

**IN THE HON'BLE HIGH COURT OF JUDICATURE OF
ANDHRA PRADESH AT HYDERABAD
WRIT PETITION NO : 26007 OF 2009**

BETWEEN:

M/s. **Modi & Modi Constructions**,
Registered Office, 5-4-187/3, & 4,
II Floor, MG Road,
SECUNDERABAD.
Rep. by Managing Partner, Mr. Soham Modi,
S/o. Satish Modi, Aged 39 years,
R/o. Plot No. 280, Jubilee Hills,
Hyderabad

... **Petitioner**

And

1. The Union of India,
Rep by its Secretary, Ministry of Finance,
Department of Revenue,
Government of India,
New Delhi.
2. The Commissioner of Customs, C.Ex &
Service Tax, Hyderabad-II Commissionerate,
3rd Floor, Shakkar Bhavan, L.B. Stadium Road,
Basheerbagh, Hyderabad-500 004.
3. The Superintendent of Service Tax,
Service Tax, Hyd-II Commissionerate,
L.B. Stadium Road,
Basheerbagh, Hyderabad-500 004.

... **Respondents**

COUNTER AFFIDAVIT FILED ON BEHALF OF RESPONDENTS

I, Ajit Indurkar, S/o Late. Sri I. Gopal Rao, aged about 58 years,
resident of Hyderabad, do hereby solemnly and sincerely affirm
and state as follows:

2. I am the Assistant Commissioner in the Office of the
Commissioner of Customs, Central Excise and Service Tax,
Hyderabad-II Commissionerate, Hyderabad and as such I am

[Signature]
31/3/10
ATTESTOR

Superintendent (Legal)
Customs & Central Excise
Hyderabad - II Commissionerate
HYDERABAD 500 004.

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Customs & Central Excise
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well acquainted with the facts of the case as borne out of records. I am authorised to file this affidavit on behalf of the respondents.

3. I have read the affidavit filed in support of the writ petition and I submit that it contains many incorrect allegations and such of the allegations, which are not specifically admitted hereunder, are here by denied.
4. In reply to Para's 1 to 6 of the affidavit, it is submitted that it contains basic facts and rule position, hence no comments.
5. In reply to Para 7 of the affidavit, it is submitted that as per Sec 65(105) (zzzh) of the Service Tax Act "taxable service" means any service provided or to be provided -to any person, by any other person, in relation to construction of complex.

As per Sec 65 (30a) of the Service Tax Act "construction of complex" means - construction of a new residential complex or a (a) part thereof; or completion and finishing services, in relation (b) 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 repair, alteration, renovation or restoration (c) of, or similar services in relation to, residential complex;

As per Sec 65(91a) of the Service Tax Act "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.

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Explanation. - For the removal of doubts, it/s 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;

As per para 3 of the Circular No. 108/02/2009-ST, dated 29th January 2009, the matter has been examined by the Board. Generally, the initial agreement between the promoters / builders / developers and the ultimate owner is in the nature of 'agreement to sell'. Such a case, as per the provisions of the Transfer of Property Act, does not by itself create any interest in or charge on such property. The property remains under the ownership of the seller (in the instant case, the promoters/builders/developers). It is only after the completion of the construction and full payment of the agreed sum that a sale deed is executed and only then the ownership of the property gets transferred to the ultimate owner. Therefore, any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax. Further, 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'. However, in both these situations, if services of any person like contractor, designer or a similar service provider are received, then such a person would be liable to pay service tax.

As per the exclusion provided in Sec 65(91a) of the Service Tax Act, the residential complex does not include a complex which is constructed by a person directly engaging any

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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. Here, personal use" includes permitting the complex for use as residence by another person on rent or without consideration.

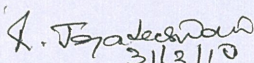
It is further clarified in para 3 of the Circular No. 108/02/2009-ST dated 29th January 2009 if the ultimate owner enters into a contract for construction of a residential complex with a promoter / builder / developer, who himself provides service of design, planning and construction; and after such construction the ultimate owner receives such property for his personal use, then such activity is not liable to service tax.

Therefore, as per the exclusion clause and the clarification mentioned above, if a builder/promoter/developer constructing entire complex for one person for personal use as residence by such person would not be subjected to service tax.

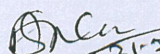
For example, construction of residential quarters by the Income tax department for their employees by employing a contractor for design, planning and construction is not leviable to service tax because it is for the personal use of the Income tax department.

Normally, a builder/promoter/developer constructs residential complex consisting number of residential units and sells those units to different customers. So, in such cases the construction of complex is not meant for one individual entity. Therefore, as the whole complex is not constructed for single person the exclusion provided in Sec 65(91a) of the Service Tax Act doesn't apply.

Further, the builder/promoter/developer normally enters into construction / completion agreements after execution of sale deed. Till the execution of sale deed the property remains in the name of the builder/promoter/developer and services rendered thereto are self services. Moreover, stamp duty will be paid on the value consideration shown in the sale deed. Therefore there is no levy of Service Tax on the services rendered till sale deed i.e., on the value consideration shown in the sale deed. But, no stamp


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duty will be paid on the agreements / contracts against which they render services to the customer after execution of sale deeds. There exists the service provider and service recipient relationship between the builder/promoter/developer and the customer. Therefore, such services invariably attract service tax. In the petition, the petitioner has intentionally replaced residential complex with residential house in the following line.

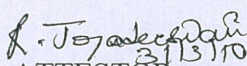
"In respect of such complexes, if construction is undertaken by engaging another person for designing or planning of the layout, then construction of the residential house intended for personal use is exempt from the purview of definition of residential complex, and consequently the charging section in Section 65(105)(zzzh) of the Act is inapplicable".

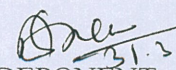
According to the department, if the whole residential complex (i.e., more than 12 units) is intended for the personal use of a person then it falls under the exclusion clause of the definition. However, the petitioner has twisted the fact and gave the meaning as residential house is exempted which is a categorical mis-statement and misguidance of Hon'ble High Court.

6. In reply to Para's 8 to 13 of the affidavit, it is submitted that it contains basic facts and rule position, hence no comments.

7. In reply to Para 14 of the affidavit, it is submitted that the petitioner has misinterpreted the provisions of Law and the clarifications of the Board, the petitioner has tried to drive to the conclusion that all the builders/Promoters/ developers are not liable for Service Tax irrespective of the services they render.

But, it is the fact that the service they render is the criteria to decide whether they are exempted or not. By mentioning the "ultimate owner" in the circular, it has been clarified that the services till execution of sale deed for the sale of land or land along with flat/residential unit i.e., till the ultimate owner becomes the owner, though there are agreements for construction with the ultimate owner prior to the sale of such constructed flat/residential unit, would not be subjected to service


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tax. Further, from the definition of Residential Complex, the construction of a complex by a person for his personal use as residence, by engaging any other person for designing or planning of the layout was excluded. Therefore, the services for construction rendered after the sale of land/flat/residential unit to the owner of the land are taxable services. There exists service provider and recipient relationship between the builder/promoter/ developer/ contractor and the owner of the land / semi finished flat/ residential unit who purchased the same under sale deed and thereafter receives services by entering into a contract / agreement with the builder/promoter/developer/contractor for construction of a residential complex or part thereof, or completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to construction a residential complex or part thereof, as the case may be.

The department has only requested to submit the record and documents of the petitioner to issue show cause notice to follow the principles of natural justice. As seen from the communication between the department and the petitioner, which is filed as Annexure P-3 of the writ petition, the petitioner has not produced the record in spite of several requests made by the department time and again. It shows non-cooperation and disinterest of the petitioner for giving information for issuance of show cause notice.

8. In reply to Para 15 of the affidavit, it is submitted that as per Service Tax provisions and the Circular No. 108/02/2009 — ST dated 29th January 2009, the services of construction of Residential Complex (as per definition) and part thereof, rendered after the sale of land/flat/residential unit to the owner of the land/flat/residential are taxable services. The customers of the petitioner may not understand the provisions of taxation as they are laymen. But, it is bounden duty of the petitioner to explain, and convince them about the taxability and collect the tax. In the indirect taxation, the petitioner cannot take escape from the

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payment of tax on this ground, as per the provisions the amounts received by them would be construed as inclusive of the tax.

9. In reply to Para 16 of the affidavit, it is submitted that it is a fact that the circulars are binding on the department. The stand taken by the department is in tune with the circular referred above which infers that the services for construction rendered after the sale of land/flat/residential unit to the owner of the land/flat/residential unit are taxable services. Further, the whole 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, is exempted.

10. In reply to Para 17 of the affidavit, it is submitted that the action taken by the Department is as per the statutory provisions of the Act, Rules and the circulars. Therefore, questioning the jurisdiction of the department by the petitioner is totally baseless.

11. In reply to Para 18 of the affidavit, it is submitted that it is to submit that when the service provider differs with the department and not paid the tax, the department with the details obtained from the assessee gives a Show Cause Notice following the principles of natural justice to give him an opportunity to make his submissions before the adjudicating authority. Thereafter, the petitioner has got opportunity to be heard before various appellate forums defending his contention or arguments. In this case, the petitioner without exhausting the procedures under the ambit of law directly approached the High Court to hinder the department. Hence, this petition is premature and the same may be disallowed on this ground itself. Moreover, issuance of the Show Cause notices are meant to protect revenue and they are time bound. Any interference in the matter may cause revenue loss.

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In view of above facts and circumstances the Hon'able court may be pleased to dismiss the writ petition as devoid of merits.

Solemnly affirmed at Hyderabad on the thirty first day of March, 2010 and signed his name in my presence.

K. Byadur Rao
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VERIFICATION

I, Ajit Indurkar, the deponent do hereby declare that what is stated above is true to the best of my information and knowledge.

Verified today the 31st day of March, 2010.

Ajit Indurkar
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