# TAXING 'SERVICE': JURISDICTIONAL ISSUES

**Abstract**

Service has meant service performed by one person for another but in twentieth century service products were commoditised and sold in the manner of goods. Since then services fall within two categories: a) 'being in service', which means people working for salary, and b) 'being of service', which means a service commodity sold in standard units in the market. Both the forms denote activity. Service tax is also put on commerce in temporary transfer of rights or duty of forbearance. Thus tax laws recognise two kinds of services: 'service of activity' and 'service of non-activity'. In 'service of activity' service appears as a form of fire which though intangible has measurable impact. In such cases there is a 'unity of consumption and provision' which marks the location of the service. This location creates the service tax jurisdiction. In 'service of non-activity' the legislature may need to define a principle for determining the tax jurisdiction as the one of 'unity of provision and consumption' would not apply.

## I Introduction

SERVICE IN its pure form is an activity and has no physical shape; it can be compared with fire, as like fire, it shows itself as a force or pure energy, which though invisible, has visible and measurable results in the material world. In the lighting of a fire, the combustion of air that takes place is one and the same as the fire itself, so much so that the point of fire and the point of combustion of air are geographically the same. This physical phenomenon is self-evident to all and it is mostly marked by the emission of light, especially at its base, though that light is only a consequence of the fire not its essential attribute. Emission of heat at the very place where combustion takes place, though not visible, is an essential feature of any fire. Likewise in relation to service it can be said that its creation, delivery and consumption are all at once. The 'point of combustion' of any service and time of delivery is thus the place and the time in which it comes into existence, whether commoditised or not. It is at this point of combustion that service makes an impact on its user or recipient, and is thereupon consumed. It is for this combustion that service has use and hence assumes economic value. There is unity in time and space of providing service and receiving service that distinguishes a service product from any other.

In tax legislation however the term 'service' has been given a meaning that cannot be borne by the word's known meanings. Service tax in India[1] is also taxed when people undertake not to perform some activity for certain consideration, and this

1 The proposedGoods and Services Tax (GST) will subsume service tax in itself and create thirty six taxing jurisdictions in India besides that of Union of India which will have concurrent jurisdiction with the states. This paper raises the question of service tax jurisdiction which is likely to have significance for inter-state commercial transactions within India besides transnational trade in services.

adds another dimension to the legal meaning of the word 'service'. In common parlance not doing something is not regarded an activity and its being called a service can only be in a metaphysical way. A legislator has the privilege of giving any meaning to a term through an enactment. The different kinds of such 'artificial services' or 'deemed service' are identifiable and distinguishable from the mainstream service products which adhere to the linguistic meaning of the word.

Service tax in India has been extended to most products after 2004, and a barrage of arguments have been made that services are intangible, and therefore the place of consumption is unknowable.[2] The argument made is that the only method to know where the consumption took place is to discover the residence of the person on whose order the services were performed, because the person's identity can be read from the same contract paper that enables the service provider to seek payment for his services. Since the law has not said anything to that effect, this argument is actually an advice to the courts to define tax jurisdiction in a particular manner. The rationality and relevance of this argument is not self-evident. Moreover their assumption that it is impossible to determine the point of consumption is incorrect if we use rationalist tools to observe the characteristics of a service and distillate that substance which the law of service tax in India tries to bring under the tax net.This paper is an exploration of the grammar of services, to identify the different elements of the phenomenon and to pin point its location which will bring it within or take it out of the Indian taxing jurisdiction. [3]

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3 The context of this paper is the dispute regarding taxability of services that are rendered within India but under a contract of service in which the contractee is resident abroad. The decision of Customs Excise and Service Tax Appellate Tribunal (in short CESTAT) in the matter of *Paul Merchants Ltd. Versus Commissioner Of C. Excise, Chandigarh* (2013 (29) S.T.R. 257 (Tri. - Del.)) says thus:-"The principle of equivalence between the taxation of goods and taxation of service had been laid down by the Apex Court in the case of Association of Leasing & Financial Service Companies v. Union of India (2010 (20) S.T.R. 417 (S.C.)) and All India Federation of Tax Practitioners v. Union of India (1998 (104) E.L.T. 595 (Del.)) in the context of constitutional validity of levy of Service Tax on certain services. This principle does not imply that Service Tax should be levied and collected in exactly the same manner as the levy and collection of tax on goods or that export of service should be understood in exactly the same manner in which the export of goods is understood". And they added as follows:-"..when the person on whose instructions the services in question had been provided by the agents/sub-agents in India and who is liable to make payment for these services, is located abroad, the destination of the services in question has to be treated abroad."It is the respectful submission of the author that this view is not based on a proper appreciation of the intrinsic character of services and this paper intends to explore that nature.

## II Evolution of service: slaves, service-men, and service shops

Perhaps the singular reason for the mystery that has engulfed the current debate on the identification of the taxable event in service tax law is that 'service', by its common meaning, is not subjected to service tax or value added tax (VAT). Service, in the most exalted sense, has been used exclusively for military service, and to date, the armed forces seem to exercise a preferential right over its usage. Till the Napoleonic era, military service was the hall mark of excellence in service, even though the word 'service' has humble origins in the word 'slavery'. Landed aristocracy; the British Duke, the Continental Count and Marquis, the Mughal Mansabdar, or the Meiji Daimyo, all supported their sovereign by providing armed men on foot or on mount, and the revenue necessary for the continuance of the state and its comforts. The landed feudal lords and even the lesser gentry were dependent on a large retinue of men in their personal employment who together governed the fiefdoms. The servants of the monarch were not as yet formed into a hierarchal bureaucracy of modern times and were generally few in numbers. The consideration paid to these persons in employment did not correspond to the quantity of service received, nor was the consideration quantifiable in money terms, as in most cases the security attendant on 'being in service' and informal favours were its greatest reward. Till the advent of the post-modern society, the question of taxing services must have seemed as alien to the human mind, as taxing water or air; and any suggestion of taxing military service would even today be viewed with great patriotic abhorrence. The introduction of the levy of service tax had to wait for certain developments in the market place.

The evolution of the concept of services from that of military service to an economic commodity distinct from labour market, that can be purchased and sold through the same market as physical goods, passed through a historical process of development of skills, technology and even more importantly, adoption of a novel business practice, in which a particular service, in a metered quantity, was offered for sale to a buyer. It also coincides with the setting in of the post-modern society, where mass-produced goods failed to meet specific human needs and the upper crust of the society rebelled against cookie cutter factory products. The market place saw a process of 'commoditisation' of service products,[4] in which they were packaged in metered

4 Economists tend to study the evolution of service sector more in terms of rise in per capita income than chronology. However it is not in doubt that service sector had minimal presence before the twentieth century. The global economy before nineteenth century had varied forms but what is indisputably common to all was that there was widespread use of service tenement instead of salary and the economy was overwhelmingly rural where many goods and services were provided without cash dealings. The manner in which goods and services were produced and distributed in pre-industrial economies, the market for these could not grow. Market for goods gained substance in industrial age and the growth of service sector is a feature of the

dose, advertised through attractive display items, and sold over the counter, and began to spread out in the market so much that now its size has become much larger than the goods sector of the economies in many countries. The commoditisation of service, nevertheless, was not capable of making inroads in many kinds of services, such as military service or the higher managerial functions in a corporate body and most sovereign functions of the state.

There is a self-evident presence of human labour in services (though computing, communication and robotic technologies do tend to minimise the role of human beings in creation and delivery of service). All services take some preparatory time in which skills are honed, or mechanical gadgets employed and certain tasks performed before rendering of the service that is being sold. The actual service sold, though it may have consumed high quantity of physical inputs and possibly input services too, is nevertheless intangible, and can be said to be delivered just when it is consumed, because a service can never be stored. In all services, commoditised or otherwise, but based on human activity have inherent common properties. This paper attempts to peel out those common characteristics, and analyse them under different heads. Certain sale of rights is also treated as service by a deeming fiction. They have been dealt in second part.

## III Characteristics of services as activity

### 'Being-in-service' and 'being-of-service'

The distinction in the traditional form in which service is obtained, and the post-modern version where service is purchased as if they were goods, is best illustrated by the difference in the expressions 'being-in-service' and 'being of service'. Traditionally service has implied personal employment with an employer who has the means to pay wages over a long stretch of time. Managers in private sector or in government remain 'in-service' and for the duration that they do so they are entitled to get a salary. They are selected because the employer thinks they can be of service, and depending on

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post-industrial economy. A World Bank paper on "Growth of Service Sector" observes thus:- "As incomes continue to rise, people's needs become less "material" and they begin to demand more services—in health, education, entertainment, and many other areas. Meanwhile, labour productivity in services does not grow as fast as it does in agriculture and industry because most service jobs cannot be filled by machines. This makes services more expensive relative to agricultural and industrial goods, further increasing the share of services in GDP. The lower mechanization of services also explains why employment in the service sector continues to grow while employment in agriculture and industry declines because of technological progress that increases labour productivity and eliminates jobs. Eventually the service sector replaces the industrial sector as the leading sector of the economy." *Available at*: http://www.worldbank.org/depweb/resource.html (last visited in June 26, 2014).The paper goes on to demonstrate exponential growth of service sector in USA after 1950.

their performance the employer may decide their future reward or whether they should be continued in service. A service holder may not have been 'of any service' to an employer but yet, it may be considered necessary to continue him in service because if he were to leave employment ( the 'being in service') the employer would be deprived of his assistance in case such a contingency arose. In government and larger corporations, removing and hiring is not a matter that can be decided merely on the statistics of how much 'of-service' a service holder has been. Such matters as hiring of employees their rewards or promotions or retrenchment are decided on the basis of a formalised human resource policy, where there is no one-to-one correspondence between the quantity of service rendered by a service holder and his service prospect. An abstract assessment of his utility is however a part of the human resource policy. Theoretically it is possible that a person is 'in-service' but in reality he is not of any service as he may not have contributed to his employer's organisation in any manner. A human resource policy would place a much higher reliance on the assessment of the potential of the employee to be of 'service' (or a threat to the company if he were to join a rival) in future than the quantum of service already rendered. Such 'in service' has not been taxed as VAT because they are not commoditised service and do not take the shape of tradable goods.

Service holders are at times taxed for being in service but that may be done through the modality of professional tax imposed by few states or pay roll tax as in USA. Professional tax[5] and pay roll tax are not commodity taxes and their characteristics are perhaps closer to income tax and not tax on goods and services.The service package offered by a producer as a commodity is a product of human skills; the buyer enters into contract for its purchase, as it will be 'of service'. In the course of the consumption, the buyer does not take on any person in his employment. His liability to pay the consideration arises only for the event of consuming the service and not wages of the service creator. The service itself does not get created but at the very time it is subjected to consumption. Taxable service therefore is one in which a service product is 'of service' to a customer and gets paid for the quantum of service consumed by the customer.

A problem may be raised about certain areas where the supply of service in market, which is in commodity form subject to taxation, borders on the region marked for the service as in employment or the 'being-in-service'. One such case is the provision of service by an agency to which certain labour intensive jobs, such as cleaning, data entry *etc.*, are out sourced. The service provided is the provision of a certain number of human beings for a certain type of task. The actual persons who employed are never 'in service' of the actual consumer of the service. They are in employment of

5 *GDA Security Private Ltd.* v.*UOI*, 2002 (140) E.L.T. 332 (Mad.).

the service provider who does not consume the services. If there is any dispute about the quality of workmanship of the persons employed, then such a matter can be settled as a claim for damages and not for non-delivery of service. This dispute would be of a similar kind if a person visited a restaurant and, noticed a dead cockroach in his plate. The restaurant had completed its promised service by serving food as per order, for but the bad quality lead to a liability of damages. There would be no dispute as between the worker or his union and the consumer of his service.

**The unity of consumption and provision**

A singular characteristic of service of activity is that it cannot be stored. The flip side of this phenomenon is that service does not come into existence till they can be consumed. Few illustrations will explain this characteristic. A hair cutting saloon is an establishment, where all equipment necessary for hair styling, - trimming, cutting, curling, cleaning, *etc.* is available. If no customer enters the premises, the saloon would be of no service to anyone, even though it would retain the potential of rendering service. A taxing event is not created if only the potential of providing service is created. Service of activity, which is taxed, needs to be in a kinetic state or else it cannot have an impact on any one. Creating a saloon with best amenities does not create a service. A barber in a saloon has to cut hair for the event to become taxable and for doing that a customer has to be present to receive that service. There is in the field of such service provision, a complete unity of consumption and provision of service.

The unity of the two is demonstrable in context of restaurant service. A customer begins to use or consume restaurant service no sooner does he park his car in the portico of the eatery. A bellhop takes over his car for parking. Next he consumes the ambience of the dining hall, with its luxurious setting and air conditioning. He is then served by major domo who shows him to a proper seat, which will be to his liking. The steward then helps him select order for food which will match his taste. Finally the food is served, an activity for which the place is clearly recognised. Lastly the waiters help him make payment and the bellhop brings his car so he can drive back with pleasant memories of the time spent. In this process, the customer has consumed a series of services, besides consuming the food. The restaurant service provision begins when the customer reaches the restaurant and ends when he gets back into the vehicle. This restaurant service is an activity which does not get created till it is to be delivered and is extinguished the very moment the service is consumed – all in the course of guests visiting the restaurant and consuming food and parting in pleasantness.

In the above example a situation may arise when a person takes four friends for a dinner to a restaurant. The bill is paid by the host while others avail of the services. In such a situation a confusion may arise if the host, who pays the bill, has consumed the service, or, in other words, if he is the lone service recipient. Whereas the person

paying the bill alone has a right to insure delivery of service, the consumers are all the persons who participate in the process in which the service is created and consumed. In this case, since all five have entered the restaurant and partaken of its service, the service recipients are all five persons no matter that only one placed the order and undertook to pay the charges. The nature of service being a unity of consumption and creation brings it more in harmony with the law of torts. Even if the four guests have no part in the contract for delivery of restaurant services, if there are civil damages arising out of defective service, then all five persons can claim damages.

There are certain services where service is rendered in destructive or violent form and then the payment are not made by the actor who "consumes" the service. An army general who is in the service of a country's army is ordered to march over another state which has been fomenting trouble for that country. The general equips his force with best metallic arms (assuming we are talking of nineteenth century). He attacks on a high horse, routs the enemy, and makes them agree to his terms. The military action has involved the general and his men. The service provided is armed battle commandeered by the general. The service 'consumer' is the enemy, who is extinguished in the process because it is on him that the service is exhausted. The general is in service of his king but the service that he renders on the king's orders, makes his enemy the unwilling consumer. The person who demands provision of a service, which is this case is the king, must not be the same as the one who consumes the service.

**Locality in provision of service of activity**

The principle of unity of service provision and consumption is a meaningful guide to establish the locality of service provision and that would indicate which taxing regime has service tax jurisdiction over that service.[6] One manifestation of this unity principle is that a service invariably marks its impact where it is provided, in the same manner as fire emits heat and possibly light where the combustion takes place. All services of activity have an area of impact and therefore a study of the impact of a service provides adequate clue to its location. A few illustrations would amplify this point.

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6 Till 2001 under Indian service tax laws there was no need to lay any guidelines for determining location of service so as to levy the tax. In all cases till them the service provider, service consumer and the contractee to the service contract were all located within India. The problem arose with companies opening officers abroad for promoting their business. It was simplistically assumed that all services which attracted payment in foreign exchange would be beyond Indian taxing jurisdiction and Service Tax Notification No.21/2003 dated Nov. 21, 2003 exempted such services. The policy was changed within one year and a quarter and a new notification was issued vide Service Tax Notification No. 9/2005-S.T., dated Mar. 3, 2005, and thereby export of services was allowed without payment of duty. The policy seemed to assume that

A very important service in the global market is business support service. A multinational entity in a foreign country seeking market access to a country, where they have no market presence, engages a company to promote their product. The local service provider begins to study the local market, assess possible consumers for their business partner's products and then selects the persons they would approach. They hold demonstrations and make presentations, interview people to study the needs of the targeted clients and advise them on what the foreign entity, their client, may be able to sell to them. This process of business promotion is an activity which begins with identifying targets, imparting necessary knowledge to the target, making him aware of the nature of goods being marketed by the foreign entity and what possible benefits to the target can be expected by him. The process may also involve some sweeteners like hosting a cocktail party or giving gifts mementoes or other such giveaways that promote a brand. The locality of all such activity is the country where the service provider is a resident because he is being paid to make an impact on the minds of the prospective buyers of the local market for foreign goods or services. [7] The CESTAT has taken a contrary view on an identical issue in the matter of *M/s GAP International Sourcing (India) Pvt. Ltd.* v. *CST Delhi*. In interpreting the Export of Services Rules they observed that term 'recipient' has not been defined in the statute and the CESTAT needs to fill the gap by construction or analogy. They then laid down that service recipient has to be treated as the person:-

services have physicality comparable to goods that can be carried in ships or aircrafts. The rules stated that a service for being qualified as export should be provided from India and used outside India and the additional clause was that it should be supplied against foreign exchange. In interpreting the provisions CESTAT ruled that the person abroad at whose instance the service was performed and who makes payment for the services should be treated as the user of service even if the service has been provided in India and consumed in India. This argument would make the husband, who uses his medical claim to get his wife's surgical process in a hospital, the user of the hospital, though due to exigencies he may not have attended the hospital at any time. Accordingly such services where payments are received from abroad are being treated as exports. The cases are in higher courts in appeal. The difficulty in legal reasoning to determine the point of consumption and thus the jurisdiction in these matters is that no clear jurisprudence of service tax jurisdiction has emerged as yet.The concept of export of service was done away presumably because it was inappropriate and a new place of provision of services" rule has been enacted since 2012. The rules are evidently structured on the concept that place of consumption decides the tax jurisdiction. In future the rules may under go due process of interpretation and legislative additions or amendments. To aid the development of this branch of law, there is need to evolve juristic principles on what constitutes the Indian service tax jurisdiction so that services which fall within such jurisdiction are taxed but others are not.The CESTAT in the above order has thereby laid a basis for determining the tax jurisdiction and made it dependent on the location of the person who causes the service to be produced and delivered. In this manner they have rejected the analysis of the process in which service is provided, and it's simultaneously consumption that leaves a measurable impact as relevant in adjudging whether a tax authority has jurisdiction in a particular matter. The decision is being challenged.

7. (2014-TIOL-465-CESTAT-DEL).

On whose instruction the service has been provided and who is obliged to make payment for the provision of service; and

(a) Whose need is satisfied by the provision of service- it may be his personal need or the need of his business or need to meet some obligation to some person.

Another example of the same genre is a business of getting deliveries of cash or goods to specific persons in a foreign land where the business company has no presence, *e.g.* an Indian company has to make a payment in Afghanistan for import of lapis lazuli. In such situations it does not make good economics to create offices everywhere for deliveries of cash. Hence the company seeks a service provider in the geographical region where the delivery has to be made. That local company in the foreign land (in Kabul) would be engaged to collect cash from a certain point and deliver to a specific person after verifying his identity. The entire business process begins in Afghanistan where the first activity is the collection of cash from a designated bank or agent in Afghanistan and it ends when the person for whom the cash is intended is located, is identified and the cash is handed over after taking acknowledgement, activities that all happen in Afghanistan. The service is to deliver the cash which implies that a person hands the cash and the other person receives the cash. This activity of handing over has to be done and even if the preparatory operations of collecting from a bank or a trader have been completed, service would not have been rendered. The receiving the cash and handing it to the other person happen together, which demonstrates the principle of unity of service provision and consumption. The impact of the service is that there is cash in the hands of the other person, and that is the consumption of service and the rationale for the agreement. The location of the service provision is therefore the country where the service provider operates, which in this case is in Afghanistan, and not the country in which company who engages the service provider is resident, which is India.

Arguably there are cases where the location of service provision may be so diverse that it becomes difficult to pin point the country where the service provision has substantially taken place. One illustration could be the financial service sector. An equity fund manager may offer services to buy and sell equities and debt instruments from different markets at the most advantageous prices besides trading in currencies. He would use the Internet and trade in shares in various stock exchanges across the national boundaries. In financial market it is possible that the same fund manager may cause impacts in 10 different countries within an hour if the equity or debt instruments belonged to 10 different countries. It is possible that all the tax jurisdiction where the fund manager is located, the tax regime on the bank from where payment is made as well as the tax authorities of the country where the shares were bought and sold, raise demands on the same fund manager for the same transaction. As markets become

more globalised and communications improve the financial sector would pose a serious challenge to tax authorities and that calls for a common acceptable norm for defining tax jurisdictions. However there would be no difficulty in determining the national location of a service of stock broking or fund management if all the shares are traded by him is from a single market or a single exchange or exchanges under only one taxing jurisdiction.[9]

In respect of lease of aircrafts on international routes, it is difficult to rationally spot the geographically distinct area where the service was provided since the aircraft would not stay at any given country for long. The amount of service provided in the soil of each country over which it over flew may be well neigh impossible to determine. In such cases there would be need to make an exception and it would devolve on the legislator to lay down which taxing regime would be considered to have taxing jurisdiction over the service. Ideally this exercise would need international cooperation and perhaps a general consensus that no country would tax such a service as is being done in similar situation of customs duty on such aircrafts or income tax on international airlines.

The concept of residence of a corporate entity determining taxability was born soon after the World War I in the field of income taxation of entities that have cross border operations. The principle that tax jurisdiction must be assigned to the country of residence of the company, was coined by Great Britain in dealing with tax jurisdiction over companies that were registered in London but their income originated from their operations in India which was then a British colony. Great Britain maintained that taxing jurisdiction over the income that arose from operations inside India was theirs and not of their colony if that income belonged to a company which was registered in England. In the colonial times, India did not have an independent voice and there was no opposition to this notion. This principle was endorsed by the League of Nations. After Indian Independence this was undone by amending Income Tax Act but later OECD brought in a model tax treaty that re-introduced the same concept with some alterations. In the OECD model source countries were not denied all rights to taxation but could withhold taxes on certain payments from source countries to the multi-national entity which amount could then be claimed by the company as tax credit by that entity in the country of residence. The Indian Income Tax Act accommodated these double tax avoidance agreements by providing that an assessee could claim benefit of such agreement if that was more beneficial to them than the legislated rate of taxation.

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9 This issue is being agitated in relation to service provided by stock brokers to foreign institutional investors. Indian service tax authorities have raised tax demands.

The OECD model is under great stress as ex-colonies like India and developing nations, especially in BRICS, have developed bargaining power in the international negotiations. Moreover the OECD model is now being used to place incomes in tax havens which thereby avoid any form of taxation making them stateless. The model now adversely affects the developed country as much as the developing but OECD has so far refused to consider any other model, such as the one that was proposed by ICC before the League of Nations of proportional distribution of income between residence and source countries on some basis as relative turnover of the company relating to different nations.

## IV Characteristics of services as non-activity

Service tax is chargeable on various transactions that cannot be said to involve any activity in the dictionary sense of the word. These are discussed in this section. Since most of the inclusions have taken place after 2012, the disputes have not reached the CESTAT for which reason it has not been possible to analyse many instances of service as non-activity. Activity, in common parlance, means doing things that require physical movement and energy. In the dictionary the term 'service' either means employment, with which service tax is not concerned or alternatively it denotes work performed. In the context of commoditised services, the term would mean a performance of some work which is useful to the receiver and for a price is charged. In Indian service tax laws the term 'service' was defined section 65 B (44) as any activity carried out by a person for another for a consideration and includes a declared service but at the same time the definition excludes several activities such as that provided by an employer to her employee.[10]

In order to extend the taxability to trade in various intangibles that do not answer to the description of the commonly understood meaning of the word service", the Finance Act inserted section 66E wherein a large variety of trade in things that are neither goods nor service were included. The commercial activity of renting has been included but that does not involve any work being done, because the only work that may get done is in the form of a tenant moving into the landlords property and this activity is not performed by the so called 'service provider' namely the landlord. Moreover that activity is not a pre-condition for creating a charge of rent. A tenant may do nothing with the leased house but the moment he constructively takes possession, he is liable to pay the rent. The list of deemed service includes temporary transfer of rights or permission to use something such as intellectual property belonging to one person and used temporarily by another. Other deemed services include receiving payment for agreements that obliges the service provider from doing any act or to

10 The provision was inserted on July 1, 2012 because earlier named services only attracted charge of service tax and such a clause was not needed.

tolerate any act. Business in hire purchase and service portion in works contract or in restaurant service are also declared to be services.

**Sale of duty of refraining from performance of activities**

Historically writers and artists were placed in personal employment of the rich and powerful and what they wrote became the property of the employer as soon as they emerged. Kingdoms invariably had a court scribe such as Abul Fazl or even those great writers who were not, such as Shakespeare; they wrote plays under contract with a theatre owner which put them under a kind of personal servitude. Paintings too were generally commissioned by rich patrons and the products as they emerged belonged to the employer. In certain quarters this practice has not entirely died out but the major terms of livelihood of writers is no longer employment but to acquire property rights over product of one's own labour and then trade that in the product. The manner of trading is either to assign temporary rights to a publisher to use the work of the owner for some limited number of copies or for sale in a specific area for certain period of time. This then becomes a temporary and limited sale of copyrights in which the activity performed by the seller for which he receives remuneration is a non-activity of not preventing the buyer from using his property in a certain prearranged manner.

The above mentioned variety of sale of copyright can be done not just in respect of literature or any work of art but also creations such as designs, formulae, patent and even trademarks. The essential character of the sale is the assumption of a duty by the seller not to exercise his fundamental and paramount right over the usage of the product of intellectual labour in lieu of consideration received from the buyer. An equally important feature of the transaction is that this sale does not transfer the property right over the product of intellectual service from the seller to the buyer. The other features of such contract comprise of the various conditions that are agreed upon between the buyer and the seller laying down the kind of usage that the buyer would make and the time and place where that temporary right of the buyer to enjoy the usage of the product would extinguish.

Similar trade in physical assets is well recognised in the market. The business of leasing of properties machines or any physical assets or even human resource is established in the market and extends to such items as commercial aircrafts or ships. A recognisable form of this trade is renting of houses for residential or commercial purposes. The contract for rent comprises in the tenant offering money to be able to use certain property for any or specified purpose and the landlord agreeing to allow the tenant entry and use of the property. The right to beneficial enjoyment of the property continues to devolve on the landlord but he undertakes to perform the duty of not exercising his right to enable the tenant to consume the property in the manner

agreed upon. In this case the consideration does not depend on whether or not the tenant uses the property, he may choose to keep the property vacant or he may never step in to the property at all but the landlord would be entitled to receive his rent as long as he keeps doing his duty of non-activity.

A more innovative service trade is in non-competing which is another form of service provision in non-activity. Parties may make a contract dividing different marketing territories and agreeing that they would not compete in territories marked for the other. This implies a kind of cartelisation as such market practices insure control over market by few entities. It is further possible that a new entrant may pay fees to another market competitor to take an assurance from him that for specified duration the other would not compete in the market for sale of goods or services. Such non-compete agreements are recognised as valid trade though they could be infringement of competition laws. The fundamental constituent of this trade is supply of a non-activity as "service" and receipt of payment for that service.

Another form of service of "non-activity" could comprise in arrangements where the buyer of service buys protection from competition from the service provider. A theatre company may have an agreement with a beverage company giving the latter exclusive dispensing rights to sell his products within the theatre campus. The theatre company assumes the duty not to allow any other beverage company to sell their products in his premises. "Not to allow" is not an activity in the literal meaning of the word, it just means preventing some activity by a communication of refusal of permission to enter premises. The consideration received by the theatre company for not allowing other companies to sell their products is a promise of forbearance and that would become liable to tax under the deemed provision though no ostensible work has been performed by the service provider.

**Locality in provision of service of non-activity**

The locality of service of non-activity cannot be determined by the characteristics of the so-called service, because negative values cannot render a positive result. Whereas in respect of activity based services the impact of the activity defines its location, a non-activity does have an impact emanating from the performance of that service. A landlord receives rent for being idle and for forsaking his right to enjoy his property in every manner possible.[11] However the contracts for such non-activity are always defined in respect of some property or territory.

A non-compete clause in agreement for marketing shares would generally be for a specific area that would lay down the locality of the service. Lease of real estate does not constitute a problem as real estate has fixed location and therefore the

11 This would explain why the expression 'rentier class' has been a word of negative connotations.

legislation could stipulate that the service would be construed to have been provided at the location of the leased premises.

Locality of service provision of 'non-activity' can best be defined by the legislators either by laying down principles or specific the method for different services. For each service there are some reference points, such as address of property that can enable all governments to evolve common norms for taxation of such services. However there cannot be any dispute about locality or taxing jurisdiction if the service is provided and received in the same country.

## V Conclusion

The dispute that occasioned this analysis is the contested view that the resident of the person who gives a contract for commissioning of a service determines the place where the service has been provided and therefore the taxing jurisdiction. There seems no basis for this view on the basis of a study of the character of services of activity. It is not easy to locate provision where the service is of 'non-activity" till there is some indication of it in the statute.

The intangibility of services is a property that opens many disputes about taxing jurisdiction. There are rational ways of determining it; by analysis the characteristics of those services that are activity based one can determine the location. The location of most services can be made out by location of the impact they make. There are problems in respect of those services which comprise in non-activity but the difficulties can be resolved by legislation. Either way there is no reason for accepting a nebulous concept such as the residence of the person who makes payments for the services as basis for determining the taxing jurisdiction as such a concept would expose the tax base to the risk of its becoming stateless which is what happened in income tax with tax havens claiming large global incomes.[12]

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12 Bret Wells and Cym H. Lowell, "Income Tax Treaty Policy in the 21st Century: Residence vs. Source" in 10 *International Taxation* 181(published by Taxmann Allied Services (P.) Ltd.2014).

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