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Service tax on residential complex – will anybody answer?

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Much water has flown under the bridge on the subject of service tax liability in respect of construction of residential flats. While the department is maintaining that the apartment builders are liable to pay service tax, many of the practitioners in the field are maintaining otherwise, leaving the stakeholders, i.e. builders to bewilder.

Many of the questions raised in support of the proposition that the builders are not liable to pay service tax, could not be satisfactorily answered by those who profess that they are liable to pay service tax. The questions are:

- 1) Once "works contract service" is introduced and while almost all construction contracts are recognisable as works contracts, involving transfer of property, what is the relevance of "construction of residential complex service" of for that matter "commercial or industrial construction service" today?
- 2) In as much as both works contract service as well as construction (residential as well as commercial) are co-existing in the statute book today, with almost similar definitions, will a service provider has the option to chose between any of these services, depending on various parameters of tax planning?
- 3) When the scope of construction services has thus become negligible in view of coverage under works contract service, what is the use of introducing an Explanation through the Finance Act, 2010 only in construction services and making amendments in the abatement percentages for the construction services?
- 4) The definition of "residential complex" excludes a residential complex constructed by a person by engaging a builder for his personal use. As per the definition of the term "construction of complex" includes construction of part of a complex also, even an individual who is getting constructed a residential flat for his personal use, would not be liable to bear any service tax burden? Is it not?
- 5) If the "personal use" exemption is available only for a residential complex (having more than 12 residential units) constructed by a person, such exclusion would be applicable only in case of construction of staff quarters, etc. by various entities. Is it the legislature's intention to give exemption to such cases and deny exemption to an aam admi, who gets constructed a single flat for his personal use?
- 6) In construction industry two models of transaction are generally followed. (a) Entering into an agreement to sell and registering the constructed flat in the name of the buyer, by a sale deed, by payment of stamp duty on the entire value (hereinafter referred to as first model); (b) Sale of Undivided Share of land and entering into a construction agreement with the buyer (hereinafter referred to as second model). Under the first model, no service is involved, as it is a transaction of sale of immovable property. It has also been clarified so, in the Circular No. 108/2/2009 ST Dated 29.01.2009. But, by introducing an Explanation in the taxable service, an element of service is deemed to be present in the transaction of sale of immovable property, if any amount is received from the buyer by the builder, before issue of completion certificate. Can an element of service (which comes under the taxation domain of Central Government) be presumed in a transaction involving sale of immovable property (which comes under the taxation domain of State Governments)? Is it not encroachment by the Central Government in the taxing domain of State Governments?
- 7) Under the second model referred to above, there is an element of service, where the builder enters into a construction agreement with the buyer. In such case, the exclusion provided for "personal use" would be applicable. But, in the first model of transaction, where the buyer is only "buying" the flat and not "getting it constructed", the benefit of personal use cannot be claimed? Is it not against the principle of equity? Can

the intention of the Government to exclude from the levy, construction for personal use, be dependent upon the mode of transaction between the builder and buyer?

8) Or, since the first model of transaction is deemed as a service, it will also be deemed as a service, when it comes to the question of extending exclusion for personal use? Can it be said that even though the buyer is purchasing a flat, by virtue of the newly introduced Explanation, it will be deemed that the builder is rendering construction service to the buyer? Since, the buyer is deemed to be getting a flat constructed, which is for his personal use, can it be said that there is no service tax liability?

9) If a person is purchasing a flat, after completion of construction and after issue of completion of certificate, the transaction is not deemed as service and not subject to service tax. Stamp duty will be paid on the whole value. When a person is approaching the builder, during the progress of the construction, the transaction may be effected under the first model referred to above. Here also, the flat will be registered through a sale deed. Just because payments are being made during the course of construction, can the transaction be deemed to involve a service?

10) As per the recent amendments to Notification 1/2006, providing an enhanced abatement of 75 %, a condition is incorporated that the enhanced rate of abatement would be available only if the value of land is included in the gross amount. The value of taxable service is only the gross amount for the services provided, as per Section 67 of the Act. Can the consideration for a transaction in an immovable property, be made part of value of taxable service, through an exemption notification?

11) The Circular dated 28.01.2009, has laid down in no uncertain terms that "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". Is this not sufficient to quell all doubts on the subject, as to who is liable to pay service tax?

