

BEFORE THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
BANGALORE

Sub: Appeal against the order of the Commissioner of Customs, Central Excise and Service Tax Hyderabad in Order in Original Nos. 06/2013-ST, dated 17.01.2013

Between:
M/s. Modi Ventures,
5-4-187/3&4, 2nd Floor,
M.G.Road,
Secunderabad-500 003

..... Appellant

Vs.

The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-I Commissionerate,
Kendriya Shulk Bhavan,
1st Floor, L.B.Stadium Road,
Hyderabad-500 004

..... Respondent

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ACCOMPANYING DECLARATION TO BE ATTACHED TO ST-5
IN THE CUSTOMS, EXCISE AND SERVICE TAX APPELLATE TRIBUNAL,
1st FLOOR, WTC BUILDING, FKCCI COMPLEX, K.G. Road, BANGLORE -
560 017

Appeal No. Of 2013

Between:

**M/s. Modi Ventures,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003**

..... **Appellant**

Vs.

**The Commissioner of Customs,
Central Excise & Service Tax,
Hyderabad-I Commissionerate,
Central Revenues Building,
1st Floor, L.B.Stadium Road,
Hyderabad - 500 004**

..... **Respondent**

ISSUE INVOLVED IN APPEAL:		Taxability of service related to sale of flats	
1.	Designation and address of the authority passing the order appealed against	:	The Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate Central Revenues Building, 1st Floor, L. B. Stadium Road, Hyderabad - 500 004
2.	The number and date of order appealed against	:	O-I-O.No.6/2013-Adjn.(ST) (Commr) (O.R. No. 53/2012-Hyd I Adjn) dated 17.01.2013
3.	Date of communication of the order appealed against	:	23.01.2013
4.	State/Union Territory and the Commissionerate in which the order/decision of assessment/penalty/fine was made	:	Andhra Pradesh, Commissioner of Customs, Central Excise & Service Tax, Hyderabad-I Commissionerate.
5.	Designation and address of the adjudicating authority in case where the order appealed against is an order of the Commissioner (Appeals).	:	Not Applicable
6.	Address to which notices may be sent to the Appellant	:	1. Hiregange & Associates, Chartered Accountants # 1010, 1 st Floor, Above Corporation Bank, 26 th Main, 4 th T Block, Jayanagar, Bangalore - 560 041. 2. S.B. Gabhawalla & Co.' Chartered Accountants, B-12, "La Bella", Azad Lane, Andheri (east), Mumbai -



			400069 (Also to Appellant as stated in cause title supra.)
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Central Revenues Building, 1st Floor, L.B. Stadium Road, Hyderabad - 500 004
8.	Whether the decision or order appealed against involves any question having a relation to the value of the taxable service for purposes of assessment; if not difference in tax or tax involved, or amount of interest or penalty involved, as the case may be.	:	Yes
8A(1) (i)	Period of dispute	:	01.06.2007 to 31.12.2010
(ii)	Amount of Tax if any demanded for the period mentioned in Item (i)	:	Rs.1, 38,13,576/-
(iii)	Amount of refund if any claimed for the period mentioned in Item (i)	:	NA
(iv)	Amount of interest involved	:	Interest under Section 75 of the Finance Act, 1994.
(v)	Amount of penalty imposed	:	Penalty of Rs.1, 38, 13,576/- under section 78 of the Finance Act, 1994. Penalty of Rs.5, 000 U/s 77(2).
9.	Whether duty or penalty or both is deposited if not whether any application for dispensing with such deposit has been made. (A copy of the challan under which the deposit is made shall be furnished).	:	An amount of service tax Rs.47, 73, 858 is already paid before issuing the show cause notice out of which Rs.27, 27, 115 is not considered. The Stay application for waiver of balance the Service Tax, applicable interest and Penalty under Section 78 & 77 of the Finance Act, 1994 and for the operation of the order has been filed along with this appeal.
9A	Whether the appellant wishes to be heard in person?	:	Yes. At the earliest convenience of this Honorable Tribunal.
10.	Reliefs claimed in appeal	:	To set aside the impugned order and grant the relief claimed.



For MODI VENTURES

Patil

FORM ST - 5
Form of appeal to Appellate Tribunal under Section 86 of the Finance Act,
1994

In the Customs, Excise and Service Tax Appellate Tribunal
Appeal No. Of 2013

Between:

M/s. Modi Ventures,
5-4-187/3&4, 2nd Floor,
M.G Road,
Secunderabad- 500 003

..... **Appellant**

Vs.

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(Also to Appellant as stated in cause



			title supra)
7.	Address to which notices may be sent to the Respondent	:	The Commissioner of Customs, Central Excise & Service Tax, Central Revenues Building, 1st Floor, L.B.Stadium Road, Hyderabad - 500 004
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(iv)	Amount of interest involved	:	Interest under Section 75 of the Finance Act, 1994.
(v)	Amount of penalty imposed	:	Penalty of Rs.1,38,13, 576/- under section 78 of the Finance Act, 1994. Penalty of Rs.5, 000 U/s 77(2).
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**For Hiregange & Associates
Chartered Accountants**

**Sudhir V S
Authorised Representative**



For MODI VENTURES

Appellant



STATEMENT OF FACTS

- A. M/s Modi Ventures (Hereinafter referred to as 'Appellant') is a Partnership Firm registered under the Partnership Act, 1932 mainly engaged in the sale of residential units to prospective buyers while the units are under construction.
- B. The Appellant had voluntarily registered with the Service Tax department vide **STC No. AAJFM0646DST001** under the category of Construction of Complex Service. Later on, based on Additional Commissioner clarifications, it registered itself under the category of "Works Contract Service" also. Further CBEC Clarifications reinforced the Appellant's belief that they are not liable for payment of service tax and accordingly, they discontinued the payment of service tax. The Appellant has presently under taken "**Residential Project**" namely "**Gulmohar Gardens**" located at Mallapur Village, R.R.District consisting of total 506 residential units.
- C. The flow of activity involved is as under:
- i. Appellant has purchased a part of the land from M/s Sri Sai builders and developed the flats such joint property/flats together and sold such flats to ultimate buyers. Further, In Phase II comprising of construction of Block F and Block G the land was fully purchased by the appellant from other landowners.
 - ii. Construction Permit/ Sanction Plan were applied by the appellant and approval has also been obtained for the entire residential complex consisting of 506 residential units from Greater Hyderabad Municipal Corporation/HUDA under their own names. The Approvals have been obtained in Phases and the date of receipt of approval for the various phases is as under:



(Copy of Approval Certificate/Occupancy Certificate has been enclosed in Annexure-III)

Phase	Date of Layout Approval from the municipal authorities	Completed/ Occupancy certificate obtained on
PHASE-I		
Block A	22.08.2005	03.11.2008
Block B	22.08.2005	23.09.2008
Block C	22.08.2005	08.06.2007
Block D	22.08.2005	03.11.2008
Block E	22.08.2005	26.12.2008
PHASE-II		
Block F	01.04.2009	19.12.2011
Block G	01.04.2009	19.12.2011

- iii. Based on the above approvals, the Appellants have started the activities of development of the said residential complex.
- iv. Simultaneous to, but independent of the activity of development of the said residential complex, the Appellants also enter into arrangements with prospective buyers for sale of the residential units contained in the said residential complex while the same is under construction. The exact modus operandi of the arrangement with the prospective buyers is explained hereunder.
 - a. Whenever an intending buyer wants to purchase a residential unit, he approaches the Appellant. Based on negotiations, he fills up a booking form. **A copy of the booking form is enclosed and marked as Annexure**



VI&VII. The key terms and conditions from the booking form are as under:-

(1) NATURE OF BOOKING:

- 1.1 This is a provisional booking for a Flat mentioned overleaf in the project known as Gulmohar Gardens. The provisional bookings do not convey in favour of purchaser any right, title or interest of whatsoever nature unless and until required documents such as Sale Agreement/ Sale Deed/ Work Order etc., are executed.
- 1.2 The purchaser shall execute the required documents within a period of 30 days from the date of booking along with payment of the 1st installment mentioned overleaf. In case, the purchaser fails to do so then this provisional booking shall stand cancelled and the builder shall be entitled to deduct cancellation charges as mentioned herein.

(2) REGISTRATION AND OTHER CHARGES

- 2.1 Registration Charges, Stamp Duty and incidental expenses thereto as applicable at the time of registration shall be extra and is to be borne by the purchaser.
- 2.2 Service Tax & VAT as applicable from time to time shall be extra and is to be borne by the purchaser.

(3) CANCELLATION CHARGES

- 3.1 In case of default mentioned in clause 1.2 above, the cancellation charges shall be Rs.5,000/-, Rs.10,000/- & Rs.15,000/- for 1,2 & 3 bedroom flats respectively.
- 3.2 In case of failure of the purchaser to obtain housing loan within 30 days of the provisional booking, the cancellation charges will be NIL provided necessary intimation to this effect



is given to the builder in writing along with necessary proof of non-sanction or cancellation charges shall be Rs.5,000/-, Rs.10,000/- & Rs.15,000/- for 1, 2 & 3 bedroom flats respectively.

3.3 In case of request for cancellation in writing within 60 days of this provisional booking, the cancellation charges shall be 10,000/-, 20,000/- & 30,000/- for 1,2 & 3 bedroom flats respectively.

3.4 In all other cases of cancellation either of booking or agreement, the cancellation charges shall be 15% of the agreed sale consideration.

(4) OTHER CONSEQUENCES UPON CANCELLATION

The purchaser shall re-convey and redeliver the possession of the Flat in favour of the builder at his/her cost free from all encumbrances, charges, claims, interests etc., of whatsoever nature.

(5) POSSESSION

5.1. The builder shall deliver the possession of the completed Flat to the purchaser only on payment of dues to the builder.

5.2. Once the booking is confirmed, the Appellant enters into an agreement of sale with the intending buyer. **A copy of the Agreement of Sale is enclosed and marked as Annexure VI.** The key aspects of the said Agreement of Sale are as under:-

- i. Preamble A to L of the Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans.



- ii. Preamble M highlights that the Appellant has agreed to sell the Scheduled Apartment together with proportionate undivided share in land and parking space as a package for the total consideration and the buyer has agreed to purchase the same.
- iii. Some important clauses of the Agreement of Sale are as under:-
 - 1. That the Vendor agrees to sell for a consideration and the Buyer agrees to purchase a Standard Apartment together with proportionate undivided share in land and a parking space, as a package, as detailed here below in the residential apartment named as Gulmohar Gardens, being constructed on the Scheduled Land (such apartment hereinafter is referred to as Scheduled Apartment) which is more fully described in Schedule 'B' annexed to this agreement. The construction of the Scheduled Apartment will be as per the specifications given in Schedule 'C'.
 - 2. That the total sale consideration for the above shall be Rs. /- (Rupees only).
 - 9. That for the purposes of creating a charge in favour of the bank/ financial institutions on the apartment being constructed so as to enable the Buyer to avail housing loan, the Vendor will execute a sale deed in favour of the Buyer for sale of apartment in a semi-finished state. In the event of execution of sale deed before the apartment is fully completed, the Buyer shall be required to enter into a separate construction contract with the Vendor for



completing the unfinished apartment and the Buyer shall not raise any objection for execution of such an agreement.

12. That on payment of the full consideration amount as mentioned above and on completion of construction of the said apartments, the Vendor shall deliver the possession of the schedule apartment to the Buyer with all amenities and facilities as agreed to between the parties and the Buyer shall enter into possession of the schedule apartment and enjoy the same with all the rights and privileges of an owner.

16. That it is specifically understood and agreed by the Buyer that the Sale Deed executed in favour of the Buyer and the Agreement for Construction entered into, if any, between the parties hereto in pursuance of this agreement are interdependent, mutually co-existing and are inseparable.

19. That the Vendor agrees to deliver the schedule apartment to the Buyer on or before with a further grace period of 6 months.

25. That from the intimation as to possession of the Scheduled Apartment or date of receipt of possession of the apartment, whichever is earlier that Buyer shall be responsible for payment of all taxes, levies, rates, dues, duties, charges, expenses etc that may be payable with respect to the Schedule apartment including Municipal taxes, water and electricity charges either assessed/charged individually or collectively and such



other taxes, etc. payable to state or Central Government or other local bodies or any other concerned body or authority, etc.

31. That the Vendor shall cause this Agreement of sale to be registered in favour of the Buyer as and when the Buyer intimates in writing to the Vendor his/her/their preparedness with the amount payable towards stamp duty, registration charges and other expenses related to the registration of this Agreement.

32. That the stamp duty, registration charges and other expenses related to the execution and registration of this agreement of sale and other deeds, or conveyances and agreements shall be borne by the Buyer only.

5.3. On a perusal of the clauses in the Agreement of Sale, it is evident that the agreement is for the sale of an apartment which consists of the standard construction, an undivided share in land and reserved parking space. All rights and obligations are cast on the respective parties accordingly. However, as stated in Para 9 of the Agreement, in certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of Apartment in a semi finished state, simultaneously entering into a separate construction contract for completing the unfinished apartment. It may be noted that as per para 16 of the Agreement of Sale, both the Sale deed and the Agreement for Construction are interdependent, mutually co-existing and inseparable. **(Enclosed**



are copies of the Sale Deed and the Agreement for Construction Annexure "VI" & "VII" for With financing/Without financing types)

5.4. Some important provisions from the Agreement for Construction (which is the subject matter of the current litigation) are extracted below for ready reference:-

- A. The Buyer under a Sale Deed dated _____ has purchased a semi-finished, semi-deluxe apartment bearing no. _____, on the _____ floor in block no. _____, admeasuring _____sft. of super built up area in residential apartments styled as 'Gulmohar Gardens', forming part of Survey Nos. 93, 94 & 95, situated at Mallapur, Uppal Mandal, Ranga Reddy District, together with:
 - a. Proportionate undivided share of land to the extent of _____sq. yds.
 - b. A reserved two wheeler parking bearing no. _____ admeasuring 15 Sft.
- B. This Sale Deed is registered as document no. _____ in the office of the Sub-Register, Uppal. This Sale Deed was executed subject to the condition that the Buyer shall enter into an Agreement for Construction for completion of construction of semi-finished apartment as per the agreed specifications.
- C. The Buyer is desirous of getting the construction completed with respect to the scheduled apartment by the Builder.
- D. The Buyer as stated above had already purchased the semi-finished apartment bearing no. _____and the parties hereto have specifically agreed that this consideration agreement and the Sale Deed referred herein above are and shall be interdependent and co-existing agreements.



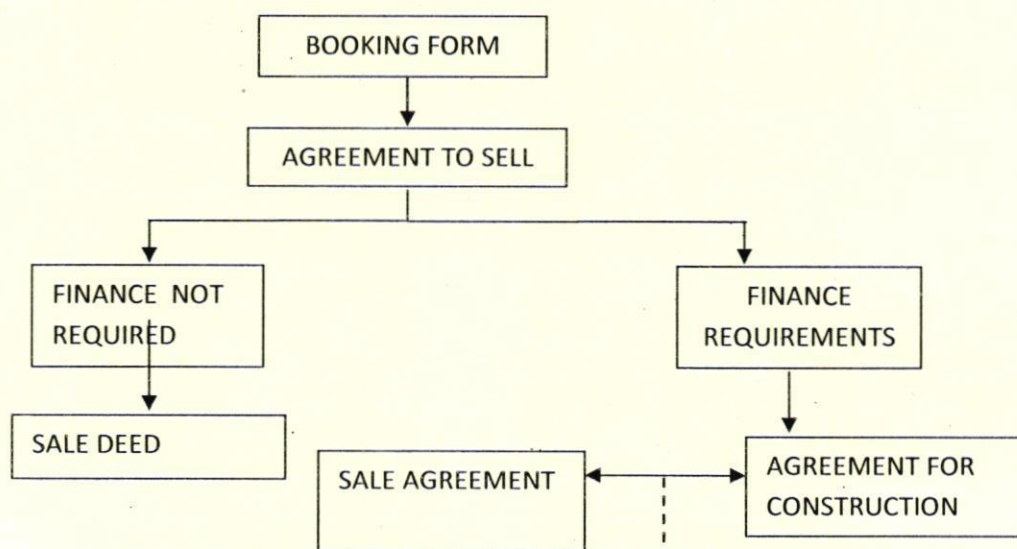
- E. The Builder shall complete the construction for the Buyer a semi-deluxe apartment bearing no.____ on the first floor in block no. 'A' admeasuring ____sft. of super built up area and undivided share of land to the extent of ____ sq. yds. A reserved two wheeler parking bearing no. _____ admeasuring 15 sft. As per the plans annexed hereto and the specifications given hereunder for a consideration of Rs. ____/- (Rupees ____ Only).
- F. The Builder upon completion of construction of the Apartment shall intimate to the Buyer the same at his last known address and the Buyer shall within 15 days of such intimation take possession of the Apartment provided however, that the Buyer shall not be entitled to take possession if he/she has not fulfilled the obligations under this agreement. After such intimation, the Builder shall not be liable or responsible for any loss, breakages, damages, trespass and the like.
- G. The buyer upon taking possession of the apartment shall own and possess the same absolutely and shall have no claims against the Builder on any account, including any defect in the construction.
- H. The Buyer upon receipt of the completion intimation from the Buyer as provided above shall thereafter be liable and responsible to bear and pay all taxes and charges for electricity, water and other services and outgoings payable in respect of the said Apartment.
- I. The Builder shall deliver the possession of the completed Apartment to the Buyer only upon payment of entire consideration and other dues by the Buyer to the Builder.



J. The Buyer hereby covenants and agrees with the Builder that if he fails to abide with the terms and conditions of this agreement, the Builder shall be entitled to cancel this agreement without any further action and intimation to the Buyer. The Builder upon such cancellation shall be entitled to forfeit a sum equivalent to 50% of the total agreed consideration as liquidated damages from the amounts paid by the Buyer to the Builder. The Builder shall further be entitled to allot, convey, transfer and assign the said Apartment to any other person of their choice and only thereafter, the Builder will refund the amounts paid by the Buyer after deducting liquidated damages provided herein.

K. It is mutually agreed upon by the parties hereto that all the terms and conditions contained in the booking form as amended from time to time shall be deemed to be the part of this agreement unless otherwise specifically waived and/or differently agreed upon in writing.

D. The entire process can be summarized below:-



Co terminus arrangements



- E. It has been the belief of the Appellant that irrespective of the mode in which the transactions are undertaken, the Appellant has a singular obligation to deliver an Apartment with the underlying land and parking space and hence the substance of the transaction is that of a sale of an immovable property and therefore, no service tax can be attracted
- F. However, subsequent to the decision of the Supreme Court in the case of K. Raheja Development Corporation, there has been substantial confusion on the applicability of service tax on such transactions. The developments on the legal front are summarized hereunder:-

DATE	PARTICULARS
10.09.2004	Any service provided to any person in relation to construction of buildings intended for commercial use were made liable for payment of service tax under section 65(105)(zzq) of the Act. Circular 80/2004-ST dated 10.09.2004 clarified that estate builders are selling shops and are therefore not liable for payment of service tax.
16.06.2005	Any service provided or to be provided to any person in relation to construction of complex was made taxable under sub-clause (zzzh) of section 65(105) of the Finance Act, 1994.
1.8.2006	Circular F. No. 332/35/2006-TRU, dated 1-8-2006 clarified that if no other person is engaged for construction work and the builder/promoter/developer undertakes construction work on his own without engaging the services of any other person, then in such cases in



	the absence of service provider and service recipient relationship, the question of providing taxable service to any person by any other person does not arise
1.6.2007	The Finance Act, 1994 has sought to levy service tax for the first time on certain specified works contracts.
15.5.2008	Held in the case of Magus Constructions 2008 (11) S.T.R. 225 (Gau HC) that it becomes clear that the circular, dated August 1, 2006, aforementioned, is binding on the department and this circular makes it more than abundantly clear that when a builder, promoter or developer undertakes construction activity for its own self, then, in such cases, in the absence of relationship of "service provider" and "service recipient", the question of providing "taxable service" to any person by any other person does not arise at all.
29.1.2009	Circular No. 108/2/2009-S.T., dated 29-1-2009 clarified that where a buyer enters into an agreement to get a fully constructed residential unit, the transaction of sale is completed only after complete construction of the residential unit. Till the completion of the construction activity, the property belongs to the builder or promoter and any service provided by him towards construction is in the nature of self service. Secondly, if the ultimate owner enters into a contract for construction of a



	residential complex with a promoter/builder/developer, who himself provides service of design, planning and construction and after such construction the ultimate owner receives such property for his personal use, then such activity would not be subjected to service tax, because this case would fall under the exclusion provided in the definition of 'residential complex'.
1.7.2010	An Explanation was inserted to both the definitions pertaining to commercial construction as well as construction of complex services, but no Explanation was inserted in the definition relating to works contract services. The Explanation deems the activity of construction undertaken by builders/developers as a service except in cases where the full payment is received after the completion certificate
15.2.2011	Trade Facility No. 1/2011, dated 15-2-2011 issued by Pune Commissionerate stated that where services of construction of Residential Complex were rendered prior to 1-7-2010 no Service Tax is leviable in terms of para 3 of Boards Circular number 108/02/2009-S.T., dated 29-1-2009.

G. In fact, the Bombay High Court decision in the case of Maharashtra Chamber of Housing Industry 2012 (25) S.T.R. 305 (Bom.) brings out the detailed developments on the legal front and therefore the relevant extracts from the said decision are reproduced below:



14. The Finance Act of 2004 brought within the fold of taxable services, a service provided or to be provided to any person by a commercial concern in relation to construction service by introducing clause (zzq) in Section 65(105). By the Finance Act of 2005 clause (zzzh) was introduced to bring "the construction of complex" within the ambit of taxable services. Simultaneously, definitions were provided of the expressions 'commercial or industrial construction service' in clause (25b), of the expression 'construction of complex' in clause (30a) and of 'residential complex' in clause (91a).

15. The rationale for the introduction of a service tax on these taxable services found elaboration in circulars of the Central Board of Excise and Customs. On 17 September 2004 the Board issued a circular, when clause (zzq) was on the statute clarifying that services provided by a commercial concern in relation to construction, repair, alteration or restoration of buildings, civil structures, or parts thereof occupied or engaged for the purposes of commerce and industry were covered by the new levy. **In this case, the circular noted, the service is essentially provided to a person who gets such construction done by a building or civil contractor. Hence, estate builders who construct buildings or civil structures for themselves (for their own use, for renting out or selling subsequently) were not regarded as taxable service providers. However, if a real estate owner were to hire a contractor, the payment made to a contractor would be subjected to service tax under the head.** The circular clarified that the gross value charged by a building contractor would include the cost of materials. The service provider would be eligible to take credit of the excise duty paid on inputs under the Cenvat Credit Rules, 2004. Since the inputs were normally procured from the market and were therefore not covered by duty paying documents, a general exemption was available to goods sold during the course of providing a service, but the exemption was subject to the condition of availability of documentary proof indicating the value of the goods sold. Since in the case of a composite contract, a bifurcation of the value of the goods sold is often difficult, an abatement of 67% was provided in case of composite contracts where the gross amount charged included the value of the material cost.

16. On 29 January 2009, a circular was issued by the Central Board of Excise and Customs recording that once an agreement of sale is entered into with a buyer for a unit in a residential complex, he becomes the owner of the unit and the activity provided by the builder of constructing the unit is a service to the customer on which service tax would be applicable. The contrary view which was expressed was that where a buyer makes a construction linked payment after entering into an agreement to sell, the nature of the transaction is not a service but a sale. Where an agreement to sell is entered into by a buyer with the builder, the property belongs to the builder till the completion of the transaction and any service provided towards construction would be in the nature of 'self



service'. The circular of the Board noted that the matter was examined. The Board was of the view that in the case of a mere agreement to sell an interest in the property is not created under the Transfer of Property Act and the property continues to remain in the ownership of the seller. The ownership of the property gets transferred to the ultimate owner only upon the completion of construction. The Board therefore opined that a service provided by a seller in connection with the construction of a residential complex till the execution of a sale deed would be in the nature of 'self service' and would not attract a liability to pay Service tax. However, if the services of a person such as a contractor, designer or a similar service provider were received, then such a person would be liable to pay Service tax.

17. The Finance Act of 2010 sought to bring within the field of Service tax such cases which may have passed out of the net of value added tax merely on account of the timing of the execution of the agreement. By the amendment, an explanation came to be inserted in clause (zzq) and clause (zzzh) of Section 65(105). The explanation creates a legal fiction. The effect of the fiction is to provide a deeming definition of what constitutes a service provided by the builder to a buyer. The explanation stipulates two pre-requisites before the construction of a new building or a complex is deemed to be a service provided by the builder to a buyer. The first condition is that the construction of a new building or, as the case may be, of a complex must be intended for sale wholly or partly by a builder or a person authorized by him whether before, during or after construction. The second requirement is that a sum must be received from or on behalf of the prospective buyer by the builder before the grant of a completion certificate by the authority competent to issue such a certificate under any law for the time being in force. Intent to sell whether before, during or after construction is therefore made the touchstone of the deeming definition of a service provided by the builder to the buyer. The exception is where no sum has been received by the builder from the prospective buyer before the grant of a completion certificate, in which case the deeming definition will not apply.

18. The rationale for the introduction of the explanation is contained in a circular issued by the Central Board of Excise and Customs on 26 February 2010. The circular explains that in the definition of 'taxable service' in clauses (zzq) and (zzzh) it is provided that unless the entire consideration for the property is paid after the issuance of a completion certificate, the activity of construction would be deemed to be a taxable service provided by the builder or developer to the prospective buyer and service tax would be charged accordingly. The reason for the explanation emerges from the following extract from the circular :

"Service tax on construction services



8.1 The service tax on construction of commercial or industrial construction services was introduced in 2004 and that on construction of complex was introduced in 2005.

8.2. As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the outright sale of the immovable property and admittedly no Service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/completion, pays the consideration in installments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can be associated with a particular buyer. Since the vacant land has lower value, this system of legal instrumentation has been devised to pay lesser stamp duty. In many cases, an instrument called 'Construction Agreement' is parallelly executed under which the obligations of the promoter to get property constructed and that of the buyer to pay the required consideration are incorporated.

8.5 These different patterns of execution, terms of payment and legal formalities have given rise to confusion, disputes and discrimination in terms of Service tax payment.

8.6. In order to achieve the legislative intent and bring in parity in tax treatment, an Explanation is being inserted to provide that unless the entire payment for the property is paid by the prospective buyer or on his behalf after the completion of construction (including its certification by the local authorities), the activity of construction would be deemed to be a taxable service provided by the builder/promoter/developer to the prospective buyer and the Service tax would be charged accordingly. This would only expand the scope of the existing service, which otherwise remain unchanged."

19. The notes on clauses annexed to the Finance Bill of 2010 would indicate that Section 65 was sought to be amended to modify



the scope inter alia of certain taxable services by amending, among others, clauses (zzq) and (zzzh). From the circular issued by the Central Board of Excise and Customs it is evident that in different parts of the country agreements involving the transfer of residential and commercial properties followed various patterns. In certain cases, agreements to sell were entered into, at which stage the full consideration is not paid. The transfer of title to the property would take place on the conclusion of the contract and the completion of payments when a sale deed would be executed with appropriate stamp duty. The sale deed would transfer title from the builder to the buyer. In other parts of the country initially an instrument for the sale of an undivided portion of the land would be executed by which an un-demarcated interest in a portion of the land would be transferred to the buyer. This was a device adopted to reduce the incidence of stamp duty since the vacant land in which an undivided interest was created would have a lower value. Simultaneously a construction agreement would be executed incorporating the obligation of the builder to build and of the buyer to pay the consideration. The legislative intent underlying the explanation was to bring about a parity in tax treatment by stipulating that unless the entire consideration for the property is paid by the prospective buyer after the completion of construction as certified by the local authority, the activity of construction would be deemed to be a taxable service provided by the builder to the prospective buyer. The scope of the existing service was consequently sought to be expanded. **The ambit of the expression 'taxable service' in relation to construction service or, as the case may be, the construction of a complex has thus undergone a material change by bringing within the fold of service tax construction services provided by builders to buyers.**

H. The Appellants were also victims of the uncertainty prevalent in the law.

However, true to their intentions, they obtained registrations and paid taxes where-ever there were doubts about the same. The compliances undertaken by the Appellant are as under:-

Date	Event
17.08.2005	Registered with the Service tax department under 'Construction of Construction Service' and paid service tax adopting aforesaid classification
21.2.2008	Received a written instruction from the Ld. Additional



	Commissioner of Service Tax Hyderabad II Commissionerate, to change classification to 'Works Contract Service' w.e.f. 01.06.07 (Copy of letter enclosed as Annexure IX)
Post 01.06.2007	Service tax on amounts received paid at the rate of 2.06% under Composition Scheme available under Works Contract. The service tax was recomputed as per the advice of the Additional commissioner and the amount paid was sufficient to cover the liability upto end of 2010 and ST was paid under protest from 2011 onwards.
02.01.2009	Received a letter from the Superintendent of Service Tax vide C. No. WCS/125 (copy of letter enclosed as Annexure IX) instructing them to file ST-3 returns for the period 30.09.2008 along with applicable late filing fees.
27.01.2009	Appellant was summoned vide HQST No. 15/2009-ST AE dated 27.01.2009 (Copy of Summons Letter enclosed as Annexure IX) Mr. Shankar Reddy Admin Manager had appeared before the authorities.
12.03.2009	Appellant submitted the letter addressing to the Assistant Commissioner enclosing copies of challans for Rs. IX- and ST 3 Returns for the period 01.06.2006 to 31.12.2008 wherein they have clarified that they were not liable for service tax in terms of clarifications vide Circular No. 108/02/2009.
21.02.2008	Clarification issued by the Joint Commissioner dated 21.02.2008 being followed presently. (Copy of the said correspondence enclosed in Annexure IX)



06.06.2009	Received a letter from the Service Tax Department for Non-filing of ST-3 returns (Copy of the letter enclosed as Annexure IX)
02.07.2009	Detailed reply filed for the letter dated 06.06.2009 (Copy of the letter enclosed as Annexure IX) stating the service tax was paid upto December 2008 and that no remittance have been made from January 2009 due to non-applicability of service tax in view of Circular No. 108/02/2009 dated 29.01.2009 and in terms of Gauhati High Court in case of Magus Constructions. However, since amounts were paid till December 2008 duly filled ST-3 returns along with applicable late filing fees were submitted to the department.
06.11.2009	Another letter issued from the department vide HQST No. 58/2009-ST AE for furnishing certain Balance Sheets, Bank statements, Project wise details of income, copies of sale deeds and agreements etc. (Copy of the Letter enclosed as Annexure IX)
18.11.2009	Detailed reply by Appellant wherein it was stated in clear terms that such information was furnished over several visits to the department and brought to their notice vide letter dated 12.03.2009 (Copy of the letter enclosed as Annexure IX) Further they requested for 15 days time to re-submit entire data which was voluminous. It was also brought out specifically stated that the deputy commissioner has assured that the builders would not be pressurized until further clarification from CBEC is received.



13.01.2010	Another letter received from Assistant Commissioner vide HQST No. 58/09-AE IV for various statements, balance sheets and other information.
22.01.2010	Reply to letter dated 13.01.2010 with Copies of all sale deeds and construction agreements, bank statements upto 30.09.2009. All such information was given on a CD since the data was voluminous about 20000 Pages.
25.01.2010	Letter sent enclosing ledger copies of each of the customer in a CD and a detailed clarification was sought on issues relating to service tax.

I. On the basis of the information submitted by the Appellant a Show Cause notice was issued by the Commissioner of Customs, Central Excise and Service Tax vide O.R. No. 125/2011-ST (Adjn). (Comm.) bearing C.NO.IV/16/169/2011 Hyderabad II Commissionerate dated 24.10.2011 (**Copy of the SCN enclosed as Annexure II**) to show cause as to why:

- i. An amount of Rs.1,38,13,576/- should not be demanded from them towards Service Tax inclusive of the cess on the Works Contract Services provided by them during the period of 1.6.2007 to 31.12.2010 under Section 73(1) of the Finance Act, 1994.
- ii. Interest should not be paid by them on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994.
- iii. Penalty should not be imposed on them under Section 77 of the Finance Act, 1994.
- iv. Penalty should not be imposed under Section 78 of the Finance Act, 1994.



J. The Appellant filed a detailed reply vide letter dated 22.02.2012 (Copy of the SCN Reply enclosed as Annexure II) to the said show cause notice and further made additional submission on 18.12.2012 **(Copy of the submission enclosed as Annexure II)** on which date a personal hearing was also fixed.

K. Despite making the submissions, the Ld. Commissioner has passed the impugned order as under.

- a. Confirmed the demand of an amount of Rs.1, 38, 13,576/- from them towards Service Tax inclusive of the cess on the Works Contract Services provided by them during the period of 1.6.2007 to 31.12.2010 under Section 73(1) of the Finance Act, 1994.
- b. Confirmed Interest on the amount demanded at (i) above under the Section 75 of the Finance Act, 1994.
- c. Confirmed a Penalty of Rs.1, 38, 13,576/- not be imposed on them under Section 78 of the Finance Act, 1994.

However, they may exercise the option for paying reduced penalty of 25% of the above penal amount subject to fulfillment of conditions prescribed therefore in Section 78 of the Finance Act, 1994 made applicable to service tax vide Section 83 of the Finance Act, 1994.

- d. Confirmed Penalty of Rs.5000/- under Section 77 (2) of the Finance Act, 1994 for failure to furnish true and complete facts to the department within the time period as specified under Section 70 of the Finance Act, 1994 read with Rule 7 of Service Tax Rules, 1994.



Appellant has been aggrieved by the impugned order, which is contrary to facts, law and evidence, apart from being contrary to a catena of judicial decisions and beset with grave and incurable legal infirmities, the appellant prefers this appeal on the following grounds (which are alternate pleas and without prejudice to one another) amongst those to be urged at the time of hearing of the appeal.



GROUND OF APPEAL

For easy comprehension, the subsequent submissions in this Appeal Memo are made under different headings covering different aspects involved in the subject order.

1. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all
2. In substance also, the transaction is a sale of immoveable property
3. The transaction of sale of immoveable property is not a works contract at all
4. Even if a view is taken that there is some element of service embedded in the transaction of sale of immoveable property, the same is taxable only with effect from 01.07.2010 and that too under a different classification of "Construction of Residential Complex Service"
5. The activity is eligible for exclusion being in the nature of construction for personal use of the intending buyer
6. There are fundamental errors in the quantification of the service tax demand
7. The Principles of Natural Justice have been violated
8. Benefit under section 73(3) should be granted
9. Extended Period of Limitation cannot be invoked in this case
10. Interest cannot be demanded
11. Penalties cannot be imposed



1. The transaction is essentially a transaction of sale of immoveable property and therefore cannot be made liable for payment of service tax at all

- 1.1. The Appellants crave leave to draw the attention of the Bench to the detailed fact matrix presented earlier. In particular, the Appellants wish to emphasize on the following documents:
- 1.1.1. The Booking Form signed by the intending buyer, which is the first document governing the relationship between the Appellant and the intending buyer.
- 1.1.2. The Agreement to Sell, which formalizes the said relationship between the Appellant and the intending buyer.
- 1.1.3. A set of two co-terminus agreements, viz. the Sale Agreement and an Agreement for Construction, which are executed only to enable the transfer of title in semi-finished construction in cases where there is a financing requirement for the buyer.
- 1.1.4. Sale Agreement, without a corresponding Agreement for Construction in cases where there is no financing requirement for the buyer.
- 1.2. The Appellants have to submit that the Booking Form and the Agreement to Sell clearly define the relationship between the Appellants and the Buyer.
- 1.3. Preamble A to L of the Agreement explains and demonstrates the Title of the Appellant in the underlying land and the sanction received by the Appellants from HUDA for development of the residential units as per the approved layout plans. It may not be out of place to stress that in a typical works contract/construction contract, the contractor works on client property and therefore the agreement has no necessity to emphasise on the title of the underlying land. The essence of the transaction between the



Appellant and the Buyer is evident right from the first preamble of the Agreement and that essence is the title in the immoveable property.

- 1.4. Thereafter, Preamble M highlights that the Appellant has agreed to sell the Scheduled Apartment together with proportionate undivided share in land and parking space as a package for the total consideration and the buyer has agreed to purchase the same. Thus, the said Preamble clearly brings out the intention of the parties, which is sale of immoveable property. This would also be evident on reading of clauses 1, 2, 12, 19 and 25 of the Agreement to Sell
- 1.5. The Appellants therefore submit that the Agreement to Sell is an agreement which evidences the transaction of commitment of sale of immoveable property at a future date and therefore there cannot be any service tax on the said transaction. In fact, the said position is accepted by the Department, since no service tax is demanded in cases where the agreement to sell is not followed by another co-terminus set of sale agreement and agreement for construction.
- 1.6. However, as stated in Para 9 of the Agreement, in certain cases the Buyers may be interested in availing finance from the Banks and for the said purpose, the Banks insist on a title in favour of the buyer. For the said purpose, the Appellants may enter into a sale deed for sale of Apartment in a semi-finished state, simultaneously entering into a separate construction contract for completing the unfinished apartment. It may be noted that as per para 16 of the Agreement of Sale, both the Sale deed and the Agreement for Construction are interdependent, mutually co-existing and inseparable



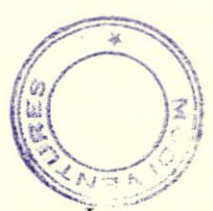
1.7. It may be noted that the said set of co-terminus agreements do not

result in any exchange of consideration between the parties but are entered into so as to effectuate the objectives of the Agreement to Sell. Therefore, in that sense, the entering into the said set of co-terminus agreements cannot be considered as an economic transaction resulting in any tax consequence.

1.8. Further, the substance of the transaction continues to be that of sale of immoveable property. Merely because the buyer is interested in defending the title to the property in the interim does not change the transaction to be that of a rendition of service.

1.9. In the case of Hindustan Shipyard Ltd. Vs. State of Andhra Pradesh [2000] 119 STC 0533 (SC), the Supreme Court held that a contract for construction of ship as per the specifications of the buyer with specific stipulations is a sale contract and not a works contract. The Supreme Court also observed that the clause in the contract providing for passing of property in goods as and when the said goods are used in the contract is not important in deciding the issue. The relevant extracts from the said decision are as under:

"22. Reverting back to the facts of the contract under consideration before us, a few prominent features of the transaction are clearly deductible from the several terms and conditions and recitals of the contract. The contract is for sale of a completely manufactured ship to be delivered after successful trials in all respects and to the satisfaction of the buyer. It is a contract for sale of made to order goods, that is, ship for an ascertained price. Although the plans and specifications for the ship are to be provided by the customer and the work has to progress under the supervision of the classification surveyor and representative of the buyer, the components used in building ship, all belong to the appellant. The price fixed is of the vessel completely built up although the payment is in a phased manner or, in other words, at certain percentages commensurate with the progress of the work. The payment of 15 per cent of the price is to be made on satisfactory completion of the dock trials, that is when the vessel is ready to be delivered and strictly speaking excepting the delivery nothing substantial remains to be done. Twenty per cent of the price is to be paid upon delivery of the vessel.



Thus 65 per cent of the price paid before the trials is intended to finance the builder and to share a part of the burden involved in the investments made by the builder towards building the ship. It is a sort of an advance payment of price. The "title and risk clause" quoted as sub-para (14) above is to be found in 6 out of 8 contracts in question. So far as these 6 contracts are concerned they leave no manner of doubt that property in goods passes from seller to the buyer only on the ship having been built fully and delivered to the buyer. In all the contracts the ultimate conclusion would remain the same. **The ship at the time of delivery has to be a completely built up ship and also seaworthy whereupon only the owner may accept the delivery.** A full reading of the contract shows that the chattel comes into existence as a chattel in a deliverable state by investment of components and labour by the seller and property in chattel passes to the buyer on delivery of chattel being accepted by the buyer. Article 15 apparently speaks of property in vessel passing to the buyer with the payment of first instalment of price but we are not to be guided by the face value of the language employed; we have to ascertain intention of the parties. The property in machines, equipments, engine, etc., purchased by the seller is not agreed upon to pass to the buyer. The delivery of the ship must be preceded by trial run or runs to the satisfaction of the owner. **All the machinery, materials, equipment, appurtenances, spare parts and outfit required for the construction of the vessel are to be purchased by the builder out of its own funds. Neither any of the said things nor the hull is provided by the owner and in none of these the property vests in the owner.** It is not a case where the builder is utilising in building the ship, the machinery, equipment, spares and material, etc., belonging to the owner, whosoever might have paid for the same. The builder has thereafter to exert and invest its own skill and labour to build the ship. Not only the owner does not supply or make available any of the said things or the hull of the ship the owner does not also pay for any of the said things or the hull separately. All the things so made available by the builder are fastened to the hull belonging to the builder and become part of it so as to make a vessel. What the owner pays to the builder in instalments and in a phased manner are all payments at the specified percentage which go towards the payment of the contract price, i.e., the price appointed for the vessel as a whole. 65 per cent payment of the price is up to the stage of the main engine having been lowered in position on board the vessel, i.e., the stage by which the building of the vessel is complete. 15 per cent payment is to be done on satisfactory completion of the trial and 20 per cent upon delivery of the vessel. **Giving maximum benefit in the matter of construction and interpretation of this clause in favour of the appellant it can be said that it is the property in vessel which starts passing gradually to the buyer proportionately with the percentage of payments made and passes fully with the payment of last instalment on delivery of vessel having been accepted.**

- 1.10. Based on the above observations, the Supreme Court concluded that the contracts in question **involve sale of the respective**

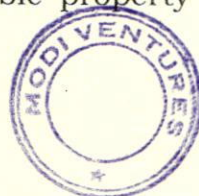


vessels within the meaning of clause (n) of the Andhra Pradesh General Sales Tax Act, 1957 and are not merely works contract as defined in clause (t) thereof.

- 1.11. A similar view has been taken by the Supreme Court in the case of State of Andhra Pradesh Vs. Kone Elevators (India) Ltd. [2005] 140 STC 0022 (SC), wherein it has been held that a contract for construction and supply of a lift is a sale contract and not a works contract. The relevant tests laid down in the said decision are reproduced below:

5. It can be treated as well-settled that there is no standard formula by which one can distinguish a "contract for sale" from a "works contract". The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract. In a "contract of sale", the main object is the transfer of property and delivery of possession of the property, whereas the main object in a "contract for work" is not the transfer of the property but it is one for work and labour. Another test often to be applied to is: when and how the property of the dealer in such a transaction passes to the customer: is it by transfer at the time of delivery of the finished article as a chattel or by accession during the procession of work on fusion to the movable property of the customer? If it is the former, it is a "sale"; if it is the latter, it is a "works contract". Therefore, in judging whether the contract is for a "sale" or for "work and labour", the essence of the contract or the reality of the transaction as a whole has to be taken into consideration. The predominant object of the contract, the circumstances of the case and the custom of the trade provides a guide in deciding whether transaction is a "sale" or a "works contract". Essentially, the question is of interpretation of the "contract". It is settled law that the substance and not the form of the contract is material in determining the nature of transaction. No definite rule can be formulated to determine the question as to whether a particular given contract is a contract for sale of goods or is a works contract. Ultimately, the terms of a given contract would be determinative of the nature of the transaction, whether it is a "sale" or a "works contract"

- 1.12. We therefore have to submit that the transaction is essentially a transaction for sale of immoveable property and the relationship



between the Appellants and the prospective flat owner is that of seller & buyer of an immoveable property. We submit that the said proposition is not altered even in cases where the set of co-terminus agreements are entered into.

- 1.13. The levy of service tax requires that there should be some rendition of service. In the instant case, there is a sale of immoveable property and therefore the provisions of the service tax law do not apply at all.
- 1.14. The view that the builders are not liable for service tax is confirmed by the Ministry of Finance *vide* its letter number F. No. 332/35/2006-TRU, dated 1st August 2006; wherein it is acknowledged that the relationship between a builder and the purchaser is not that of a "service provider" and "service recipient"¹.

2. In substance also, the transaction is a sale of immoveable property

- 2.1. It is an accepted principle that before characterizing a transaction, one has to carefully examine the exact legal nature of the transaction and other material facts. Not only the form but also the substance of transaction must be duly taken into account². While taking a view, both the form and substance of the transaction are to be taken into account. The guiding principle is to identify the essential features of the transaction. The method of charging does not in itself determine whether the service provided is a single service or multiple services
- 2.2. Further, in the following cases it has been held that substance of the transaction prevails over the form:

¹ Reply to Question 1 addresses this issue.

² CBEC Letter (F. No. B14/2006-TRU) dated 19/04/2006.

- Venus Jewel Vs. Commr of S.T. -I, Mumbai 2012 (285) E.L.T. 167 (Guj.)
- Bhootpurva Sainik Society Vs. Commr of C. EX. & S.T., Allahabad 2012 (25) S.T.R. 39 (Tri. - Del.)
- Commr. OF S.T., Bangalore Vs. Karnataka State Beverages Corp.Ltd. 2011 (24) S.T.R. 405 (Kar.)

- 2.3. Even in commercial & legal parlance, the transactions are not in the nature of the Works Contract Services
- 2.4. When one looks at the substance of the transaction in the fact matrix as explained earlier, the issue is crystal clear, the essential feature of the transaction is that the Appellants sell immoveable properties. That being the case, the only place where the tax can be examined is under the Explanation to Section 65(105)(zzzh) as a deemed service and not under Section 65(105)(zzzza).
- 2.5. The Appellants submit that the activity of construction is for self and as a part of the obligation to deliver a developed immoveable property. Notwithstanding the same, even if it is presumed that the transaction contains elements of works contract services as alleged, the same are subsidiary and do not lend the essential characteristic to the transaction. For example, the Buyer has little wherewithal of the quality, quantity, brand or the price of most of the building materials used. Similarly, the Buyer is not concerned with the extent to which the labour or the services are required for the purpose of the completion of the unit. For both the Appellant as well as the Buyer, the linkage with works contracts is very remote and laborious.
- 2.6. From the above clarifications and distinctions, it is more than evident that commercially and legally, the transaction does not



represent the characteristics required of the alleged categories of taxable services.

2.7. We submit that in a taxing statute words which are not technical expressions or words of art, but are words of everyday use, must be understood and given a meaning, not in their technical or scientific sense, but in a sense as understood in common parlance i.e. "that sense which people conversant with the subject-matter with which the statute is dealing, would attribute to it". Such words must be understood in their 'popular sense'. The particular terms used by the legislature in the denomination of articles are to be understood according to the common, commercial understanding of those terms used and not in their scientific and technical sense "for the legislature does not suppose our merchants to be naturalists or geologists or botanists". This is referred to as the common parlance test³.

2.8. Based on the above common parlance test, we have to submit that in common parlance, no one would treat us as a works contractor but would consider us as sellers of immoveable properties and therefore, the transaction cannot be classified as Works Contract Services. For the said purpose, we rely on the following decisions:

- i. The expression "fish" is not wide enough to include prawns since If a man were to ask for fish in the market and if prawn is provided or in the vice versa, he would not accept the same⁴
- ii. Steam generated from water cannot be considered as chemical in common parlance⁵

³ Mukesh Kumar Aggarwal & Co vs. State of Madhya Pradesh 2004 (178) ELT 3 (SC)

⁴ Commissioner of Customs vs. Edhayam Frozen Foods 2008 (230) ELT 225 (Mad HC)

⁵ Gopalanand Rasayan vs. State of Maharashtra 2011 (263) ELT 381 (Bom HC)



- 2.9. The Appellants therefore submit that the essence of the transaction is not the same as alleged and therefore cannot be made liable for payment of service tax under the said categories of taxable services. The Appellants therefore submit that since the transaction in substance is that of sale of immoveable property and not one of construction, the same is not liable for payment of service tax.

3. The transaction of sale of immoveable property is not a works contract at all

- 3.1. The Appellants have to submit that service tax is levied on a selective approach. The service tax is demanded under the category of "Works Contract Services". However, the Order in Original has no detailed analysis of why the alleged transaction constitutes a works contract.
- 3.2. It is a settled proposition in law that a works contract is a contract wherein the contractor works upon a property owned by the client and while performing the work transfers the ownership of materials to the client.
- 3.3. Whether the contracts for sale of immoveable properties can be considered as works contracts or not is right now an issue pending before the Supreme Court since the decision in the case of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT has been doubted by the Supreme Court and the matter has been referred to a Larger Bench⁶.
- 3.4. Further, the transaction cannot be covered under the category of "Works Contract Services" since the activity is not specifically listed in the definition set

⁶ Larsen & Toubro Ltd. Vs. State of Karnataka 2008 (12) STR 257 (SC)



3.5. The relevant definition sets are reproduced below for ease of reference:

<i>Taxable Service defined u/s 65(105)(zzza)</i>	Taxable service means any service provided or to be provided to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams. <i>Explanation.—For the purposes of this sub-clause, "works contract" means a contract wherein,—</i> (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and (ii) such contract is for the purposes of carrying out,— (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or (c) construction of a new residential complex or a part thereof; or (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;
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3.6. On a perusal of the above definition sets, it is evident that there are twin conditions to consider a transaction as a works contract under the provisions of the service tax law. The first condition is that transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods and the second condition is that the contract is for specific purposes, which inter alia includes construction of a new residential complex or a part thereof



- 3.7. The Appellants have to submit that the Order does not demonstrate in reasonable detail the satisfaction of either of the two conditions.
- 3.8. The first condition for treating a transaction as works contract is that the transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods. Neither the SCN nor the OIO at any point of time, refer to this vital condition nor is there any demonstration of how this condition is satisfied. ***In fact, the OIO, by demanding a service tax on the entire value of the contract negates this very condition and therefore the OIO is self conflicting***
- 3.9. The Appellants have to submit that though they are paying sales tax on the agreement for construction, the mere act of paying the sales tax does not demonstrate that the sales tax was actually leviable and the condition of works contract requires that the sales tax was actually leviable. As stated earlier, the issue regarding the applicability of sales tax on such transactions is pending before the Supreme Court.
- 3.10. The Appellants have to further submit that the role played by them is much wider than that of mere construction. We typically undertakes numerous activities like
- Evaluation/Acquisition of a Site
 - Removal of Encumbrances
 - Demolition
 - Layout Planning & Approval
 - Purchase of Additional TDR
 - Construction
 - Sale
 - Possession & Maintenance



- Society Formation & Handing over

- 3.11. All the above steps are performed by the Appellants for self and are not performed specific for any buyer or prospective buyer. In fact, the approval of the standard layout is obtained by the Appellants without any consultation with the buyers and much before the buyer even knows the Appellants.
- 3.12. The Appellants therefore have to submit that merely entering to co-terminus agreements in case of financing requirements do not change the substance of the transaction to that of provision of works contract services.
- 3.13. Further, the Supreme Court judgment of K Raheja Development Corporation v State of Karnataka 2005-TIOL-77-SC-CT, which is the sole basis for treating the transaction as works contract was rendered in the context of works contract tax. Under the Karnataka GST, the definition of works contract was specifically including development contracts, which is not the case with the service tax law, which includes only construction contracts. Further, the scope of development contracts is much wider than that of construction contracts and construction is just one of the responsibilities of the said contract.
- 4. Even if a view is taken that there is some element of service embedded in the transaction of sale of immoveable property, the same is taxable only with effect from 01.07.2010 and that too under a different classification of "Construction of Residential Complex Service"**
- 4.1. The Appellants have to submit that even if a view is taken that there is some element of service embedded in the transaction of sale of immoveable property, the same is taxable only with effect from



01.07.2010 and that too under a different classification of "Construction of Residential Complex Service"

- 4.2. The Appellants submit that in order to impose service tax on the service component embedded within a transaction of sale of immovable property where some amounts are received before the completion of construction, an Explanation was inserted to section 65(105)(zzzh) with effect from 01.07.2010. The said Explanation is reproduced below:

Explanation.—For the purposes of this sub-clause, construction of a complex which is intended for sale, wholly or partly, by a builder or any person authorised by the builder before, during or after construction (except in cases for which no sum is received from or on behalf of the prospective buyer by the builder or a person authorised by the builder before the grant of completion certificate by the authority competent to issue such certificate under any law for the time being in force) shall be deemed to be service provided by the builder to the buyer.

- 4.3. In this context, it has been clarified⁷ as under:

8.2 As regards payment made by the prospective buyers/flat owners, in few cases the entire consideration is paid after the residential complex has been fully developed. This is in the nature of outright sale of the immovable property and admittedly no service tax is chargeable on such transfer. However, in most cases, the prospective buyer books a flat before its construction commencement/ completion, pays the consideration in instalments and takes possession of the property when the entire consideration is paid and the construction is over.

8.3 In some cases the initial transaction between the buyer and the builder is done through an instrument called 'Agreement to Sell'. At that stage neither the full consideration is paid nor is there any transfer in ownership of the property although an agreement to ultimately sell the property under settled terms is signed. In other words, the builder continues to remain the legal owner of the property. At the conclusion of the contract and completion of the payments relating thereto, another instrument called 'Sale Deed' is executed on payment of appropriate stamp duty. This instrument represents the legal transfer of property from the promoter to the buyer.

8.4 In other places a different pattern is followed. At the initial stage, instruments are created between the promoter and all the prospective buyers (which may include a person who has provided the vacant land for the construction), known as 'Sale of Undivided Portion of The Land'. This instrument transfers the property right to the buyers though it does not demarcate a part of land, which can

⁷ DOF. No. 334/1/2010-TRU, dated 26-2-2010

