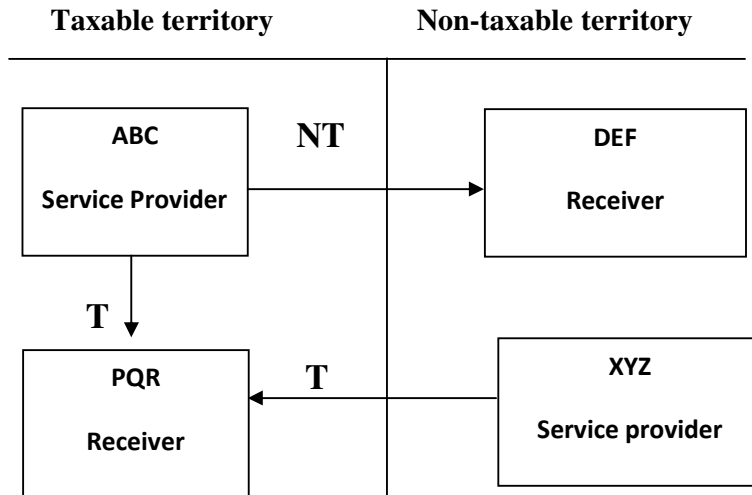
3.1 The general or default rule is that the place of provision of a service shall be the *location of the service receiver* unless the transaction of service falls within any of the other rules mentioned below [paras 3.2 – 3.22]. The *Education Guide* in *para 5.3.1* sums up the impact of this rule as under:

“The principal effect of the Main Rule is that:-

A. Where the location of receiver of a service is in the taxable territory, such service will be deemed to be provided in the taxable territory and service tax will be payable.

B. However if the receiver is located outside the taxable territory, no service tax will be payable on the said service.”

The above has been pictorially captured by the *Education Guide* (*para 5.3.2*) as under:



T = Taxable NT = Non-Taxable

3.2 In case the location of the service receiver is not available in the ordinary course of business, the place of provision shall be the location of the service provider.

Place of provision of ‘performance based’ services to be location where the services are actually performed [rule 4]

3.3 The place of provision of ‘performance based services’ shall be the location where the services are actually performed. ‘Performance based’ services are categorized by the PoP Rules to be of two types which may conveniently be described as:

- (i) Work upon ‘goods’;
- (ii) Work upon ‘individuals’.

3.4 ***Type 1: Work upon goods*** *i.e.* services provided in respect of ‘goods’ that are required to be made physically available by the recipient of service to the provider of service, or to a person acting on behalf of the provider of service, in order to provide the service. In such cases the place of provision of service would be where the services are actually performed. Example, repairs, courier, cargo handling, storage, technical testing, inspection, etc⁴. The *Education Guide* has clarified (*para 5.4.1*) that this category will not cover ‘goods’ provided by the service recipient which are not material to the provision of the service by the service provider e.g. free samples provided by a client – manufacturer to a market research agency to be distributed in order to conduct a survey.

3.5 The above rule has two exceptions:

- (i) when such services are provided from a remote location by way of electronic means the place of provision shall be the location where goods are situated at the time of provision of service.

⁴ Para 5.4.1 of the Education Guide

- (ii) the performance based criteria will not apply in the case of a service provided in respect of goods that are temporarily imported into India for repairs and are exported after repairs without being put to any use in taxable territory (except that use which is required for such repair). Thus, the PoP for the above repair services would be the location of service recipient and not where the services are performed.

3.6 ***Type 2: Work upon individuals*** *i.e.* services provided to an individual, represented either as the recipient of service or a person acting on behalf of the recipient, which require the physical presence of the receiver or the person acting on behalf of the receiver, with the provider for the provision of the service. In such cases the place of provision of service would be where the services are actually performed. These are essentially personalized services e.g. beauty treatment, cosmetic surgery, classroom teaching, etc⁵.

Place of provision of services relating to immovable property would be the location of immovable property [rule 5].

3.7 The place of provision of the following services shall be the *place where the immovable property is located* or intended to be located [i.e. property to come into existence]:

- (i) services provided *directly in relation to* an immovable property. This would include services granting right to use, occupation, enjoyment and exploitation of immovable property or services ‘upon’ or for bringing into existence an immovable property or services that alter the nature and value of the property or services

⁵ Para 5.4.3 of the Education Guide.

for transfer of, or determination of title to, the property⁶. E.g. construction, repair, renovation of a building or a civil engineering work; survey / exploration / exploitation of land and sea-bed, property management, etc⁷. This would not include services that have only an indirect bearing on an immovable property e.g., services of a tax consultant on capital gains on land or feasibility studies for an investment in a property, advice on property prices, etc.⁸;

- (ii) services provided by experts and estate agents in relation to immovable property e.g. auctioneers, engineers, valuers, surveyors, legal services in relation to planning permission, etc.⁹;
- (iii) provision of hotel accommodation by a hotel, inn, guest house, club or campsite, by whatever name called;
- (iv) grant of rights to use immovable property e.g. renting;
- (v) services for carrying out or co-ordination of construction work, including architects or interior decorators.

⁶ Para 5.5.2 *ibid.*

⁷ Para 5.5.3 *ibid.*

⁸ Para 5.5.2 and 5.5.5 of the Education Guide.

⁹ Para 5.5.3 *ibid.*

Place of provision of services relating to events to be the place where the event is actually held [rule 6]

3.8 The place of provision of the following services shall be the *place where the event is actually held*–

(i) Services provided by way of –

(a) admission to; or

(b) organization of, and

(ii) services ancillary to admission of

a cultural, artistic, sporting, scientific, educational, or **entertainment** event, or a celebration, conference, fair, exhibition, or similar events.

However, it is to be noted that admission to entertainment events and amusement facilities is covered in the Negative List [s. 66D(j)] and “entertainment event” has been defined in section 65B(24) to include concerts, drama, sporting events, etc. Hence admission to such entertainment events would not be liable for service tax and hence the PoP Rules would not be relevant for these events.

Place of provision of ‘performance based’ or ‘immovable property based’ or ‘event based’ services where they are provided at more than one location including a location in the taxable territory [rule 7].

3.9 Where any ‘performance based’ or ‘immovable property based’ or ‘event based’ services referred to paras 3.3 to 3.8 above are provided at more than one location, including a location in the taxable territory, its place of provision shall be the *location in the taxable territory where the greatest proportion of the service is provided*. Example¹⁰, where a firm provides technical inspection and certification services of a product to its client at Maharashtra (say, 20%), Kerala (say, 25%) and Colombo (say, 55%),

¹⁰ Para 5.7.1 of the Education Guide

then notwithstanding that the greatest proportion of the service is done at Colombo – a non-taxable territory, the place of provision of the entire service would be the place where the greatest proportion of the service within the taxable territory is done i.e. Kerala. Thus, in service exports even if a small percentage of the work is carried out in India, the exporter would have to pay service tax on the entire amount though the major part of the service is provided in non-taxable territory. Similarly, in case of service imports, the recipient maybe liable to pay service tax under reverse charge on the whole value even if a small percentage of the work is carried out in India. Hence, the said rule would cause undue hardships in cases where the service providers are required to perform substantial part of their service outside the taxable territory and only a small part of the service is performed in India. However the Education Guide in para 5.7.1 gives a caveat “This rule is, however, not intended to capture insignificant portion of a service rendered in any part of the taxable territory like mere issue of invoice, processing of purchase order or recovery, which are not by way of service actually performed on goods”.

- 3.10 Under the Export of Service Rules, 2005, if a ‘performance based’ service is partly performed outside India it would be considered as performed outside India and be entitled to export exemption. Under the PoP Rules, this exemption would not be available by virtue of the above rule. However similar imports would continue to be liable for service tax on the entire amount.

Where provider and receiver are located in taxable territory the place of provision of services shall be the location of service recipient [rule 8].

3.11 The basic philosophy of the PoP Rules is to fix the location where service is provided based on the consumption. The general rule (Rule 3) is that the place of provision of a service shall be the location of the service receiver unless the transaction of service falls within any of the other rules. In some cases, (as explained above) the place of provision of service is based on the other criteria viz., where -

- (i) the service is actually performed (Rule 4); or
- (ii) the land is located (Rule 5); or
- (iii) the event is actually held (Rule 6).

However, Rule 8 of the PoP Rules overrides rule 4, 5 and 6 by providing that where the location of the service provider as well as that of the service receiver is in the taxable territory, the place of provision of the service shall be the location of the service receiver. The implication of this rule is that it overrides rules 4 to 6 (paras 3.3 to 3.8). For example¹¹, the place of provision of helicopter repair services performed in Nepal would be Nepal (i.e. non-taxable territory) by virtue of rule 4 [refer para 3.3]. But if the service provider and the service receiver are located in India (e.g. Hindustan Aeronautics Ltd. – the service provider and Pawan Hans Ltd. – the service recipient) the services would be considered as provided in India (in the taxable territory), notwithstanding rule 4.

3.12 In this regard the following maybe noted. It appears that rule 4, 5 and 6 is necessary since the nature of services envisaged in the said rules indicate that the services are consumed where -

- a. it is actually performed (Rule 4); or
- b. the land is located (Rule 5); or
- c. the event is actually held (Rule 6).

¹¹ Para 5.8.2 of the Education Guide

Thus it is dependent on where the services have been utilized and not where the provider or receiver of service is located. If the services covered in rule 4, 5 and 6 of the PoP Rules are utilized outside the taxable territory the consumption of the services can be said to have taken place outside the taxable territory. The mere fact that both the service provider and service receiver are located within the taxable territory may not alter the above position. However, the philosophy of the PoP rules is otherwise. The intention of rule 8 it appears is to trigger the 'proxy' rule and consider the location of service recipient as place of provision and not where the service is actually utilized in a case where the service provider and recipient are based in the taxable territory!

- 3.13 However, conversely, even if the place of provision of service is in the taxable territory but the provider and the receiver of the service are located outside the taxable territory, the services are exempted vide entry 34(c) of Notification no. 25/2012-ST dated 20.6.2012. Thus, if a French architect provides a UK company certain designs for an office to be located in India the place of provision of the services by virtue of rule 5 would be in the Taxable Territory. However, it would be exempt from service tax due to Notification no. 25/2012-ST dated 20.6.2012.

Place of provision of ‘specified services’ shall be the place of service provider [rule 9].

3.14 The place of provision of the following ‘specified services’ shall be the *location of the service provider*:

- (a) Services provided by a banking company, or a financial institution, or a non-banking financial company, to ‘account’ holders’. The word ‘account’ is defined in rule 2(b) of the PoP Rules as ‘an account bearing interest to the depositor and includes a non-resident external account and non-resident ordinary account’. The *Education Guide* clarifies that the services normally provided to account holders are operation of bank accounts, transfer of money, lending etc.; and services not normally provided to account holders are financial leasing, merchant banking, securities and forex broking, advisory services, etc.¹² For services provided to non-account holders, the place of provision of service would be location of service recipient (rule 3 – para 3.1 above – default rule) where it is known (ascertainable in the ordinary course of business) and the location of the service provider otherwise¹³;
- (b) Online information and database access or retrieval services;
- (c) Intermediary services (see para 3.15 below);
- (d) Service consisting of hiring of means of transport excluding aircrafts and vessels (other than yachts), upto a period of one month. The PoP for hiring of aircrafts and vessels (other than yachts), whether for more or less than one month, would be the location of the Service Recipient.

¹² Para 5.9.3 and para 5.9.4

¹³ Para 5.9.4 *ibid.*

3.15 An ‘intermediary’ is defined in rule 2(f) as meaning “*a broker, an agent or any other person, by whatever name called, who arranges or facilitates a provision of 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.*” The *Education Guide* has clarified (*para 5.9.6*) the following points -

(a) There are two supplies in a situation involving an intermediary-

- (i) the supply of services by the principal to a third party;
- (ii) the supply of services by the intermediary to the principal.

An intermediary is essentially an agent, whose services to his principal are clearly identifiable and have a distinct value and who cannot alter the nature and value of the supply made by the principal to the third party.

(b) W.e.f. 1.10.2014 an intermediary for goods (e.g. a commission agent for goods or a stock broker) would also be covered by this rule. Accordingly w.e.f. 1.10.2014, the place of provision of the services of an intermediary for goods is the location of service provider. This would bring a lot of commission agents for goods in India within the ambit of service tax though they would be bringing in substantial foreign exchange by providing services to overseas service recipients.

(c) A person who arranges or facilitates the provision of service (referred to as main service) but provides the main service on his own account is also not covered by this rule.

Further, the *Education Guide* gives the following examples of intermediaries (*para 5.9.6*):

- (i) Travel Agent (any mode of travel);
- (ii) Tour operator
- (iii) Commission agent (for services)

(iv) Recovery agent.

3.16 The *Education Guide* has clarified (*para 5.9.6*) that a freight forwarder who buys-in and sells freight transport as a principal would not be regarded as an intermediary and place of provision of service which in this case will be place of transportation of goods will be governed by rule 10 [refer para 3.17]. However, if the freight forwarder acts as an agent of an importer or an exporter by arranging freight transport, he would be considered as an 'intermediary' and place of provision of service would be his location. The *Education Guide* has also clarified (*para 5.9.6*) that the call centres who provide services to their clients by dealing with the customers of the clients on the client's behalf, but actually provide these services on their own account, will not be categorized as intermediaries.

Place of provision of goods transportation services other than a goods transportation agency services shall be the place of destination of goods [rule 10].

3.17 The place of provision of services of transportation of goods (except by a goods transportation agency or by way of mail or courier) shall be the *place of destination of the goods*. Thus, services provided by shipping lines / airlines for transportation of goods from India to a place outside India (exports) would not be liable (since it would be considered as provided in non-taxable territory). As regards imports i.e. services provided by shipping lines / airlines for transportation of goods from a place outside India to a place in India, the place of provision of service is India. However, it may be noted that the services by way of transportation of goods by an aircraft or vessel from a place outside India to the customs station of clearance in India is an item in the negative list [section 66D(p)] and hence would not be taxable.

Place of provision of services of a goods transportation agency (GTA) shall be the location of the ‘person liable to pay tax’ [rule 10 - proviso]

- 3.18 The place of provision of service in case of GTA services shall be *location of the person liable to pay tax*. In terms of rule 2(1)(d)(i)(B) of the Service Tax Rules, 1994, for services of goods transportation agency services in case of specified categories of persons liable to pay the freight, such persons liable to pay freight would be the person liable to pay service tax and if such person is located in a non-taxable territory it is the GTA who would be liable to pay service tax.

Place of provision of passenger transportation services shall be the place of embarkation for ‘continuous journey’ [rule 11]

- 3.19 The place of provision in respect of a passenger transportation service shall be the *place where the passenger embarks on the conveyance for a continuous journey*. Continuous journey is defined in rule 2(d) of the PoP Rules to mean a journey for which –
- (a) a single ticket is issued; or
 - (b) more than one ticket or invoice is issued at the same time, either by one service provider or through one agent acting on behalf of more than one service provider,
- and which involves no stopover between any of the legs of the journey for which one or more separate tickets or invoices are issued.

Place of provision of services provided on board a conveyance [rule 12].

- 3.20 Place of provision of services provided on board a conveyance during the course of a passenger transport operation, including services intended to be wholly or substantially consumed while on board, shall be the *first*

scheduled point of departure of that conveyance for the journey. The example given by *Education Guide (para 5.12.2)* is as under:

“A video game or a movie-on-demand is provided as on-board entertainment during the Kolkata-Delhi leg of a Bangkok-Kolkata-Delhi flight. The place of provision of *this service will be Bangkok (outside taxable territory, hence not liable to tax).*

If the above service is provided on a Delhi-Kolkata-Bangkok-Jakarta flight during the Bangkok-Jakarta leg, then the place of provision will be Delhi (in the taxable territory, hence liable to tax).”

Powers to notify description of services or circumstances for certain purposes [rule 13].

- 3.21 In order to prevent double taxation or non-taxation of the provision of a service, or for the uniform application of rules, the Central Government shall have the power to notify any description of service or circumstances in which the place of provision shall be the *‘place of effective use and enjoyment of a service’*. In this regard it has to be appreciated that under the service tax law there are no Double Tax Avoidance Agreements between Governments of various countries to provide relief from double taxation in case where Indian service tax is payable on services provided by an overseas company which is also charged to VAT (or other similar taxes) in the country of the overseas company. Further, the law on service tax also does not have a section parallel to section 91 of the Income tax Act, 1961 to provide for a unilateral tax relief.

Tie breaker test – later rule to apply [rule 14]

- 3.22 Where the provision of a service is, *prima facie*, determinable in terms of more than one rule discussed above, it shall be determined in accordance with the ***rule that occurs later*** among the rules that merit equal consideration.

Summing up

3.23 The above rules maybe summed up in a table as under:

Sl. No.	Description of service	Place of Provision of service
1.	All services (except if specifically covered below)	Location of service recipient. If location of service recipient not available in ordinary course, location of service provider.
2.	Specified ' <i>performance based</i> ' services	Location of performance of service
3.	Services relating to ' <i>immoveable property</i> '	Where the immoveable property is located or intended to be located
4.	Services relating to ' <i>events</i> '	Where the event is actually held
5.	Performance based / immoveable property based / event based services provided at more than one location including a location in the taxable territory.	Location in the taxable territory where the greatest proportion of service is provided.
6.	Where the service provider and receiver are located in the taxable territory	Location of service recipient notwithstanding the location of performance, immoveable property or event
7.	Specified services [services provided to account holders by banks, etc.; online information and database access or retrieval services; intermediary services; and hiring of means of transport excluding aircrafts and vessels (except yachts) upto a month]	Location of service provider
8.	Goods transport (other than by a goods transportation agency or by way of mail or courier)	Location of destination of goods

9.	Goods Transport Agency services (i.e. transport by road in a goods carriage)	Location of the person liable to pay service tax.
10.	Passenger transportation services	Place of embarkation for 'continuous journey'
11.	Services on-board a conveyance	First scheduled point of departure
12.	Services <i>prima facie</i> fitting into two or more of the above rules - tie-breaker	Later rule to apply

Annexure A

Location of service provider and service recipient

Rules to determine Location of service provider and service recipient

A1. The ascertainment of location of the service provider and the service recipient are significant in the PoP Rules.

A2. The “*location of the service provider*” is ascertained by the application of the following rules *in seriatum* -

Rule 1: where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained.

Rule 2: where the service provider is not covered by rule 1 above, the location of service provider would be determined by the following rules:

- (i) the location of his ‘*business establishment*’; or
- (ii) where the services are provided from a place other than the business establishment, that is to say, a ‘*fixed establishment*’ elsewhere, the location of such establishment; or
- (iii) where services are provided from more than one establishment, whether business or fixed, the *establishment most directly concerned* with the provision of the service; and
- (iv) in the absence of such places, the *usual place of residence* of the service provider.

A3. The “*location of the service recipient*” is ascertained by the application of the following rules *in seriatum* –

Rule 1: where the service receiver has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;

Rule 2: where the service recipient is not covered by rule 1 above, the location of service recipient would be determined by the following rules:

- (i) the location of his *business establishment*; or
- (ii) where services are used at a place other than the business establishment, that is to say, a *fixed establishment* elsewhere, the location of such establishment; or
- (iii) where services are used at more than one establishment, whether business or fixed, the *establishment most directly concerned* with the use of the service; and
- (iv) in the absence of such places, the *usual place of residence* of the service receiver which in case of telecommunication service, shall be the billing address.

A4. The terms ‘establishment’, ‘business establishment’, ‘fixed establishment’, ‘establishment most directly concerned in providing the service’, etc. have not been defined in the law. Hence meanings of these terms are to be ascertained as is generally understood and in the context in which they are used. As regards the term *usual place of residence*, it is defined only for body corporates as the place of incorporation or where they are legally constituted. The terms are explained below.

Establishment

A5. The Black’s Law Dictionary - 6th edition – page 546 defines the term “establishment” as follows:

“**Establishment.** An institution or place of business, with its fixtures and organized staff. *Abnie v. Ford Motor Co.* Ohio Com. Pl. 195 N. E. 2d 131, 135. State of being established.”

Thus, the term establishment envisages a structure or a place as well as human resources to conduct the business. A ‘*branch*’ or ‘*agency*’ or ‘*representational office*’ in any territory is considered to be an ‘establishment’ in the territory [Explanation 3 to s. 65B(44)].

- A6. An establishment could be a ‘business establishment’ or a ‘fixed establishment’.

Business Establishment

- A7. The *Education Guide* clarifies that “*a business establishment is the place where the essential decisions concerning the general management of the business are adopted, and where the functions of its central administration are carried out. This could be the Head Office or a factory or a workshop or shop / retail outlet. Most significantly , there is only one business establishment that a service provider or receiver can have.*” In this context one may also usefully refer to the TRU circular dated 27.7.2005 which in the context of the erstwhile explanation to s. 65(105) had clarified as follows: “*The business establishment is the principal place of business, usually head office or headquarters or the seat from which business is run. There can be only one such place. A business may have headquarters in one country but branches in many other countries. A company may be incorporated in one country but does the business entirely from a head office in another country. In such cases, business establishment is treated to be in a country where the business is entirely done from the head office.*”

Fixed Establishment

A8. The term “fixed establishment” consists of two words “fixed” and “establishment”. As explained in para A5 above an “establishment” is a place having a structure and human resources to carry on business. Further the word “fixed” would denote that the establishment must have a sufficient degree of permanence. Thus, the definition of the term as clarified in the *Education Guide* i.e. “*a place (other than a business establishment) which is characterized by a sufficient degree of permanence and suitable structure in terms of human and technical resources to provide the services that are to be supplied by it, or to enable it to receive and use the services supplied to it for its own needs.*” would be within the normal meaning of the term. In a nutshell three factors are determinative of a ‘fixed establishment’: (i) a **p**lace; (ii) **p**eople, (iii) with a degree of ‘**p**ermanence’ [the three PPPs like a three piece suit!].

Illustrations

(Per Education Guide –para 5.2.7 – illustrations 2 &3)

- An overseas business house sets up offices with staff in India to provide services to Indian customers. Its fixed establishment is in India.
- A company with a business establishment abroad buys a property in India which it leases to a tenant. The property by itself does not create a fixed establishment. If the company sets up an office in India to carry on its business by managing the property, this will create a fixed establishment in India.

Usual Place of Residence

A9. The term ‘usual place of residence’ for a ‘body corporate’ (i.e. incorporated bodies) is defined by the *Explanation to* clauses (h) and (i) of rule 2 to mean the place of incorporation or where they are legally constituted. As regards individuals, to whom the criterion of ‘usual place

of residence’ would apply more appropriately the *Education Guide* clarifies the meaning of the term as follows:

“The usual place of residence of an individual is the place (country, state, etc.) where the individual spends most of his time for the period in question. It is likely to be the place where the **individual has set up his home, or where he lives with his family and is in full time employment.** Individuals are not treated as belonging in a country if they are short term, transitory visitors (for example if they are visiting as tourists, or receive medical treatment or for a short term language / other course). **An individual cannot have more than one place of usual residence.**”

Establishment most directly concerned in providing/ receiving a service relevant.

A10. The rules provide that where services are provided / received from more than one establishment, whether business or fixed, the *establishment most directly concerned* with the provision / receipt of the service would be relevant. Thus, where a provider who has his headquarters in the US and a branch in India provides services directly from his headquarters to an Indian company, the location of the service provider would be US (i.e. outside the taxable territory) although he has an establishment in India and the location of service recipient would be India i.e. taxable territory. However, where the Indian branch provided services to the Indian company, the location of both the service provider and service recipient would be India.

A11. In this context, in order to ascertain the ‘*establishment more directly concerned in providing the service*’, the *Education Guide* provides guidance as follows:

“This will depend on the facts and supporting documentation, specific to each case. The documentation will include the following:-

- the contract(s) between the service provider and receiver;

- where there are no written contracts, any written account (documents, e-mail etc) between parties which sets out in detail their understanding of the oral contract;
- in particular, for suppliers, from which establishment the services are actually provided;
- in particular, for receiver, at which establishment the services are actually consumed, effectively used or enjoyed;
- details of how the business fits into any larger corporate structure;
- the establishment whose staff is actually involved in the execution of the job;
- performance agreements (which may be indicative both of the substance and actual nature of work performed at a particular establishment).”

Establishment in taxable territory and non-taxable territories of a person are considered as separate entities

A12. A ‘branch’ or ‘agency’ or ‘representational office’ in any territory is considered to be an ‘establishment’ in the territory [Explanation 3 to s. 65B(44)]. Further, Explanation 3(b) to s. 65B(44) defining the term ‘service’ provides that an establishment (e.g. branch, agency or representative office) of a person located in the taxable territory and another establishment of such person located in a non-taxable territory will be separate persons.

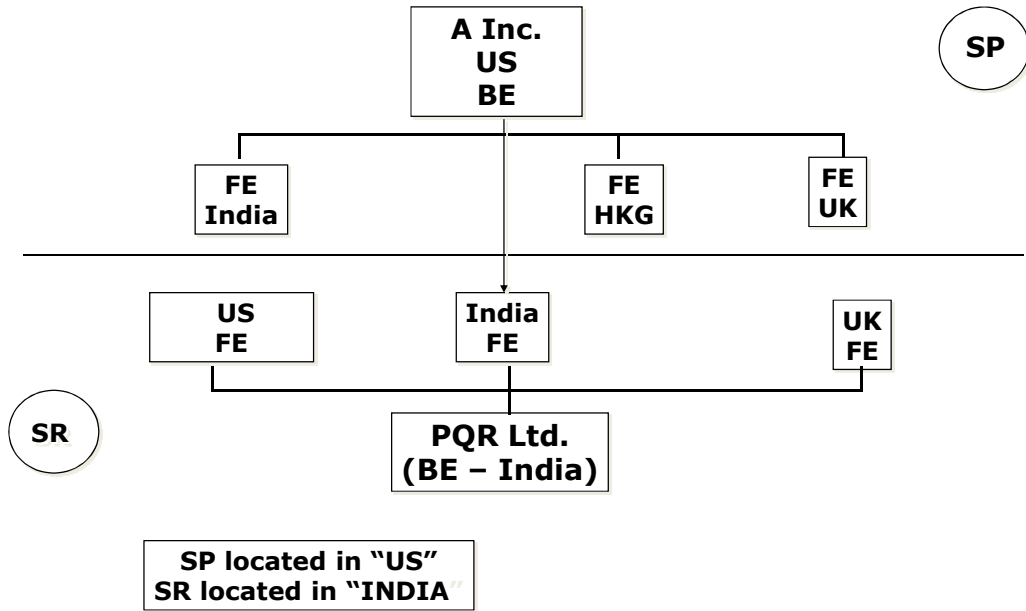
A13. One consequence of the above may be that a transaction between say, a US Head office of a company and its Indian branch may be considered as ‘service’ if the transaction satisfies the definition of ‘service’ as per section 65B(44). In such a case, the location of the service provider would be US (outside the taxable territory) and the location of the service recipient would be India (within the taxable territory).

A14. Another consequence of the rule stated above is that where the service provider / recipient has a business / fixed establishment in several countries each of these establishments would be treated as separate persons and accordingly, the location of the service provider / recipient vis-à-vis the particular service would be determined by this rule. For e.g. where the US branch of an Indian company receives services from its overseas suppliers the location of both the service provider and service recipient would be considered as outside the taxable territory.

Diagrammatic examples of application of the rules to determine location of Service Provider and service recipients

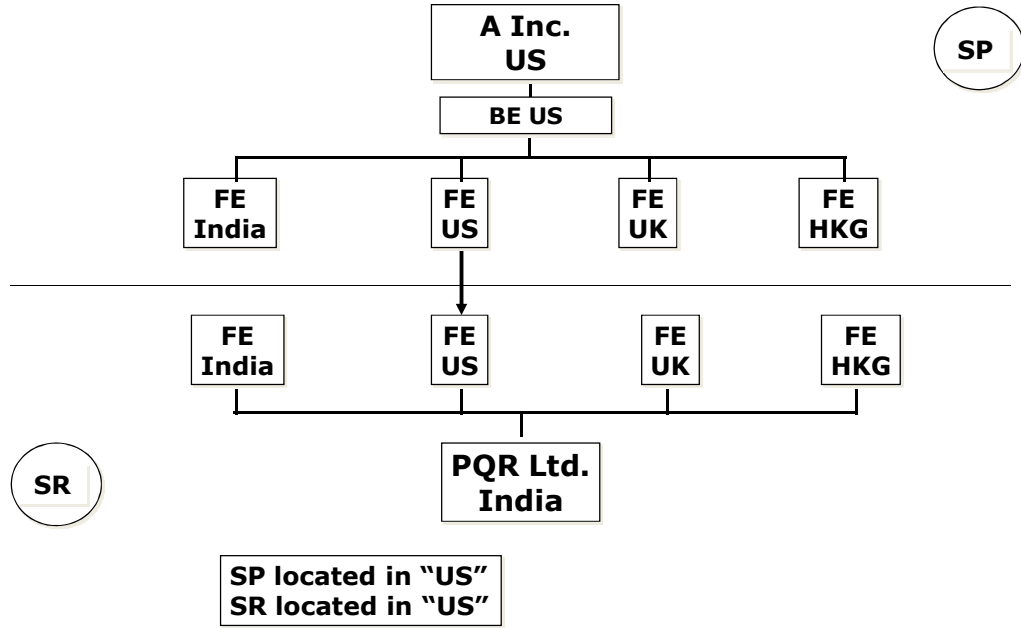
A15. The application of the above rules to determine location of Service Provider (SP) and Service Recipient (SR) can be explained by way of diagrammatic examples.

Example 1



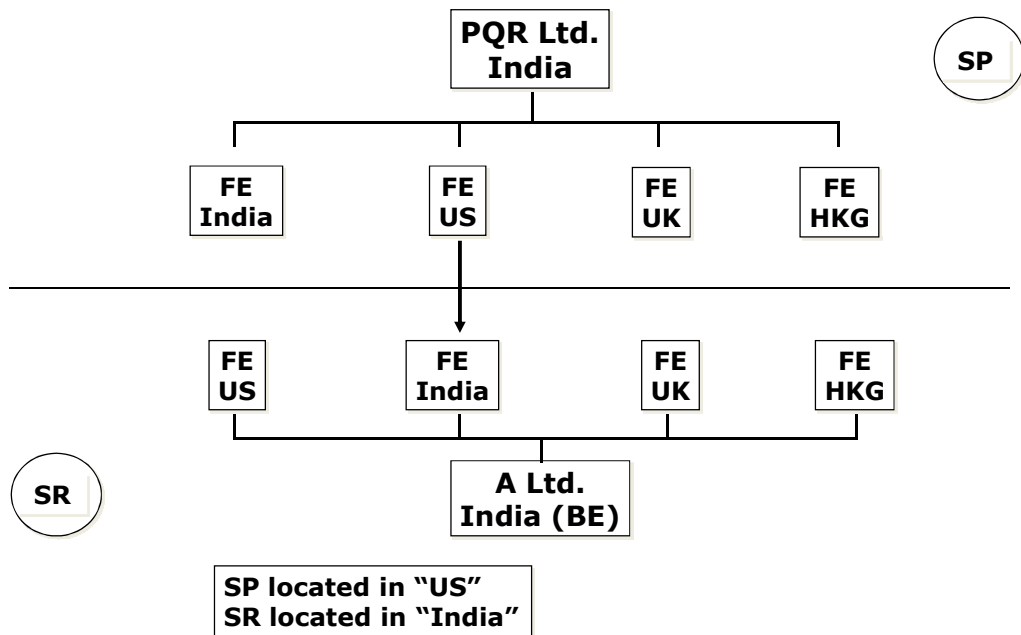
Business establishment of A Inc. a US company provides services directly to a fixed establishment of an Indian Company PQR Ltd.

Example 2



US Fixed establishment of A Inc. a US company provides services to a US Fixed establishment of an Indian Company PQR Ltd.

Example 3



US Fixed establishment of PQR Ltd. an Indian company provides services to the Indian Fixed establishment of an Indian Company A Ltd.

Example 4

