

CORPORATE OFFICE, TAXATION SECTION  
1ST FLOOR, BHARAT SANCHAR BHAWAN  
JANPATH, NEW DELHI-110 001



BHARAT SANCHAR NIGAM LIMITED  
[A Government of India Enterprise]

No.1002-15/2011-12/Taxation/BSNL/646

Dated: /07/2013

21.08.2013

To

The Chief General Managers,

1. All Telecom Circles/ Metro Telephone Districts/Maintenance Regions/ Project Circles
2. Task Force/ Data Network/ NCES/QA/ T&D/ Telecom Stores/ Telecom Factories/ CPAO (ITI Bills)/ IT Project Circle
3. ALTTC/BRBRAITT/NATFM
4. All PGMs/Sr.GMs/GMs, BSNL Corporate office

**Sub.: Applicability of Service Tax on the services provided in J&K and received from J&K in light of the Place of Provision of Services (POS) Rules, 2012 - reg.**

Ref:-This office letter No.1002-15/2011-12/Taxation/BSNL/313 Dated: 17 /08/2012

Kindly refer to the letter cited under reference whereby Place of Provision of Services (POS) Rules, 2012 issued vide Notification No. 28/2012-Service Tax Dated 20.06.2012 by DOR, MOF, GOI was circulated for its implementation by the BSNL Circles/ field units. Further, this matter has been examined in consultation with Tax consultants M/s Ernst & Young Pvt. Ltd. since this rule has been newly introduced in Budget 2012 and it affects Service Tax and Cenvat Credit issues.

The relevant provisions in this regard are explained below:

- Section 64(1) of the Act provides that the provisions of Chapter V of the Act shall apply to whole of India except the state of Jammu and Kashmir. Further, as per clause 27 of Section 65B, 'India' has been defined to mean;

- “(a) The territory of the Union as referred to in clause (2) and (3) of article 1 of the Constitution;*
- (b) Its territorial waters, continental shelf, exclusive economic zone or any other maritime zone as defined in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976);*
- (c) The seabed and the subsoil underlying the territorial waters;*
- (d) The air space above its territory and territorial waters; and*
- (e) The installations, structures and vessels located in the continental shelf of India and the exclusive economic zone of India, for the purposes of prospecting or extraction or production of mineral oil and natural gas and supply thereof;”*

Thus, as per the definition of India given in the Act, J&K would form part of India.

Contd...2

- ▶ 'Taxable territory' has been defined in section 65B (52) of the Act to mean the territory to which the provisions of this chapter shall apply i.e. whole of India excluding the State of J&K.

'Non-taxable territory' has been defined in section 65B (35) of the Act as the territory other than the taxable territory i.e. J&K and all other territory outside India.

- ▶ Thus on a reading of the above definitions it follows that **J&K is a part of India, but constitutes the non-taxable territory.**

In light of the above, Clarification on the above noted subject pursuant to introduction of Place of Provision of Services (POS) Rules, 2012 in the context of BSNL is as follows which have been categorized into two parts i.e. (i) When BSNL is the Service Provider and (ii) When BSNL is the service recipient.

**Category A: - When BSNL is the service provider**

The Service tax liability arising on BSNL as a service provider, in the context of J&K, has been analyzed as follows:

**Case 1- Service provider BSNL in taxable territory; service recipient in J&K**

- ▶ As per Rule 3, the place of provision of telecommunication services provided by BSNL located in taxable territory would be 'location of service recipient'.
- ▶ The location of such service recipient would need to be analyzed in light of the definition prescribed under Rule 2(i) of the POS Rules, on a case to case basis depending upon:
  - Constitution of the recipient (individual or body corporate etc); and
  - Location of usage of service
- ▶ As discussed in the above paragraphs, J&K qualifies as a part of the non-taxable territory. Accordingly, if the location of the service recipient as per the above mentioned definition and indicators is determined to be J&K, place of provision would fall outside the taxable territory.
- ▶ Accordingly, such services provided by BSNL in taxable territory to a service recipient in J&K would not attract the levy of Service tax, as the charging section 66B states Service tax shall be leviable on services *provided within the taxable territory.*
- ▶ With regard to the export status of such services, as per Rule 6A of ST Rules (discussed in Category- B), a service qualifies as export only when it is provided to a recipient located outside India, among other conditions.

Contd...3

As discussed above [at page 1 & upper part of page 2], since J&K is covered within the meaning of 'India', the above mentioned condition for export is not fulfilled. In other words, a recipient located in J&K does not qualify as a service recipient located outside India. Accordingly, services provided by BSNL to a recipient having subscription in J&K would not qualify as an export.

**Consequential impact on Cenvat Credit Rules, 2004:-**

- ▶ Since Service tax is not leviable on such services, the output service provided by BSNL in taxable territory in this case would qualify as 'exempted service' within the meaning of Cenvat Credit Rules, 2004.

**Case 2- Service provider BSNL in J&K; service recipient in J&K**

- ▶ In this case firstly, the definition of the 'location of service provider' as per Rule 2(h) of POS Rules, 2012 has to be understood which is given below:

*(a).where the service provider has obtained a single registration, whether centralized or otherwise, the premises for which such registration has been obtained;*

*(b).where the service provider is not covered under sub-clause (a):*

- (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.*

The meaning of the phrases 'business establishment' and 'fixed establishment' has not been defined in the Law; however, in the Guidance Note issued by the Government, the meaning has been explained. The same has been reproduced below:

*'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.*

*'Fixed establishment' is a place (other than the 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.*



Contd..4

- ▶ In light of the above, since BSNL J&K circle has not obtained Service tax registration, the location would need to be determined in accordance with other clause (b) of the definition above.
- ▶ BSNL in J&K is a separate person for the purpose of Service tax (discussed in Case 4 below). As the location of business establishment of the service provider is J&K in this case, accordingly, the location of BSNL in this case would be outside the taxable territory.
- ▶ As the location of the service provider has been determined to be J&K, the provisions of Finance Act would not be applicable as Section 64(1) of the finance Act, 1994 states that the provisions of the chapter shall apply to the whole of India, except J&K. That is to say, the provisions governing levy of Service Tax are not applicable to service providers located in J&K.
- ▶ Determining the location of the service recipient in the instant case would be irrelevant.
- ▶ To conclude, services provided by BSNL in J&K to a subscriber of J&K, would not attract the levy of Service tax.


***Case 3- Service provider BSNL in J&K; service recipient in taxable territory***

- ▶ In the instant case, the location of the service provider i.e. BSNL in J&K is outside the taxable territory (as explained in Case 2 above).
- ▶ There would arise no requirement for BSNL to deposit Service tax in the instant case as the provisions of the Finance Act, 1994 apply to the whole of India, except J&K (as discussed in Case 2 above). That is to say, the provisions governing Service tax levy are not applicable to service providers located in J&K.
- ▶ Determining the location of the service recipient in the instant case would be irrelevant.

***Case 4- Service provider BSNL in taxable territory; service recipient BSNL in J&K***

- ▶ In the instant case, the distinctiveness of the two divisions i.e. BSNL in taxable territory, and BSNL in J&K, and the taxability of transactions between the two would need to be analyzed in light of the Explanation 3(b) to the definition of service under Section 65B(44) of the Finance Act, 1994.
- ▶ The said explanation provides that an establishment of a person in taxable territory and any of his establishment in non-taxable territory shall be treated as distinct persons for the purpose of the Finance Act, 1994.

Since J&K does not fall within the meaning of 'taxable territory', BSNL in J&K qualifies as an establishment of BSNL located in non-taxable territory. Accordingly, BSNL in taxable territory say Karnataka, and BSNL in J&K would be two distinct persons for the purpose of Service tax. Therefore, the flow of activities between the two, in exchange of a consideration, would need to be analyzed with regard to its taxability.



Contd...5

- ▶ The service recipient in the said case BSNL J&K is located outside taxable territory. Accordingly, the place of provision of services provided by BSNL in taxable territory would be outside the taxable territory.

**Consequential impact on Cenvat Credit Rules, 2004:-**

- ▶ However, such services provided by BSNL in taxable territory would qualify as 'exempted services' and there would be requirement of reversal of Cenvat credit.

**Category B: When BSNL is the service recipient**

The liability arising on BSNL in capacity of a service recipient under reverse charge mechanism has been analyzed, read with Notification No. 30/2012-ST dated 20/06/2012, as follows:-

***Case 1- Service recipient BSNL in taxable territory; service provider in J&K***

- ▶ As per Section 66B of the Finance Act, 1994 Service tax shall be levied on all the services other than the services specified under the negative list provided or agreed to be provided within the taxable territory.
- ▶ As per Section 68(2) of the Finance Act, 1994 read with Notification 30/2012-ST, Dated 20.06.2012 it follows that in cases where services are received by a person located in the taxable territory, from a person located outside the taxable territory, Service tax shall be deposited by the service recipient, provided the place of provision of such services is within the taxable territory.
- ▶ Therefore, if services are procured by BSNL from service providers located in J&K i.e. non-taxable territory, then BSNL would be liable to deposit the Service tax with the Government, as per the reverse charge mechanism (provided place of provision of service procured is within the taxable territory).


***Case 2- Service recipient BSNL in J&K; service provider outside India***

- ▶ In order to determine whether Service tax liability arises on BSNL in the instant case, the location of service recipient i.e. BSNL J&K circle would need to be determined.

Since in this case, the services are being used by BSNL at its business establishment i.e. in J&K, the location of service recipient i.e. BSNL in J&K would be outside the taxable territory.

- ▶ As it is determined that the recipient is located in J&K, the provisions of the Finance Act, 1994 relating to payment of Service Tax under reverse charge mechanism [Section 68(2) of Finance Act, 1994 read with Notification 30/2012-ST dated 20/06/2012 ] would not apply to BSNL in J&K.
- ▶ Accordingly, BSNL J&K would not be required to deposit Service tax on procurement of services from a person located outside India.

Contd...6



**Case 3- Service recipient BSNL in taxable territory; service provider BSNL in J&K**

- ▶ As discussed in Category A - Case 4, an establishment of a person in taxable territory and any of his establishment in non-taxable territory shall be treated as distinct persons for the purpose of the Finance Act, 1994.

In the instant case, the location of the service recipient i.e. BSNL in Karnataka would be within the taxable territory as the service is being used at a place other than business establishment (i.e. BSNL Delhi). Accordingly, the place of provision of services is within the taxable territory.

- ▶ Since services are received by a person located in taxable territory i.e. BSNL Karnataka, from a person located in non-taxable territory i.e. BSNL in J&K, the service recipient i.e. BSNL in Karnataka, would be required to deposit Service tax on the services procured from BSNL in J&K (in accordance with Section 68(2) of Finance Act, 1994 read with Notification 30/2012-ST Dated 20/06/2012).

**Cenvat credit implications**

- ▶ As discussed in Category A- Case 1, 2, 3 and 4, the service provided by BSNL is not leviable to Service tax.

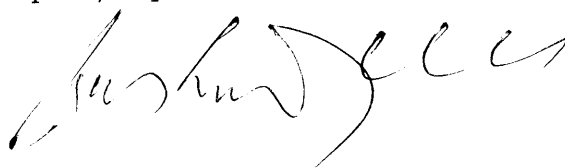
However, the services provided under only Case 1 and 4 would qualify the definition of 'exempted service' in terms of Cenvat Credit Rules, 2004. Case 2 and 3 would not qualify as 'exempted services' as any service provided from J&K is outside the ambit of the Finance Act, 1994 [vide Section 64(1) of Finance Act, 1994] and the Cenvat Rules do not apply on the same.

- ▶ Rule 6 of Cenvat Credit Rules, 2004 prescribes that a service provider engaged in providing such exempted services is not eligible to avail the Cenvat credit on input services used for the provision of such exempted services.

Further Rule 6(3) of Cenvat Credit Rules, 2004 provides that where a service provider is engaged in providing both taxable and exempt services and does not maintain separate books of accounts, the service provider would be required to pay an amount computed as per the provisions prescribed under the said rule [presently @6%].

Since BSNL (located in taxable territory) is engaged in provision of both taxable services (telecommunication services) and exempted services [Category A- Case 1 and 4], it would be required to pay proportionate Cenvat credit in accordance with provisions of Rule 6(3) of Cenvat Credit Rules, 2004, to the extent of provision of such exempted services.

- ▶ Thus, BSNL would be required to pay a proportionate amount of Cenvat credit with respect to common inputs/ inputs services used by BSNL J&K circle.



Contd...7

**Summary**

In view of above, for easy reference, the same are presented in tabular form in the table below:

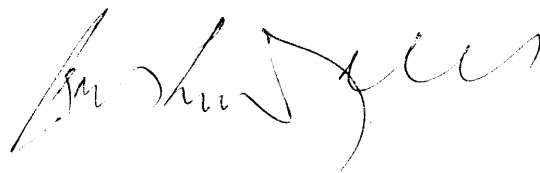
**Table-I**

S. No.	Particulars	Whether qualifies as export/ import/ exempted service	Applicability of Service tax
<b><i>BSNL is the service provider</i></b>			
1.	BSNL in taxable territory (except J&K); recipient in J&K	Exempted	Service tax not required to be paid by BSNL Reversal of Cenvat Credit required - as per Rule 6(3)
2.	BSNL in J&K; recipient in J&K	NA (Provisions of Finance Act not applicable in J&K)	Service tax not required to be paid by BSNL Cenvat reversal not required
3.	BSNL in J&K; recipient in taxable territory (reverse charge liability may arise on service recipient)	NA (Provisions of Finance Act not applicable in J&K)	Service tax not required to be paid by BSNL Cenvat reversal not required
4.	BSNL in taxable territory; recipient <b>BSNL J&amp;K</b>	Exempted	Service tax not required to be paid by BSNL Cenvat reversal required- as per Rule 6(3)
<b><i>BSNL is the service recipient</i></b>			
1.	Recipient BSNL in taxable territory, service provider in J&K	Import (Provided the POP is within taxable territory)	Service tax required to be deposited by BSNL under reverse charge
2.	Recipient BSNL in J&K, service provider outside India	NA (Provisions of Finance Act not applicable in J&K- i.e. reverse charge provisions not applicable on recipients located in J&K)	Service tax not required to be deposited by BSNL
3.	Recipient BSNL in taxable territory; service provider BSNL in J&K	Import	Service tax required to be deposited by BSNL in taxable territory, under reverse charge.

On the basis of the above discussion, on an illustrative basis, various scenarios along with the Service tax implication, when telecommunication services are provided by BSNL to *individual subscribers* have been examined and presented in Table II below:-

**Table-II**

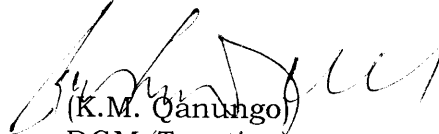
<b>S. No.</b>	<b>Particulars</b>	<b>Whether taxable service / exempted service as per new Regime</b>
1	Call by BSNL subscriber of J&K, to BSNL subscriber/ any other subscriber in J&K (Service provider BSNL J&K)	Outside the purview of the Act
2	Call by BSNL subscriber of J&K, to BSNL subscriber in Delhi (Service provider BSNL J&K)	Outside the purview of the Act
3	Call by BSNL subscriber of J&K on roaming in Delhi, to BSNL subscriber/ other subscriber in J&K (Service provider BSNL J&K)	Outside the purview of the Act
4	Call by BSNL subscriber of J&K on roaming in Delhi, to BSNL / other subscriber in Delhi (Service provider BSNL J&K)	Outside the purview of the Act
5	Call by BSNL subscriber of Delhi, to BSNL subscriber/ other subscriber in J&K (Service provider BSNL Delhi)	Taxable service
6	Call by BSNL subscriber of Delhi on roaming in J&K, to BSNL subscriber in Delhi (Service provider BSNL Delhi)	Taxable service
7	Call by BSNL subscriber of Delhi on roaming in J&K, to other subscriber in J&K (Service provider BSNL Delhi)	Taxable service
8	Call by BSNL subscriber of Delhi on roaming in J&K, to other subscriber in Delhi (Service provider BSNL Delhi)	Taxable service
9	Call by BSNL subscriber of Delhi to other BSNL subscriber of Delhi roaming in J&K (Service provider BSNL Delhi)	Taxable service





In view of above, it is requested to kindly go through the above mentioned clarifications and contents of the same may be brought to the notice of all concerned for taking necessary action.

This issue with the approval of GM (Taxation).

  
(K.M. Canungo)  
DGM (Taxation)  
BSNL C.O.