

**IN THE OFFICE OF COMMISSIONER
DEPARTMENT OF TRADE AND TAXES
GOVERNMENT OF N.C.T. OF DELHI
VYAPAR BHAWAN, NEW DELHI**

No.357/CDVAT/2013/241

Dated: 17-02-2014

M/s. Valmax Buildtech,
D-71, Basement, Corner Side,
Malviya Nagar,
New Delhi – 110017.

ORDER

Present for the Applicant : Sh. Gaurav Goyal, Counsel
Present for the Department : Sh. T.C. Sharma, Departmental
Representative

The above named applicant filed an application on 21/11/2013 under section 84 of Delhi Value Added Tax Act, 2004 (hereinafter referred to as the “said Act”) and the question put up for determination under the aforesaid provision of law is as under :-

“Whether the work done by the applicant at G-44B, East of Kailash, New Delhi, is in the nature of Work Contract or not ? If yes which part is work contract”

The question in detail is as below:

Mrs. Punam Goyal & Mr. Anuj Sharma both Partners of M/s. Valmax Buildtech hereinafter called the “Partnership Firm” purchased Entire Ground Floor with terrace of Second Floor along with undivided share in the land of property measuring 400 Sq. Yds. Bearing No. G-44B, East of Kailash, New Delhi from Smt. Sushila Devi Pansari on 04.08.2011.

Mrs. Punam Goyal & Mr. Anuj Sharma both partners of M/s. Valmax Buildtech hereinafter called the “Partnership Firm” purchased Entire First Floor along with undivided share in the land of property measuring 400 Sq. Yds bearing No. G-44B, East of Kailash, New Delhi from Mr. Anil Aggarwal on 19.08.2011.

Mrs. Punam Goyal & Mr. Anuj Sharma both Partners of M/s. Valmax Buildtech hereinafter called the “Partnership Firm” purchased Entire Second Floor along with undivided share in the land of property measuring 400 Sq. Yds. Bearing No. G-44B, East of Kailash, New Delhi from Mr. Anil Aggarwal on 04.05.2012.

In the manner aforesaid Mrs. Punam Goyal & Mr. Anuj Sharma the partners of Valmax Buildtech became the absolute owner and in the possession of the immovable property measuring 400 Sq. Yds. bearing No. G-44 B, East of Kailash, New Delhi.

The entire Stamp Duty & Registration fee etc. for the floors purchased/acquired by the "Partnership Firm" was paid by the Firm on the cost of Land and also on the cost of construction as per the actual transaction value of the property which was higher than the circle rates prescribed by the Delhi Government.

The "Partnership Firm" constructed the entire building comprising of Basement, Ground Floor, First Floor, Second Floor & Third Floor after getting the plan sanction from the MCD out of its own funds & resources including the borrowed Money.

The Partnership Firm incurred the construction expenses for Rs. 1,11,29,733.82/- up to 07/06/2013 (the date on which the partnership firm got regularize the property under construction & also paid the compounding charges for Rs.12,17,000/-) the partnership firm further decided for upgradation of the building for better use occupancy & further sale. The Partnership Firm further incurred the expenses for Rs.20,41,811/- up to date. Hence, the partnership firm incurred total expenses for construction of the aforesaid property for Rs.1,31,71,544.82/- including material, labour & other incidental expenses (except the interest on borrowed money). New building is complete from all aspects and ready to occupy (the certificate of the registered architect is hereby enclosed). And further certificate from chartered accountant for the expenses of construction is also hereby attached.

This is more important to mention here that regularization of building and the compounding charges has been paid then further there is no requirement of completion certificate.

The entire building is still unsold.

As per legal opinion this transaction is a purchase/acquisition and further sale and is a transaction of immovable property covered under the section 17(1)(b) of Indian Registration Act, 1908 in which the proper stamp duty etc. has already been paid by the "Partnership Firm" on the land as well as on cost of construction. Moreover, upon further sale of the property after construction, the duty of conveyance shall be paid by the purchasers on the share of land as well as on the cost of construction.

2. The application has been preferred in the prescribed format DVAT-42 and the requisite fee of Rs.500/- paid through demand draft No.078697 dated 21.11.2013 of Axis Bank Limited, Malviya Nagar, New Delhi.
3. M/s. Valmax Buildtech is a Partnership Firm, Office at D-71, Basement, Corner Side, Malviya Nagar, New Delhi-110017. Sh. Gaurav Goyal, Counsel of the partnership firm appeared and reiterated the grounds of the determination application. In brief, his submissions are as under:-

a) Submissions dated 02.12.2013

- (i) That Mrs. Punam goyal & Mr. Anuj Sharma both partners of M/s. Valmax Buildtech (hereinafter referred to as the “Partnership firm”) purchased the property bearing No. G-44B, measuring 400 sq. yards situated at East of Kailash, New delhi-110065 through three separate sale deeds.
- (ii) That the stamp duty of conveyance under article 23 of Delhi Stamp Rules, 2007 read with the Indian Stamp Act, 1899, with other charges were paid by the partnership firm on the total land and also on its construction part at the time of purchase of the aforesaid property.
- (iii) That the entire property comprising of basement, ground floor, first floor, second floor, third floor are unsold and upon sale the proper Duty of Conveyance under Article 23 of Delhi Stamp Rules, 2007 read with Indian Stamp Act, 1899, along with other charges shall be paid by the ultimate purchasers on the proportionate share of land as well as on the cost of construction.
- (iv) That the construction done by the partnership firm was not done “ for and on behalf of “ any one and the same was done without any type of consideration having been received or to be received from the owners of the property or from the purchasers of floors to whom the same were sold subsequently. The definition of works contract as per Section 2(1)(zo) of the DVAT Act 2004 reads asunder:

“Work Contract” includes any agreement for carrying out for cash or deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair & commissioning of any movable property.

Further submitted that it is a tax on transfer of goods involved and not on total consideration of works contract, and where no material is transferred by the contractor to the contractee for cash or deferred payment or for valuable consideration; such contracts are not liable for tax under this clause.

- (v) That it is a known fact that DVAT is an indirect tax, which is ultimately recoverable from the ultimate purchaser of goods. In the present case the purchaser shall pay paid duty of conveyance along with other charges on the proportionate land share and construction part of their floor under sale. If DVAT is to be levied on the purchaser, then it shall amount to double taxation as it would lead to charging/levying two types of duty/tax on the ‘same commodity/product’ by different departments of the government, which to my understanding are erroneous.

Moreover, it is pertinent to mention that the issue of discrimination between the citizens would arise keeping in mind, equality before law as enshrined under Article 14 of Indian Constitution, would stand breached since the purchaser who enters into an agreement before completion would be liable to DVAT, however a person who purchases after completion would not be liable to pay DVAT. Such discrimination is unfounded and untenable.

- (vi) That the definition of works contract is self-explanatory and is all inclusive and it itself speaks that there should be some consideration whether in the form of cash, deferred payment or valuable consideration. It is also pertinent to note that without cash or valuable consideration or deferred payment, being an essential part of the contract or the agreement of works contract, the activity cannot be a “work contract”. Therefore, the same shall not be covered under the ambit of DVAT Act 2004.

- (vii) That any notification is effective from the day of its notification only until and unless the same has been given retrospective operation by the government/statute.
- (viii) That with the implementation of VAT in Delhi, with retrospective effect on builders, it is further submitted that the levy of DVAT on the same transaction/product/commodity would result in double taxation. However, it is made clear that not every case is the like this instant matter and in normal circumstances, levy of DVAT would amount to double taxation.
- (ix) That the partnership firm like other builders are not able to collect or receive the amount towards DVAT, since the same has to be borne by the purchaser/purchaser of properties (if it is so applicable) being an indirect tax. It would not be out of place to refer to the intention of the apex court in the L&T case, wherein the court was also of the opinion that levy/charging of such duties/taxes shall not result in double taxation and each case had to be ascertained individually in the light of specific facts and circumstances. It is pertinent to mention that this instant case is distinguishable from the L&T case and the grounds for the same have been given at length in the submission.
- (x) The counsel has contended that the facts of K. Raheja case are different from his case on the grounds that in K. Raheja case no separate sale deed or conveyance deed was executed in favour of the flat buyers after the completion of the construction as they became the owners by virtue of their membership of the society formed under Karnataka Ownership Flat (regulation of the promotion of construction, Sale, Management and Transfer) Act, 1972 (for short “ KOFA”)

This Act (“KOFA”) is not applicable in the state of Delhi as the nature of the properties in Delhi and their construction & further sale are governed by the Transfer of Property Act 1882. Indian Registration Act 1908 and The Indian Stamp Act, 1899. All Sale/Conveyance Deeds have to be executed on payment of stamp duty, corporation fee and registration fee on the proportionate share of land as well as on as per the cost of construction of the portion under sale/transfer. Circle rates prescribed by the Delhi Government or on the actual

sale consideration whichever is higher. There is no valid separate apartment act in Delhi like “KOFA”/“MOFA”, even if anything was there prior to this time, it is not applicable as of now.

K. Raheja had undertaken to construct for and on behalf of the prospective buyer. On the other hand, the builders, both in case of outright purchase and collaboration model, construct the building as their own building and not for and on behalf of prospective buyer.

It is important to note that all above charges re to be paid on the land share and also as well as on the construction part as per the schedule prepared on the first page of the conveyance deed.

Hence, status of all the buyers in K. Raheja case was same and there was no double taxation i.e. VAT/Service Tax and others like Stamp Duty, Corporation Fee and Registration Fee. It was treated as work contract because the state was getting nothing on the construction part in the shape of VAT, Service Tax, Stamp Duty, Corporation Fee or Registration Fee etc.

- (xi) Further, the counsel referred to the contents of Larsen & Toubro (L&T) case, brief details of which are as under:

In the case of Larsen & Toubro (L&T) no monetary consideration was paid towards the cost of land to the owners of the land. The only investment and contribution by L&T was just the construction of the entire complex and in consideration got 75% built up area. The money received from the prospective buyers was deemed to be the money against the cost of construction. Hence, it was held that this type of activity was covered under the ambit of “works contract”.

In the case of L&T no stamp duty of conveyance was paid on the power of attorney and the Power of Attorney did not confer any right in favour of L&T to transfer the title of the land to the flat buyers.

Counsel stated that this is not the case here in NCT of Delhi or more precisely, the practice carried on by the real estate developers in Delhi. In Delhi, such power of attorney(s) are subject to the stamp duty of conveyance on the proportionate share of land as well as construction for the owner’s share which differs from time to time in the absence of clear laws in this regard. The concerned authorities, be it be the Sub-registrar or anyone else, seem to wield

discretionary and arbitrary authority at the time of the execution of power of attorney in question. Now the problem arises, since there is no clear law in this regard and people suffer due to this ambiguous and erroneous situation of the prevailing laws.

Further, the counsel contended that as per his understanding of the L&T judgement and also as per the already laid down laws, no double taxation by the same level of government is permitted in Indian constitution the State cannot cover one product into two acts. It is also pertinent to note that the apex court was of the view that implementation of Rule 58(I-A) shall not result in double taxation and that if there is any case of double taxation, then the same shall be ascertained in individual case and has filed a copy of the Rule 58(I-A) of MVAT Act, 2002 and also submitted a copy of Article 63 which was added to Bombay Stamp Act, 1958 (w.e.f. 0105.2006) for implementation of R. 58(1) and 58(1-A) of the MVAT Act, 2002. In Delhi there is no such type of system of separate stamp duty on proportionate share of land for conveyance and on construction part (duty of “works contract”). Here, the stamp duty on both is being charged as duty of conveyance of immovable property. He also submitted a copy of the order of collector of stamps (S.D.M.) Vasant Vihar, New Delhi and has stated that such transactions are being covered under the 17(1)(B) of the Indian Registration Act as Transaction of immovable properties.

On page 8 of the submissions dated 02.12.2013, he has referred to various types of collaboration agreements and requirement of stamp duty in Delhi. The main contention of the counsel is that if the construction part is under the ambit of the “works contract” as under DVAT Act, then the stamp duty of conveyance should be charged only on the proportionate share of land and the stamp duty for the construction part should be charged as duty of “works contract”. The construction agreements which are under the ambit of “works contract” are only the general agreements for which a stamp duty of Fifty rupees is required as per the prevailing bylaws for stamp duty and there is no separate stamp duty for the “works contract” in Delhi as provided under Article 63 of Bombay Stamp Act, 1958. It is pertinent to mention here that Article 63 of the Bombay Stamp Act, 1958 provides for separate duty of “works contract”. The purpose of mentioning the same here is that this point makes the case of Delhi incidentally and substantially different from that in Maharashtra, on which the L&T judgement is based on. Therefore, one can safely assume that the L&T judgement is based on entirely different facts.

The counsel referred to para 115 of the L&T judgement 2013STPL(Web) 791 SC. “It may, however, be clarified that activity of construction undertaken by the developer would be “works contract” only from the stage the developer enters into a contract with the flat purchaser. The value addition made to the goods transferred after the agreement is entered into with the flat purchaser can only be made chargeable to tax by the State Government.”

The counsel in his written submissions has further contended that the requirement of the completion certificates for proof of completion of construction is baseless, wrong and unjustified. It is self contradictory and explanatory as there are instances when the owner of the property gets a completion certificate at one stage of the property and thereafter the owner further decides to get furnishing, additions and modifications etc. which doesn't require pre-sanction from the MCD or any other authority as stated in the Delhi building bye-laws and submitted a copy of the same.

Further, the counsel has stated that where no prior sanction is required from the MCD or any other authority then the question of obtaining completion certificate becomes infructuous since the same has no value as the ancillary jobs (furnishing, modification, additions carried out) which do not require sanction can be carried out even after obtaining completion certificate and those activities thus carried out can be termed as 'value addition' which brings such construction activities under the ambit of DVAT. The applicant has questioned the requirement of completion certificate from competent authority and has instead suggested alternate source e.g. reports from Electricity Department, DJB, persons appointed under Delhi Lift Rules, 1942 and Chartered Accountants for expenditure incurred on construction.

4. The brief facts of the case are that the applicant M/s. Valmax Buildtech, a partnership firm, has purchased the entire property bearing No. G-44B, East of Kailash, New Delhi measuring 400 sq. yards. The partnership firm incurred the construction expenses of Rs.1,31,71,544/- (including compounding charges of Rs.12,17,000/-). He has submitted a completion certificate issued by a registered architect and has also submitted a certificate from chartered accountant for the expenses incurred on construction of the said property. His contention is that after the regularization of building and payment of compounding charges, there is no requirement of completion certificate from MCD. He has informed that the entire building is still unsold and has sought clarification whether the work done at whether the work done by the partnership firm is in the nature of work contract or not? If yes which part is "work contract".
5. The counsel for the applicant stated that the Rule 3(1A) of DVAT Rules, 2005 came into existence on 20.09.2013 whereas his case pertains to earlier period.

The DR submitted that it is the definition of “works contract” which empowers state to identify such transactions and tax them as per DVAT Act and Rules. He further submitted that the definition under DVAT Act is similar as it existed in the Karnataka VAT Act, which was discussed by the APEX Court in K. Raheja case. As per section 2(1)(zo) of the DVAT Act, 2004, the definition of ‘Works Contract’ is as under:

“ (zo) “Works Contract” includes any agreement for carrying out for cash or for deferred payment or for valuable consideration, the building construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property;”

6. In response to applicant’s contention that the completion certificate issued by Architect with other evidences like receipt for development charges paid to DJB and Electricity Company should be treated as sufficient proof for completion of construction instead of insisting for completion certificate from competent authority. The department’s view was that the completion certificate can only be treated as valid when it is issued by an authority competent to issue it. The counsel agreed that as per the building bye-laws of Delhi, the building completion certificate is to be issued by MCD.

The applicant during hearing stated that under the provisions of Service Tax, the completion certificate by an architect is sufficient and therefore, no completion certificate from the Municipal Corporation is required under the said Act. The department’s view point is that the service tax provisions have no bearing upon computation of VAT, which would be determined as per DVAT Act and Rules made thereunder.

7. I have perused in detail the application filed under Section-84 of the Delhi Value Added Tax Act, 2004 and written submissions, rejoinder by the applicant and written submission by the DR.

The counsel raised the issue of double taxation as works contract under DVAT vis-a-vis stamp duty payable on the same subject on execution of power of attorney, which has been examined and details are as under:

- i) A 'work contract' is all together a different aspect subject to VAT depending upon the Act and Rules made by the state. The state is competent to impose tax on such types of 'work contract' after 46th amendment of the constitution by which sub-clause (b) of clause (29A) Article 366 was inserted, which was held as constitutionally valid by the Supreme Court in P.N.C. construction case. By this amendment of the constitution it became possible for the states to levy sales tax on the value of the goods involved in a work contract in the same way in which the sale tax was leviable on the price of goods, in a building contract. The 'work contract' can be taxed by the state legislature under entry 54 list-II of 7th schedule read with article 366(29A) of the constitution.

- ii) In Raheja Development Corporation Vs. State of Karnataka the issue came up for adjudication directly as regard an agreement to carry out construction activity on behalf of owner governed by the term 'work contract' and element of transfer of property also as a complete component by virtue of agreement to sale with the prospective buyers. It was settled by the Apex Court that where a contract comprises of both work contract and a transfer of immoveable property such contract does not denude it of its character as work contract. This view has been reiterated in a recent judgment by the Supreme Court on 26-09-2013 in Larsen Toubro Vs. State of Karnataka.

The term 'work contract' is a contract in which one of the parties is obliged to undertake or to execute work. Such activity of construction has all the characters of work contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of work contract is not involved in that transaction. In a contract to build a flat there will necessarily be a sale of goods element. Work contract include building contract. Ordinarily in the case of work contract the property in the goods used in construction of the building passes to the owner when the goods and material used are incorporated. Thus a value is added to the land by construction activity which includes goods and building material which passes to the owner of the land on which building is constructed.

- iii) As per 'aspect theory' propounded and applied by the judiciary, a tax can be imposed on more than one distinct field of legislation in relation to same matter provided that there exists in the state/union legislative competence/power to levy a tax under each distinct head. In *Bharat Sanchar Ltd. Vs. Union of India*, the Supreme Court supported the view that taxation on different aspects of the same transaction as separate taxation events is permissible.

It is observed that both stamp duty and VAT are different aspects and not one aspect. The stamp duty is state subject. Every state has its own policy of prescribing and imposing rate of duty under said Act. Merely because in Bombay/Mumbai the state of Maharashtra sought to impose stamp duty of a particular fixed value whereas in Delhi it is ad-veloram has no legal ground to compare or challenge. There is no legal substance to term tax on 'work contract' and 'duty on instrument' as tantamount to double taxation as both aspects are diverse, different and independent transactions and also have distinct bearing. The stamp duty is not a tax on the transfer of immoveable property. Hence, there is no question of double taxation.

8. In view of the foregoing, I am of the considered view that in the instant case, the dealer carried out construction on its own land. As per DVAT Act and Rules, if a person sells constructed property then he is not liable to pay VAT. So, the work done by the applicant at G-44B, East of Kailash, New Delhi is not in the nature of Work Contract. In case, the contract for construction of building or part of the building, was awarded to a contractor, in which the contractor purchased the goods, then the work executed by said contractor shall be works contract and that contractor shall be liable to pay tax on the consideration amount received by him from the applicant. If so, the applicant dealer being partnership firm, was also required to deduct TDS from such contractor. Held accordingly.
9. It is for the assessing authority to ascertain whether the building was sold prior to its completion or after completion. However, as the applicant is a dealer and has assessable turnover in other cases, so the consideration received through sale proceeds of fixtures and fittings and other building material including iron and steel, recovered from the demolished building are taxable.

The purpose of this determination is just to clarify the issues raised by the applicant. This determination order, in no way, puts any bar on the powers of the Assessing Authority/Objection Hearing Authority under the Act, to examine the terms and conditions of the agreement, project wise/stage wise construction accounts, books of accounts, cash flow of funds etc. with the relevant facts of the case. In case of any deviations noticed during examination of such books of accounts etc., the Assessing Authority/Objection Hearing Authority shall be at liberty to invoke any provisions under the DVAT Act and Rules including the provisions under section 40 A of the DVAT Act, 2004.

(Prashant Goyal)
Commissioner, VAT

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7. President, Sales Tax Bar Association (Regd.)
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(Prashant Goyal)
Commissioner, VAT