

**IN THE HIGH COURT OF JUDICATURE OF ANDHRA PRADESH
AT HYDERABAD
(SPECIAL ORIGINAL JURISDICTION)**

W.P.NO. 28007 OF 2009

BETWEEN:

M/s. Modi & Modi Constructions,
Having its registered office
5-4-187/3 & 4, II Floor, MG Road,
Secunderabad
Rep. by its Managing Partner,
Mr. Soham Modi,
S/o. Satish Modi, Aged 39 years,
R/o. Plot No. 280, Road No. 25,
Jubilee Hills, Hyderabad.

...PETITIONER

A N D

1. Union of India,
Represented by its
Secretary,
Ministry of Finance,
Government of India,
New Delhi
2. Commissioner of Central Excise,
Customs and Service Tax,
Hyderabad II Commissionerate,
3rd Floor, Shakkar Bhawan,
LB Stadium Road,
Basheerbagh,
Hyderabad
3. Superintendent of Service Tax,
Hyderabad-II Commissionerate,
LB Stadium Road,
Basheerbagh, Hyderabad

...RESPONDENTS

AFFIDAVIT

I, Soham Modi, S/o. Shri Satish Modi, aged about 39 years, Resident of Hyderabad, do hereby
solemnly affirm and sincerely state as follows:-

1. I am the Managing Partner of the Petitioner Company herein and as such I am well
acquainted with the facts of the case and swear to the contents of this affidavit.
2. The Petitioner is engaged in the business of promoting, developing and constructing
residential complexes. The Petitioner identifies plots of land suitable for development

into residential complexes and makes an outright purchase or enters into a development agreement with the owners of the land. The Petitioner employs contractors / sub contractors as also its own labour after having conceived construction of the residential complex. The architects are employed by the Petitioner, designs are prepared, approval and permission of GHMC, HUDA or other local authorities for the purposes of construction is taken by the Petitioner. The residential flats so constructed are marketed by the Petitioner.

3. The Petitioner eventually transfers the residential units or apartments to the intending buyers. Depending upon the stage at which the prospective buyer contracts with the Petitioner, the consummation of transaction could take one of the several forms. In the case of construction of residential bungalows, the Petitioner sells the land or causes the sale of the land in favour of the prospective buyer. In case of residential complexes, the Petitioner executes a sale deed with respect to undivided interest in the land with a partially constructed structure. In either event, the Petitioner enters into an agreement for construction of the residential complex and completing the construction of residential apartment in favour of the prospective buyer. A few typical documents executed by the Petitioner with its clients are marked collectively as **Annexure P-1** hereto.

4. The Union of India levies service tax on several services under the provisions of Finance Act, 1994 as amended from time to time. In so far as the construction activity is concerned, Section 65 (105) (zzzh) authorizes the levy of service tax in relation to services rendered "to any person by any other person in relation to construction of a complex". The expression "construction of complex" is defined in Section 65 (30a) of the Act in the following terms.

"(a) construction of a new residential complex or a part thereof;

(b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or

(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;"

5. The analysis of the scope of Section 65 (30a) of the Act would yield the following result. The term "residential complex" employed in Section 65 (30a) is again defined in Section 65 (91a) of the Act in the following terms:

" "residential complex" means any complex comprising of –

(i) a building or buildings, having more than twelve residential units;

(ii) a common area; and

(iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

Located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation-For the removal of doubts, it is hereby declared that for the purposes of this clause,-

(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;

(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;"

6. Qua the residential complex, it is essential, therefore, that there must be 12 or more residential dwelling units. A complex which has less than 12 residential units is outside the purview of the definition of "residential complex". There is a further exception which is carved out in the definition of a "residential complex". That exception says that if the complex is located within the premises and the layout of such premises is approved by the authority and if the complex is constructed by a person directly engaging any other person for designing or planning of the layout and the construction of such complex is intended for personal use as a residence by such person, then there is no liability to service tax.
7. "Personal use" has been defined to include residence by another person on rent or without consideration. The applicability of latter part of the definition of a residential complex under Section 65 (91a) of the Act could only be in relation to complexes which house more than 12 residential units. In respect of such complexes, construction is undertaken by engaging another person for designing or planning of the layout. Construction of the residential house intended for personal use is exempt from the purview of definition of residential complex, and consequently the charging section in Section 65 (105) (zzzh) is inapplicable.
8. The parliament amended the provisions of Finance Act, 1994 with effect from 01.06.2007 by Finance Act, 2007 by inserting several further clauses. One such clause is clause 65 (105) (zzzza) which brings to charge services in relation to execution of a works contract. A works contract in relation to construction of a new residential complex or part thereof is taxed under the provisions of Section 65 (105 (zzzza) (ii) (c) of the Act.

9. A considerable amount of confusion prevailed in the housing/builder with respect to the implication of the two statutory provisions contained in Section 65 (105 (zzzh) and 65 (105) (zzzza) of the Act. The Central Board of Excise and Customs ("CBEC") from time to time issued circulars clarifying the position with respect to the applicability of service tax in relation to residential complexes. One such circular was issued by the CBEC on the 29.01.2009 vide Circular No. 108/02/2009-ST. The provisions of Section 65 (105) (zzzh) in relation to the construction of a residential complex has been examined by the CBEC and the position has been clarified. A copy of the circular dated 29.01.2009 is annexed hereto as **Annexure P-2** hereto.
10. The circular, in paragraph 3, specifically deals with the different methods that the developers adopt for eventually conveying right, title and interest in the apartments in favour of the prospective buyers. The first case that is examined is where the Agreement of Sale precedes the sale deed in respect of a residential unit. Until such time as the conveyance is executed in favour of the prospective buyer, service if any, rendered by promoter / developer / builder is a service to himself. Consequently, the circular recognizes that there is no charge to service tax in such cases. The second mode that is considered is where the prospective purchaser enters into a contract of construction of a residential complex with promoter / developer / builder. In such cases where the contract provides service of design, planning and construction of after such construction the ultimate owner receives such property for personal use, the view of the Central Board of Excise and Customs is that this would fall within the exclusion provided in the definition of "residential complex" in terms of definition in Section 65 (91a) of the Act.
11. The real purport of the circular is further explained that in both these situations services that promoter / developer / builder may hire like that of a contractor, designer or other similar service provider are the services which would attract levy of service tax.
12. Whether a charge is under section 65 (105) (zzzh) or 65 (105) (zzzza) (ii) (c), eventually the liability is to be determined on the basis of the definition of "residential complex" in Section 65 (91a) of the Act to be read along with the exclusion.
13. The Petitioner had been paying service tax up to December, 2008. However, from about January, 2009 onwards there were discussions that were going on between the builders' representatives and the Union of India, represented by Central Board of Excise and Customs which culminated in the issuance of the circular referred to hereinbefore. Therefore, the Petitioner had stopped paying service tax from 1st of January, 2009.
14. The Petitioner is now bombarded with frequent queries from Respondent Nos. 2 and 3 with respect to the various projects that it is undertaking. There is a demand for

production of records and there is threat of collection of service tax by coercion. In fact, in case of certain other builders, the service tax personnel have forcibly collected cheques in spite of the fact that the CBEC has categorically held that whether a promoter / developer / builder is engaged in the construction of a residential complex, irrespective of whether the whole apartment is sold by execution of single conveyance or there is an agreement of construction that is entered into between such promoter / developer / builder and the prospective buyer, there is no liability to service tax. The Petitioner has been apprising the Respondent Nos. 2 and 3 of the legal position as has been explained by the CBEC. Copies of the entire correspondence exchanged between the Petitioner and the service tax department in this context are collectively filed as **Annexure P-3** in chronological order.

15. While on one hand, the service tax authorities are insisting that the Petitioner comply with the provisions of the Finance Act, 1994 as amended from time to time by paying the service tax, on the other hand, the prospective buyers of the residential units are protesting the collection of service tax from them. Service tax being an indirect tax, the Petitioner is entitled to recover the same from the purchasers and remit it to the service tax department, if truly there is a charge on the activities which the Petitioner undertakes. Copies of the correspondence with some of the prospective purchasers are collectively filed as **Annexure P-4** hereto.
16. It is respectfully submitted that the question whether there is a liability to service tax in respect of the activity of construction of residential complex in relation under consideration payable by a buyer of flats or not is *res integra*.
17. The circulars issued by the Central Board of Excise and Customs are with statutory sanction and are also in the nature of contemporaneous exposition on the law and merit consideration especially since such circular in the present case is favourable to the tax payer. The settled legal position is that circulars that are favourable to the tax payers bind the department. The department cannot go behind the circulars.
18. It is submitted that the action of the Respondents No. 2 and 3 which is at variance of the statutory provisions of the Finance Act, as also the circular, is therefore without jurisdiction, Respondents No. 2 and 3 are acting in excess of the jurisdiction and the Petitioner is entitled for writ of prohibition restraining Respondents No. 2 and 3 from exercising jurisdiction which is totally absent. It is respectfully submitted that it is not the case of irregular exercise of jurisdiction by the Respondent but an attempt to exercise jurisdiction which is totally absent in view of circular of the CBEC as explained above.

19. The Petitioner having no effective alternative remedy has approached this Hon'ble Court under Article 226 of the Constitution of India. The Petitioner has not filed any application, petition or appeal before any authority except as mentioned hereinbefore.

For the reasons aforesaid, the Petitioner prays that this Hon'ble Court may be pleased to issue an appropriate writ, direction or order especially in the nature of writ of mandamus declaring that in view of the circular No. 108/2/2009 dated 29-1-2009 explaining the provisions of Finance Act, 1994, agreements of sale / sale deeds / agreements of construction in respect of residential dwelling units do not attract service tax with respect to the consideration payable by the prospective buyer to the builder / promoter / developer and consequently issue a writ of prohibition against Respondents No.2 and 3 from raising any demand on the Petitioner towards service tax in respect of agreements of sale / sale deeds / agreements of construction in respect of residential dwelling units and pass such other order(s) as this Hon'ble Court deems fit and proper.

Pending disposal of the writ petition, it is humbly prayed that this Hon'ble Court may be pleased to stay all further proceedings pursuant to the notices issued by Respondent Nos. 2 and 3 for levy of service tax in relation to the consideration receivable by the Petitioner from prospective purchasers of residential dwelling units either under an agreement of sale / conveyance or under agreements of construction and pass such other order(s) as this Hon'ble Court deems fit and proper in the circumstances of the case.

Solemnly affirmed and signed
on this the day of October,
2009, before me at Hyderabad.

DEPONENT

ADVOCATE :: HYDERABAD

VERIFICATION STATEMENT

I, Soham Modi, S/o. Shri Satish Modi, aged about 39 years, Resident of Hyderabad being the Petitioner / person acquainted with the facts do hereby verify and state that the contents of paras (1) to (19) etc., of the affidavit filed in support of the Writ Petition are true to my personal knowledge, based on records and believed to be correct and are based on legal advice believed to be correct.

Verified at Hyderabad on this day of October, 2009.

ADVOCATE

DEPONENT