SERVICE TAX ON TRANSFER CHARGES – WHETHER ACTUALLY PAYABLE ?

By

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The Real Estate Developer/Builder generally develop a Housing Complex, Vilas, Flats, Shops, Show Rooms in a Shopping complex. Pursuant thereto, applications are invited from the interested parties seeking allotment of flats, vilas, shops, office etc.etc. In terms of the application so made by the applicants, allotment takes place. Sometimes, Apartments Buyers Agreement/Letter of Allotment is issued and on many occasions, the Agreement to Sell is executed. Later on, due to variety of reasons, the original allottee may assign his right under the Apartments Buyers Agreement/Agreement to Sell to another person on certain terms and conditions. Thereafter, the Developer/Builder may endorse the name of the assignee in the Apartment Buyers Agreement/Letter of Allotment/Agreement to Sell.

2: The Developer/Builder charge "Transfer Charges" for meeting the expenses such as endorsing the copy of the agreement in the name of new buyer, placing their papers like Identity proof, residential proof, PAN Card etc. in carrying out such activities. The Developer/Builder has to incur certain costs such as Staff Costs, documentation expenses, administration charges etc. To cover the costs so incurred, the respondent collects an amount under the "transfer charges" from the person who apply for change – who generally the original allottee.

3: Later on, Respondent enters into with the Allottee Apartment Buyer's Agreement which is in the nature of "Agreement to Sell". The Agreement to Sell does not confer any right, title or interest in the immoveable property as per Section 54 of Transfer of Property Act. The property remains under the

ownership of the Builder/Developer. After completion of project, Sale Deed/Conveyance Deeds are executed between the Developer/Builder on the one hand and the Allottee on the other hand and such Sale Deed/Conveyance Deed confers/transfers right, title and interest in such immoveable property in favour of allottee.

4: After the allotment of flat/vila/shop, the original allottee say Mr A, in future, decides to dispose off his right, in favour of Mr. B, however, Developer/Builder no where comes into picture in this transaction. The Developer/Builder has neither approached Mr A nor Mr B nor acted as an Agent of either Mr A or Mr B nor involved in any negotiations, discussions or finalization of the terms and conditions transaction and execution of documents between them. After execution of documents between Mr A and Mr B, Mr A approaches the Respondent for transfer or substitution of his name with that of Mr B and for such administrative work, the Developer/Builder charge "Administration / Transfer Charges". The question has arisen as to whether the Developer/Builder has acted as "Real Estate Agent". The relevant provisions are reproduced below:-

5: Section 65 (105) (v) defines taxable service in relation to 'Real Estate Agent' as under:-

> "Taxable service" means any service provided or to be provided to any person, by a real estate agent in relation to real estate; and the terms "service provider' shall be construed accordingly.

6: The Section 65(88) "Real Estate Agent" means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant.

7: The Section 65(89) "Real Estate Consultant" means a person who renders in any manner, either directly or indirectly, advice consultancy or technical assistants, in relation to evaluation, conception, design, development, construction, implementation, supervision, maintenance, marketing acquisition or management of real estate.

8: In order to find answer to the core issue of taxability of "Transfer Charges", one has to trace the history on the issue.

9: The Hon'ble Custom Excise and Service Tax Appellate Tribunal (hereinafter called " CESTAT) in interim order in Puravankara Projects Ltd. Vs. Commissioner of Service Tax MANU/CB/0422/2009 has observed as under:-

> We find that this taxable service is defined in Section 65(105)(v) as any service provided or to be provided to a client, by a real estate agent in relation to real estate. As per the statute, 'real estate agent' is a person who is engaged in rendering any service in relation to, among others, sale of real estate. In the instant case, persons who have entered into agreement with appellants for purchasing flats under construction and periodically pay the consideration, sold the flats to other parties identified on their own. In this transaction, the appellant has no role. However, the appellant collects a charge in such transfers of ownership of flat as per the agreement with the potential flat owners.

10: In the case of Ansal Housing & Constructions Ltd. Vs. Commissioner of Service Tax Manu/CE/0815/2011 (stay order only) has held as under:

> In the context of the facts of this case, the taxable service in the real estate domain is the service provided or to be provided by a "real estate agent" in relation to the real estate. To levy the service tax, it shall have to be proved that the person acted as "real estate agent". Further, while acting as the "real estate agent", the person concerned should have provided service of sale, purchase, leasing or renting of real estate. If the person on whom the tax is sought to be levied did not act as a "real estate agent", no tax can be levied on him. In the statutory definition of the "real estate agent", no tax can be levied on him. In the statutory definition of the "real estate agent" in section 65(88) of the Act'94, the words, " in relation to sale, purchase, leasing or renting of real estate…." shall mean any service that, directly or indirectly, resulted in sale, purchase etc. of real estate. The words cannot, in their ambit, include an activity which is not

connected with the sale, purchase etc. of a real estate. An activity which only involves the recording of the sale, purchase etc. of real estate without being the causative factor for such sale or purchase shall not be a taxable activity. Only such activities, direct or indirect, that are causative activities for sale, purchase etc. are taxable service under the Act '94. In the instant case, persons who have entered into agreement with appellants for purchasing flats under construction and periodically pay the consideration, sold the flats to other parties identified on their own. In this transaction, the appellant has no role. However, the appellant collects a charge in such transfers of ownership of flat as per the agreement with potential flat owners. We find that, prima facie, this consideration is not received towards any service rendered by the appellants as real estate agent. Demand under this category is therefore not sustainable.

11: In the case of Ansal Buildwell Limited Vs. Commissioner of Central Excise & S.T. Delhi MANU/CE/0823/2014 (Stay Order) has held as under:-

It is the admitted factual position that the appellant is the owner of the premises where flats are being constructed. Till the sale is completed in favour of the initial allottee by execution of a written sale deed which is registered under provisions of the Registration Act, there is no sale and therefore no transfer of ownership in favour of the allottee. Till such time the title of the property continues with the appellant. "Real Estate Agent" Service is defined to mean a person engaged in rendering any service in relation to sale, purchase, leasing or renting of any real estate and includes a real estate consultant. The enumerated taxable service is any service provided or to be provided to a client by a real estate agent in relation to real estate. In terms of the definition real estate agent must act as the agent of the owner of real estate and thus the owner of the property cannot be a real estate agent. In terms of clause 156, since administrative charges are collected only prior to a concluded sale by the appellant in favour of third parties, the appellant continues to be owner of the real estate and therefore could not be considered an agent of his own property. On the above

prima facie analyses, the classification of the petitioner is a "Real Estate Agent" and leavy and demand of service tax on administrative charges collected, appears fundamentally misconceived.

12: Section 65 (105) (v) defines taxable service in relation to 'real estate agent' as under:-

> "taxable service" means any service provided or to be provided to any person, by a real estate agent in relation to real estate; and the terms "service provider' shall be construed accordingly.

13: From the definition, it is clear that Service Tax is leviable on person acting as 'Real Estate Agent'. Therefore, the definition pre supposes two things (i) there has to be person acting as an agent; (ii) person should have dealt in sale/purchase etc, or real estate.

14: A service, even if provided for consideration, only to make a few change about sale or purchase of real estate in the records without being the causative factor for such sale or purchase is not a taxable service.

15: The Section 65(88) defines "Real Estate Agent" means a person who is engaged in rendering any service in relation to sale, purchase, leasing or renting, of real estate and includes a real estate consultant.

16: The Developer/Builder has, in no manner, rendered any service which can be said to be related to sale or purchase of real estate. The original allottee only seek the consent of the Developer to transfer its allotment to another person (the new assignee). The Developer was not a party in the understanding that came to be entered into between the two parties (i.e. the original allottee and the new assignee). It is important to bear in mind that this levy itself is based on the principle of agency (i.e. the real estate agent should either be an agent of the seller or the purchaser or of both the parties). The Developer was not a party to the transaction between the original allottee and the subsequent assignee, the question of being an agent does not arise at all.

17: The transfer of allotment from the original allottee to the new assignee/interested party/nominee is not a sale/purchase

transaction. The change of name only brings about a substitution in the name of the person in the 'agreement', which itself only an agreement to sell. It is settled law that an agreement to sell is not a sale itself. The sale would take place only when a conveyance deed/sale deed is executed between the parties. Till such time, the ownership of the property continues to vest with the Developer/Builder.

18: A real estate agent provides a service where the property belongs to a third person and he/she assists in bringing the buyer and the seller effect the sale of the real estate. In the present case, the real estate belonged to the Developer itself. Given this, it cannot be said that the Developer acted as an agent of its own property (real estate). For this reason also, the above taxable service is not attracted.

19: The Developer did not induce, advise or assist either of these two parties to affect the transfer (substitute the name of one for another) and, therefore, the transaction cannot be said to be covered under the ambit of a 'real estate consultant'. The transfer charges were fixed charges only to cover the administrative costs incurred by the Developer.

20: One need to look to the Explanation added to Section 65(zzzh) on 1.7.2010 after adding of Explanation, Section 65(zzzh) reads as under:

> Section 65(zzzh) read as under after addition of explanation w.e.f. 1.7.2010
>
> Any service provided or to be provided to any person, by any person in relation to construction of complex.
>
> Explanation: For the purpose of sub-clause, construction of complex which is intended for sale, wholly or partly, by a builder or any person authorized 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 authorized 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.

21: It may kindly be seen that before addition of above explanation, the position of law was that when builder was constructing the flats and the developer/builder had received advances of applicants/allottees from time to time, it was self service since before the execution of sale deed, there was no transfer of right, title and interest by the builder and hence, it was held to be "self service" and consequently, no service tax was payable. The above ratio has been laid down by the Hon'ble Gauhati High Court in the case of Magus Construction Pvt. Ltd. and Anr. Vs. Union of India (UOI) and Ors. MANU/GH/0115/2008, which, inter-alia, read as under:-

> In the present case, the materials placed by the writ petitioners clearly show that the construction activities, which the Petitioners have been undertaking, are in respect of the Petitioners' own work and it is only the completed construction work, which is sold by the Petitioner-company to the buyers, who may have made agreements for sale before the construction had actually started or during the progress of the construction activity or at the end or completion of the construction activity. Any advance, made by a prospective buyer, or deposit received by the Petitioner-company, is against consideration of sale of the flat/building to such prospective buyer and not for the purpose of obtaining "service" from the petitioner company.

22: The Hon'ble Division Bench of Tribunal, following the Hon'ble Gauhati High Court in the case of Magus Construction (P) Ltd, MANU/GH/0115/2008 has observed in the case of CCE Vs. Vee Aar Developers (P) Limited MANU/CE/0694/2012 has observed as under:-

FACTS:

22.1: The Respondents constructed residential complexes on their land and sold the residential units in such complexes to customers. Before doing the construction activity, they entered into agreement for sale of residential units and also took advances from their prospective customers. They did not pay any service tax on the activity based on the reasoning that the building was being constructed on their own land and hence the activity of

construction was for their own benefit and as such, it could not be considered as a service rendered to the prospective customers.

RATIO

22.2: But the decision of Gauhati High Court in Magus Constructions Pvt. Ltd. is also directly on the same issue giving a decision against Revenue. The decision of the Allahabad High Court in the case of Assotech Realty Pvt. Ltd. is also directly on the issue though in the matter of interpretation of works contract for the purpose of levy of VAT. Thus this is a matter involving conflicting decisions by judicial forums. Following the hierarchy of Courts the decisions of High Courts should prevail over decision of the Tribunal and Advance Ruling Authority. Therefore, we are of the view that during the impugned period, the activity in question could not be considered as service and subjected to service tax. So the appeals filed by Revenue are rejected.

23: The Hon'ble Division Bench of CESTAT in the case of CCE Vs. U B Construction (P) Ltd MANU/CE/0530/2013, dealing with the issue of levy of Service Tax on "Residential Complex" has observed as under:-

> 4. In Maharashtra Chamber of Housing Industry v. Union of India - MANU/MH/0072/2012 : 2012 (25) S.T.R. 305 (Bom.), the validity of the 'Explanation' added to Sections 65(105)(zzq) and (zzzh) was challenged on several grounds. The Bombay High Court, also considered the issue whether the explanation was prospective or retrospective in operation and ruled that the explanation inserted by the Finance Act, 2010 brings within the fold of taxable service a construction service provided by the builder to a buyer where there is an intended sale between the parties whether before, during or after construction; that the 'Explanation' was specifically legislated upon to expand the concept of taxable service; that prior to the explanation, the view taken was that since a mere agreement to sell does not create any interest in the property and the title to the property continues to remain with the builder, no service was provided to the buyer; that the service, if any, would be in the nature of a

service rendered by the builder to himself; that the explanation expands the scope of the taxable service, provided by builders to buyers pursuant to an intended sale of immovable property before, during or after the construction and therefore the provision is expansive of the existing intent and not clarificatory of the same; and is consequently prospective. In the light of the judgment of Bombay High Court in Maharashtra Chamber of Housing Industry (supra) and in the light of the admitted factual situation that constructions on behalf of the assessee were during the period prior to 1-7-2010 when the explanation was not yet appended to Section 65(106)(zzzh) of the Act, there is no liability on the assessee to remit tax under the then extant legislative regime. On the aforesaid analysis the impugned order passed by the Commissioner (Appeals) is impeccable and warrants no interference. The appeal is without merits and is accordingly dismissed. Cross objections are also disposed of.

24. The CBEC has issued a Circular No. 108/02/2009 dated 29.1.2009 which, inter-alia, read as under:-

> 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 create any interest in or charge on such property. The property remains under the ownership of the sellor (in the instant case, the promoters/developers/builders). 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 sellor in connection with the construction of residential complex, till the execution of sale deed would be in the nature of "self-service" and consequently would not attract Service Tax.

25: The Division Bench of the Hon'ble Delhi High Court in the case of Suresh Kumar Bansal Vs. Union of India MANU/DE/1414/2016 has observed as under:- The para 27, as is relevant for our purpose, is reproduced below:-

27: It is a usual practice for builders/developers to sell their project at its launch. Builders accept bookings from prospective buyers and in many cases provide multiple options for making payment for the purchase of the constructed unit. In some cases, prospective buyers make the payment upfront while in other cases, the buyers may opt for construction linked payment plans, where the agreed consideration is paid in installments linked to the builder achieving certain specified milestones. While it may be correct to state that the title to the unit (the immoveable property) doe not pass to the prospective buyer at the stage of booking, it can hardly be disputed that the buyer acquires an economic stake in the project and in one sense, the services subsumed in construction – services in relation to a construction of complex – are rendered for the benefit of buyer. However, but for the legal fiction introduced by the impugned explanation, such value add would be outside the scope of services because sensu strict no services, as commonly understood, are rendered in a contract to sell immoveable property.

26: The Hon'ble Tribunal in the case of Jaipuria Infrastructure Developers (P) Ltd Vs. Commissioner of Service Tax MANU/CE/0781/2016 has rendered a final judgment on 22.12.2016 wherein the Hon'ble Tribunal was dealing with the same issue and for the period prior to introduction of "Explanation" - though taken note of the judgment of the Hon'ble Gauhati High Court in the case of Magus Construction (P) Ltd, MANU/GH/0115/2008 but, however, failed to deal with this judgment and has completely ignored the ratio laid down by the Hon'ble Gauhati High Court. At the same time, the judgment of the Delhi High Court in the case of S K Bansal Vs. Union of India (supra) rendered on 3.6.2016, has not been brought to the notice of the Hon'ble Bench deciding Jaipuria Infrastructure and, therefore, the judgment in Jaipuria Infrastructure is also contrary to the ratio laid down in (i) Magus Construction (ii) S K Bansal and also contrary to the Board Circular dated 29.1.2009.

27: To summarize, in my view, prior to introduction of Explanation, as set out in para 20 hereinabove, both Hon'ble High Courts (i.e. Gauhati and Delhi) have held that it is a "self-

service" and, therefore, no service tax is payable and consequently, on the same analogy, no service tax is also payable on "Transfer Charges" claimed by the Developer/Builder. There is also no gainsaying in the fact that otherwise also no service is rendered by the Builder. If this principle is stretched to that extent, then wherever the name of sellor of an immoveable property is substituted with the name of buyer either in the records of House Tax, Electricity, Water, Municipal Records, Welfare Association, every body is rendering "Real Estate Agent", all the above shall be held to be "Real Estate Agent" and shall be liable to pay Service Tax – in as much as all of them substitute the name of buyer with the name of sellor of immoveable property at the request of either sellor or buyer.