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

No.350/CDVAT/2013/239 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 30/10/2013 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 A-2/89, Safdarjung Enclave, New Delhi, is in the nature of Work Contract or not ?"

Mrs. Poonam Goyal & Mr. Anuj Sharma both partners of M/s. Valmax Buildtech hereinafter called the "Partnership Firm" purchased entire first floor, entire second floor and entire terrace rights over and above the second floor along with 67.5% undivided share in the land property measuring 200 sq. yds bearing No.A-2/89, Safdarjung Enclave, New Delhi from M/s. T.R. India International (P) Ltd. on 09.12.2011. Mr. Vijay Israni & Mr. Dharam Pal Vig purchased the basement & ground floor along with 32.5% undivided share in the land of the aforesaid property from M/s. T.R. Indian International (P) Ltd.

The property purchased by the above parties was very old and was not able to bear the further load of an additional floor. Therefore, the aforesaid "Partnership Firm" for its self interest agreed to construct the new building. The aforesaid "Partnership Firm" entered into M.O.U. dated 09.12.2011 with Mr. Viojay Israni & Mr. Dharam Pal Vig for the aforesaid purpose.

The "Partnership Firm" constructed the entire building comprising of basement, ground floor, first floor, second floor & third floor out of its own funds & resources including the borrowed money.

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.

No further document was to be executed by the parties for transfer of any portion or anything in favour of each other. No monetary consideration or other kind of consideration was received by the "Partnership Firm" from the other party. The "Partnership Firm" was the owner of the First, Second and Third Floors along with terrace.

Thereafter upon completion of the construction, both the partners of the above said "Partnership Firm" sold the entire first floor, second floor and the entire third floor with terrace to M/s. Radox Tradex (P) Ltd. vide three sale deeds dated 16.05.2013.

2. The application has been preferred in the prescribed format DVAT-42 and the requisite fee of Rs.500/- paid through demand draft No.078365 dated 30.10.2013 of Axis Bank Limited, Malviya Nagar, New Delhi.

3. M/s. Valmax Buildtech is a Partnership Firm with its registered office/principal place of business at D-71 (Basement), Malviya Nagar, New Delhi-11017. Sh. Gaurav Goyal, Counsel of the Company appeared and reiterated the grounds of the determination application.

a) Submissions dated 11.11.2013

i) That the partnership firm entered into Memorandum of Understanding with the owners of the Basement and Ground Floor for reconstruction of the aforesaid property after demolishing the existing building, out of funds and resources of the partnership firm (either borrowed or otherwise) to enable to acquire the same floors in the newly constructed building.

ii) That the partnership firm <u>in its own interest</u> had agreed to construct the building and it was in the interest of the partnership firm to construct the building after demolishing the existing structure, <u>and the cost of construction was to be regarded as its investment</u> in the property.

iii) That during the course of construction the partnership firm did not receive any advance consideration against the floors owned by the partnership firm.

iv) That the partnership firm sold/conveyed the floors to the purchasers after completion of entire construction. Moreover the entire cost of construction was over in the books of accounts of the partnership firm before any consideration for sale was received by the partnership firm from the purchaser of the floors owned by the partnership firm.

v) 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.

vi) That the transaction/work done by the Company is covered under the Section 17(1)(b) of the Indian Registration Act, 1908.

vii) Therefore, the transaction carried out by the company is out of the ambit of "works contract" therefore not covered under DVAT Act, 2004.

b) Submissions dated 25.11.2013.

i) 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.

ii) 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 25.11.2013, 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.

He submitted a certificate from Architect for completion and certificate from chartered accountant for expenditure incurred on construction and insisted that these two documents along with receipt showing deposit of service line and development charges for new electricity connection, in support of his contention.

4. The brief facts of the case are that the applicant M/s. Valmax Buildtech entered into Memorandum of Understanding on 09.12.2011 with Mr. Vijay Israni and Mr. Dharam Pal vig co-owners of the property measuring 360 sq. yds. bearing no.A-2/89, Safdarjung Enclave, New Delhi for carrying out construction of the aforesaid property after demolishing the existing building out of its own funds comprising Basement below stilt parking floor, Stilt Parking floor, Ground floor, First Floor, Second Floor and Third Floor portions with terrace. The said construction including the construction on the co-owner's portion of land was carried out in the interest of the partnership firm.

5. Scrutiny of the various clauses of the Memorandum of Understanding reveals that there is a clear cut arrangement to demolish and reconstruct the building and in the process property in goods has been transferred during the course of execution of works contract by the partnership firm. Some of the relevant clauses of Memorandum of Understanding have been underlined to highlight the intentions of the related parties.

6. That after construction/completion of the new building, the newly constructed area will be acquired, owned and possessed by the First party & Second Party hereto, in the following manner:

Memorandum of Understanding

On page 5 -

Lot A(First Party) : The entire Zero Level Basement with toilet i.e. basement below stilt parking floor and Entire Ground Floor with Two Car Parking in the Stilt Area along with One Servant Quarter (App size 6'. 6" X 6'. 6") with common toilet in the Stilt Area (as

per plan), in/of the said property bearing No. A-2/89, erected on a plot of land admeasuring 200 sq. yards situated in the lay out plan of Safdarjung Development Residential Scheme, in the colony now known as Safdarjung Enclave, New Delhi, along with 32.5% undivided, indivisible and impartiable ownership rights in the land underneath the said property also to use common areas, facilities and services such as entrance, passage, staircase, lift, sewer lines, space for underground tanks, space for electric and water meters/motor pumps and common toilet etc. in/of the said property shall remain with the First Party and the First Party shall be tis solve owner with absolute power of alienation.

Lot B (Second Party):- The entire First floor, entire Second Floor & entire Third Floor with entire terrace/roof above/upon the Third Floor with stilt parking floor (except two car parking & one servant quarter with common toilet for Ground floor i.e. for First Party) (as per plan), in/of the said property bearing No.A-2/89, erected on a plot of land admeasuring 200 Sq. yards, situated in the colony now known as Safdarjjng Enclave, New Delhi, along with 67.5% undivided, indivisible and impartiable ownership rights in the land underneath the said property also to use common areas, facilities and services such as entrance, passage, staircase, lift, sewer lines, space for underground tanks, space for electric and water meters/motor pumps and common toilet etc. in/of the said property shall remain with the Second party and the Second Party shall be its sole owner with absolute power of alienation.

On page 6 – para 8

That the building project shall be completed and finished in every respect by Second party and the First party his/their duly constituted/appointed Attorney or nominee shall behanded over their share as stated above within 15 (Fifteen) months from the date of sanction of the building plan.

In case of any delay in handing over possession beyond 15 months the Second Party shall compensate the First Party to the extent of the rental of their shares i.e. to the extent of Rs.1,00,000/- (Rupees One Lac Only) per month.

7. The Departmental Representative stated that right from the beginning, the intention of the dealer was very clear. As per the APEX Court direction and amended building bye-laws in Delhi, no additional floor was to be allowed without getting approval from the land owning agency and no building plan without stilt parking was to be passed. Accordingly, when he entered into the contract his intention was to demolish the old construction and to construct a new building so it was an arrangement with the existing owner of the land. This construction is covered under works contract definition and the applicant has got rights for construction as consideration. It has been agreed by the applicant in his submissions that for his self interest, the applicant has agreed to construct the new building including the construction on the portion of the co-owner's land. The said arrangement is covered under Rule 3(1A) of the DVAT Rules, 2005. The extracts of the Rule 3 are as under:

"3. Works Contract

(1) In the case of turnover arising from the execution of a works contract, the amount included in taxable turnover is the total consideration paid or payable to the dealer under the contract and exclude –

(i) the charges towards labour, services and other like charges; and

(ii) the charges towards cost of land, if any, in civil works contracts,

subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of above referred charges to the satisfaction of the Commissioner.

Explanation. – The term "civil works contracts" for the purpose of this rule shall include construction of building or complexes - residential or commercial, bridges, flyovers, dams, barriers, canals, diversions, other works of similar nature, and the collaboration agreements or joint development agreements or similar other agreements/arrangements between the land-owner(s) and the contractor(s)/builder(s)/ developers/ collaborators/ similar other persons by whatever name called for construction of complex or property.

(1A) In case the civil works contract mentioned in sub-rule (1) are of the nature wherein the agreement executed between the land owner(s) and contractor(s) or similar other agreements/ arrangements is of the nature of collaboration or joint development where the contractor(s) constructs the building/units and consideration for the construction is given by the land owner in the form of share in the land with or without additional money exchange, the value of works contract carried out by the contractor(s) for the land owner shall be highest of the following amounts:

(i) Actual value of construction, including profit, transferred by the contractor to the land-owner in accordance with the books of accounts maintained by the contractor.

(ii) Where proportionate land is transferred by the land-owner to the contractor by executing a separate conveyance/sale deed, the value stated in the deed for the purpose of payment of stamp duty as reduced by consideration paid by the contractor to the land owner through account payee cheque/ draft/ pay order/ electronic transfer, if any.

(iii) On the basis of circle rate of proportionate area of land transferred by the land-owner to the contractor in accordance with the notification under Delhi (Prevention of Under Valuation of Instruments) Rules, 2007 as amended from time to time (hereinafter referred as "circle rates") prevailing at the time of execution of agreement between them, as reduced by the consideration paid by contractor to the land-owner through account payee cheque/draft/pay order/electronic transfer, if any.

Provided that where separate circle rates for land and construction have not been notified in respect of certain buildings or properties, then circle rate for land and construction prevailing in that locality for other buildings or properties, in respect of which separate circle rates have been notified, shall be taken for the purpose of determination of value under this sub-rule.

Provided further that the value of works contract under this sub-rule shall not be less than the circle rate of construction applicable on the date on which agreement between the land-owner and the contractor for the construction of property was executed.

Explanations:-

1.- The term "contractor" for the purpose of this sub-rule shall include the builders, developers, collaborators and similar other persons by whatever name called.

2.- The taxable turnover in relation to contractor's share of construction for activity carried on by him for the intended purchaser shall be calculated separately as per sub rule (1) of this rule."

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;"

I agree with the view point of Departmental Representative as the definition of Works Contract is already there in the Act since its inception. The present transaction is covered under the said definition as the developer has done construction on the 32.5% share of land on behalf of the land owner of such share of land. The taxable turnover shall be calculated as per pre-revised Rule-3 of DVAT Rules, 2005.

The pre revised Rule -3 of DVAT Rules, 2005, in no way restricts imposition of tax on works contract transaction. The pre revised Rule 3 has been reproduced below:

"3. Works contract. -(1) In case of turnover arising from the execution of the works contract, the amount representing the taxable turnover shall be the value at the time of transfer of property in goods (whether as goods or in some other form) involved in the execution of work contract and shall exclude -

(i) the charges towards labour, services and other like charges; and
(ii) the charges towards cost of land, if any, in civil works contracts;

subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of referred charges to the satisfaction of the Commissioner.

Explanation.- Civil works contracts for the purpose of this rule shall include construction of building or complexes - residential or commercial, bridges, flyovers, dams, barriers, canals, diversions and other works of similar nature.

(2) For the purpose of sub-rule (1), the charges towards labour, services and other like charges shall include-

(i) labour charges for execution of works;
(ii) charges for planning and architects fees;
(iii) charges for obtaining on hire or otherwise machinery and tools used for the execution of the works contract;
(iv) cost of consumables such as water, electricity, fuel, etc. used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract;

(v) cost of establishment of the contractor including cost of marketing, finance expenses and securities deposits to the extent it is relatable to supply of labour and services;

(vi) other similar expenses relatable to supply of labour and services;

(vii) profits earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites:

PROVIDED that where amount of charges towards labour, services and other like charges are not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated at the percentages specified in the following table :-

TABLE
PERCENTAGES FOR WORKS CONTRACTS

	Type of contract	Labour, service and other like charges are percentage of total value of the contract
	Fabrication and installation of plant and machinery.	
	-------	

(3) (a) In the case of works contract of civil nature where the payment of charges towards the cost of land, if any, is not ascertainable from the books of accounts of the dealer, the amount of such charges shall be calculated @ 30% of the total value of the contract except in the case of construction of commercial buildings or complexes where it shall be calculated @ 50% of the total value of the contract.

(b) In the case of works contract of civil nature where only a part of the total constructed area is being transferred, the charges towards the cost of land shall be calculated on a pro-rata basis by the following formula:-

$$\frac{\text{Proportionate super area} \times \text{Indexed cost of acquisition of land}}{\text{Total plot area} \times \text{Floor Area Ratio}}$$

Explanation.- Proportionate super area for the purpose of this clause means the covered area booked for transfer and the proportionate common constructed area attributable to it.

(c) In the case of work contract of civil nature where only a part of total constructed area is being transferred, the deduction towards labour, services and other like charges mentioned in sub-rule (1) shall be calculated on a pro-rata basis.

(d) In the case of works contract of civil nature, the tax shall be payable by the contractor during the tax period in which the property in goods is transferred.

Explanation 1.- For the purpose of this rule, indexed cost of acquisition shall be calculated as per section 48 of the Income Tax Act, 1961.

Explanation 2.- No tax shall be payable by a contractor on the amount representing the value of the goods supplied by the contractee to the contractor in the execution of works contract in which the ownership of such goods remains with the contractee under the terms of the contract and the amount representing the value of the goods supplied by the contractee to the contractor does not form part of the contract and is not deductible from the amount payable to the contractor by the contractee for the execution of the works contract.

8. 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.

9. The DR stated that the payment of stamp duty is insignificant for the purpose of VAT, since owner can also be builder as held by the APEX Court in K. Raheja Case. In para 30 of the said case, the issue of Stamp Duty was also raised by the L&T. But the issue of Stamp Duty was found to be insignificant so much so that the Hon'ble Supreme Court has not discussed it in its final judgement. Submissions as recorded in Para 30 of the judgement are as under:

   "30. Without prejudice to the above arguments, it is firstly submitted that assuming that the activity of construction undertaken by the developer is a works contract then the same would be a works contract only from the stage when the developer enters into a contract with the flat purchaser. Only the value addition made to the goods

transferred after the agreement is entered into with the flat purchaser can be made chargeable under MVAT Act. VAT cannot be charged on the entire sale price as described in the agreement entered into between developer and flat purchaser as sought to be done under the composition scheme. Secondly, it is submitted that assuming that the agreement entered into between the developer and the flat purchaser has two components, namely, a works contract and sale of proportionate share in the land then the stamp duty on such transaction should be levied under Article 25 (stamp duty for conveyance) only on the component sale of proportionate share in the land and the stamp duty on the value of construction carried out ought to be charged under Article 63 (stamp duty for works contract)."

Accordingly, I agree that levy of stamp duty on the transactions of immovable property does not debar the levy of VAT on the Works Contract activity involved.

10. The applicant has tried to distinguish his case from the K. Raheja case which is not correct and relevant paras 93, 94 and 95 of the said decision have been reproduced below:

"93. The question is: Whether taxing sale of goods in an agreement for sale of flat which is to be constructed by the developer/promoter is permissible under the Constitution? When the agreement between the promoter/developer and the flat purchaser is to construct a flat and eventually sell the flat with the fraction of land, it is obvious that such transaction involves the activity of construction inasmuch as it is only when the flat is constructed then it can be conveyed. We, therefore, think that there is no reason why such activity of construction is not covered by the term "works contract". After all, the term "works contract" is nothing but a contract in which one of the parties is obliged to undertake or to execute works. Such activity of construction has all the characteristics or elements of works contract. The ultimate transaction between the parties may be sale of flat but it cannot be said that the characteristics of works contract are not involved in that transaction. When the transaction involves the activity of construction, the factors such as, the flat purchaser has no control over the type and standard of the material to be used in the construction of building or he does not get any right to monitor or supervise the construction activity or he has no say in the designing or lay-out of the building, in our view, are not of much significance and in any case these factors do not detract the contract being works contract insofar as construction part is concerned.

94. For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, in our opinion, three conditions must be fulfilled: (i) there must be a works contract, (ii) the goods should have been involved in the execution of a works contract, and (iii) the property in those goods must be transferred to a third party either as goods or in some other form. In a building contract or any contract to do construction, the above three things are fully met. In a contract to build a flat there will necessarily be a sale of goods element. Works contracts also include building contracts and therefore without any fear of contradiction it can be stated that building contracts are species of the works contract.

95. Ordinarily in the case of a works contract the property in the goods used in the construction of the building passes to the owner of the land on which the building is constructed when the goods and materials used are incorporated in the building. But there may be contract to the contrary or a statute may provide otherwise. Therefore, it cannot be said to be an absolute proposition in law that the ownership of the goods must pass by way of accretion or exertion to the owner of the immovable property to which they are affixed or upon which the building is built."

The final decision of the APEX Court in the said case is relevant to the present case and therefore has been reproduced for convenience, which is as under:

"101. In light of the above discussion, we may summarise the legal position, as follows:

(i) For sustaining the levy of tax on the goods deemed to have been sold in execution of a works contract, three conditions must be fulfilled:

(one) there must be a works contract, (two) the goods should have been involved in the execution of a works contract and (three) the property in those goods must be transferred to a third party either as goods or in some other form.

(ii) For the purposes of Article 366(29-A)(b), in a building contract or any contract to do construction, if the developer has received or is entitled to receive valuable consideration, the above three things are fully met. It is so because in the performance of a contract for construction of building, the goods (chattels) like cement, concrete, steel, bricks etc. are intended to be incorporated in the structure and even though they lost their identity as goods but this factor does not prevent them from being goods.

(iii) Where a contract comprises of both a works contract and a transfer of immovable property, such contract does not denude it of its character as works contract. The term "works contract" in Article 366 (29-A)(b) takes within its fold all genre of works contract and is not restricted to one specie of contract to provide

for labour and services alone. Nothing in Article 366(29-A)(b) limits the term "works contract".

(iv) Building contracts are species of the works contract.

(v) A contract may involve both a contract of work and labour and a contract for sale. In such composite contract, the distinction between contract for sale of goods and contract for work (or service) is virtually diminished.

(vi) The dominant nature test has no application and the traditional decisions which have held that the substance of the contract must be seen have lost their significance where transactions are of the nature contemplated in Article 366(29-A). Even if the dominant intention of the contract is not to transfer the property in goods and rather it is rendering of service or the ultimate transaction is transfer of immovable property, then also it is open to the States to levy sales tax on the materials used in such contract if such contract otherwise has elements of works contract. The enforceability test is also not determinative.

(vii) A transfer of property in goods under clause 29-A(b) of Article 366 is deemed to be a sale of the goods involved in the execution of a works contract by the person making the transfer and the purchase of those goods by the person to whom such transfer is made.

(viii) Even in a single and indivisible works contract, by virtue of the legal fiction introduced by Article 366(29-A)(b), there is a deemed sale of goods which are involved in the execution of the works contract.

Such a deemed sale has all the incidents of the sale of goods involved in the execution of a works contract where the contract is divisible into one for the sale of goods and the other for supply of labour and services. In other words, the single and indivisible contract, now by Forty-sixth Amendment has been brought on par with a contract containing two separate agreements and States have now power to levy sales tax on the value of the material in the execution of works contract.

(ix) The expression "tax on the sale or purchase of goods" in Entry 54 in List II of Seventh Schedule when read with the definition clause 29-A of Article 366 includes a tax on the transfer of property in goods whether as goods or in the form other than goods involved in the execution of works contract.

(x) Article 366(29-A)(b) serves to bring transactions where essential ingredients of 'sale' defined in the Sale of Goods Act, 1930 are absent within the ambit of sale or purchase for the purposes of levy of sales tax. In other words, transfer of movable property in a works contract is deemed to be sale even though it may not be sale within the meaning of the Sale of Goods Act.

(xi) Taxing the sale of goods element in a works contract under Article 366(29-A)(b) read with Entry 54 List II is permissible even after incorporation of goods provided tax is directed to the value of goods and does not purport to tax the transfer of immovable property. The value of the goods which can constitute the measure for the levy of the tax has to be the value of the goods at the time of incorporation of the goods in works even though property passes as between the developer and the flat purchaser after incorporation of goods.

107. On consideration of the arguments that were put forth by the parties, the Court in Raheja Development1 held as under:

(i) The definition of the term "works contract" in the Act is an inclusive definition.

(ii) It is a wide definition which includes "any agreement" for carrying out building or construction activity for cash, deferred payment or other valuable consideration.

(iii) The definition of works contract does not make a distinction based on who carries on the construction activity. Even an owner of the property may be said to be carrying on a works contract if he enters into an agreement to construct for cash, deferred payment or other valuable consideration.

(iv) The developers had undertaken to build for the prospective purchaser.

(v) Such construction/development was to be on payment of a price in various installments set out in the agreement.

(vi) The developers were not the owners. They claimed lien on the property. They had right to terminate the agreement and dispose of the unit if a breach was committed by the purchaser. A clause like this does not mean that the agreement ceases to be "works contract". So long as there is no termination, the construction is for and on behalf of the purchaser and it remains a "works contract".

(vii) If there is a termination and a particular unit is not resold but retained by the developer, there would be no works contract to that extent.

(viii) If the agreement is entered into after the flat or unit is already constructed then there would be no works contract. But, so long as the agreement is entered into before the construction is complete it would be works contract.

111. In the development agreement between the owner of the land and the developer, direct monetary consideration may not be involved but such agreement cannot be seen in isolation to the terms contained therein and following development agreement, the agreement in the nature of the tripartite agreement between the owner of the land, the developer and the flat purchaser whereunder the developer has undertaken to construct for the flat purchaser for monetary consideration. Seen thus, there is nothing wrong if the transaction is treated as a composite contract comprising of both a works contract and a transfer of immovable property and levy sales tax on the value of the material involved in execution of the works contract. The observation in the referral order that if the ratio in Raheja Development1 is to be accepted then there would be no difference between works contract and a contract for sale of chattel as chattel overlooks the legal position which we have summarized above.

112. The argument that flat is to be sold as a flat and not an aggregate of its component parts is already negated by the Constitution Bench in the case of Builders' Association4. As a matter of fact, in Builders' Association4, this argument was advanced on behalf of the States. Repelling the argument, the Constitution Bench observed that it was difficult to agree with the contention of the States that the properties that are transferred to the owner in the execution of a works contract are not the goods involved in the execution of works contract, but a conglomerate, that is the entire building which is actually constructed.

113. Yet another argument advanced on behalf of the appellants is that in Raheja Development1, it is noticed that the builder has a lien on the property but incorrectly states that lien is because they are not owners. It is argued that lien is because if the monies are not recovered from the prospective flat purchasers, the lien can be exercised and this would show that the contract is a contract of an agreement to sell immovable property. The argument is insignificant because if the developer has undertaken to build for the prospective purchaser for cash or deferred payment or a valuable consideration pursuant to a contract then to that extent, the contract is works contract and there is deemed sale of material (goods) used in the construction of building and merely because the builder has a right of lien in the event due monies are not paid does not alter the character of contract being works contract.

114. In Article 366(29-A)(b), the term 'works contract' covers all genre of works contract and it is not limited to one specie of the contract. In Raheja Development1, the definition of "works contract" in KST Act was under consideration. That definition of "works contract" is inclusive and refers to building contracts and diverse construction activities for monetary consideration viz; for cash, deferred payment or other valuable consideration as works contract. Having regard to the factual position, inter alia, Raheja Development1 entered into development agreements with the owners of the land and it also entered into agreements for sale with the flat purchasers, the consideration being payment in installments and also the clauses of the agreement the Court held that developer had undertaken to build for the flat purchaser and so long as there was no termination of the contract, the construction is for and on behalf of the purchaser and it remains a "works contract". The legal position summarized by us and the foregoing discussion would justify the view taken by the two Judge Bench in Raheja Development1.

11. 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.

12. It is necessary to understand the nature of works contract activities and the method of accounting for levy of VAT, which has been explained through an example below :

As the land prices in Delhi are sky rocketing and for builders it is difficult to acquire entire piece of land and then construct flats for prospective buyers. On the other hand, there are land owners whose houses are in dilapidated conditions but due to financial constraints they are unable to re-construct the building. So, in the recent past, the builders and land owners have entered into agreement to reconstruct the building after demolition of the existing old building. Depending upon the prevailing rates of land and construction cost, the share in the newly constructed building are decided between the land owner and the builder. As such there may be different permutations and combinations of agreements between the land owners and the builders.

For instance, when a builder enters into an agreement with the land owner to demolish and construct a new building comprising of basement, stilt parking and four floors. The builder and the land owner decide to share the land/floors depending upon the cost of land and quality of construction. The transfer of agreed land may be in advance to the builder or after construction, the land owner, directly transfers the land beneath the flats pertaining to the builder on his advice. In such type of contracts, the builder works as a contractor for the portion of the land owner/co-owner and in lieu of that he receives share in the undivided land beneath his portion of construction. Besides, he can also be a contractor for his share also, if he finds a prospective buyer for such share of undivided land and flat/apartments to be constructed on it. In case, the builder is not able to get a prospective buyer and the building is completed, then it will not be a works contract transaction because it is a transaction relating to sale of immovable property. It is important to mention here that the contractor who carries out construction for the land owner /co-owner and receives share in land as consideration has to take into account the said value of land for the purpose of calculation of gross turnover. This land value, though, might not have directly been reflected in their audited balance sheet, due to lack of system of accounting for such inherent financial consideration, over and above the sale consideration received by them for the sale of their portion to prospective buyers.

This can be explained by taking an example where the land owner has a piece of land measuring 150 square yards enters into a contract with a builder assuming that the cost of land is Rs.150 lakh. It is decided to construct a building and for the purpose, to divide the land into two pieces of 75 sq. yds. each. On the one portion, builder builds four flats for land owner and the cost of construction for land owner for the purpose of works contract is Rs. 75 lakhs i.e. the value of the land received by the builder in lieu of the construction carried out by him for the land owner. This is the first part though the transaction of which is not generally recorded in the books of accounts of the builder until unless he sells the piece of land. This means that builder gets the land worth Rs.75 lakhs as a consideration to construct land owners part. The second part where the contractor finds prospective buyers for the portion of land and flats thereon, such transactions are recorded in the books of accounts. The builder sells his four flats for Rs.160 lakh.

If the dealer wishes to pay tax under composition scheme he will pay tax as under :

- For the works contract executed on land owners portion as he has received valuable consideration in the form of 75 sq. yds of land worth Rs.75 lakhs = @ 3% on Rs.75 lakhs AND

- For the works contract executed on the land received by the builder and flats sold to prospective buyers = Rs.160 lakhs (-) Rs.75 lakhs (being cost of land) = On Rs. 85 lakhs @ 3% OR

- If the dealer is eligible for 1% composition scheme, he would have to pay on the entire consideration received from the prospective buyers i.e. on Rs.160 lakhs.

Alternatively, if the dealer opts to pay tax under amnesty scheme (available till 31.01.2014) for the transactions on which tax has not been paid, he may elect to pay VAT @ 3% on the construction cost i.e. Rs.75 lakhs on land owner's share (received 75 sq. yds land in lieu of construction) and @ 1% on flats built on builder's land share i.e. Rs.1.60 crore including the cost of land.

The purpose of the above example is to clarify the various components of works contract transactions where collaboration agreements took place and the nature of transactions is complex in nature and cannot be ascertained from the books of accounts maintained by such builders in normal course of business. So, for the purposes of these transactions, value of land, and value of construction, are to be ascertained.

13. There is no ambiguity on the consideration received by the builder for construction carried out on the land owner's portion which is in the form of additional proportionate undivided land, share in stilt parking, servant quarters in the stilt parking as consideration. The definition of 'works contract' under DVAT Act, 2004, includes 'other valuable considerations' which may be in any form including land portion.

14. The modus operandi of the applicant is also similar to the one as mentioned in the above example except for the purchase document for the first, second and terrace right of the second floor. It is noticed that the purchase document was executed on 9/12/2011 and the builder was aware that the property was old and was not able to bear the further load of an additional floor. Had the owner/owners of the other floors beneath the portion purchased by the builder, refused to reconstruct the property, the purchase of the builder had been futile. Hence, it is highly unpractical to purchase a share in an old property without having some arrangement with the other owners in advance. This contention also gets support from the fact that the 'memorandum of understanding' has been executed on the same day of the said purchase by the builder i.e. 09.12.2011. The other party involved in the Memorandum of Understanding has purchased their respective share in the property on the same date i.e. 09.12.2011 (page 3 and page 4 of MoU). The contention of the arrangement is further strengthened by the fact that M/s. T.R. India International Pvt. Ltd., from whom the purchase of respective shares in land is made, had acquired the rights of the property through two separate sale deeds as per following details:

    a) Entire first floor, entire second floor and entire terrace thereupon and four car parking space along with 55% undivided, indivisible ownership rights in the land

b) Entire basement, entire ground floor with rear court yard and three car parking along with 45% undivided, indivisible ownership rights in the land.

But when the properties at a and b as mentioned above, were sold to the builder and the other party involved in MoU respectively, the share in the land has been mentioned as 67.50% and 32.50% respectively. (page 3 and 4 of MoU). Since the proportionate share in the land in respect of the builder has been increased at the time of execution of sale deed itself, the arrangement amongst these parties is confirmed. It is obvious that being a business man, the builder is not doing any charity. By making arrangement with the other parties, the builder has made an attempt to try and avoid the tax on works contract activity by executing a sale deed and showing the builder as one of the co-owners on the date of MoU.

As per MoU, in page 7 para 13

"That the First Party, Second Party have entered into this M.O.U. purely on a principal to principal basis for their mutual benefit and nothing stated herein shall be deemed to or construed as a partnership between parties nor shall in any manner it constitutes an association of persons. The basis of this agreement is to construct retain and transfer, which means the Second Party shall construct a new/fresh building with it's own funds and resources, shall retain it's share as specified above and is fully competent to sell, transfer the same to the intending buyer."

. As regards the construction carried out on the share of the land relating to land owner, there is undoubtedly a owner-contractor relationship because he has transferred to the owner the property in goods in the course of execution of works contract and has also received consideration as mentioned in the above para 13.

15. During the hearing, the issue of applicability of Rule 3 of DVAT Rules, 2005 notified on 20.09.2013 on the transactions of the applicant which relates to earlier period i.e. prior to the said notification also came for discussion. It is clarified that in case, the dealers who opt for Amnesty Scheme, the Rule 3 of DVAT Rules, 2005 notified on 20.09.2013 shall be applicable. In all other cases, the pre revised Rule 3 of the DVAT Rules, 2005 may be applicable. As regards the issue relating to Completion Certificate, it is clarified that in conformity with the building bye-laws applicable in Delhi, the

completion certificate issued by the MCD shall be valid until and unless the government notifies a different manner to ascertain the completion of construction under the relevant provisions of DVAT Rules, 2005.

16. In view of the foregoing, I am of the considered view that in the instant case, the dealer carried out construction on co-owners land i.e. 32.5%. This construction is covered under works contract definition and the applicant has got consideration in the form of additional proportionate undivided land, share in stilt parking, servants quarters in the stilt parking. Hence, the applicant is liable to pay tax on the works executed by him. So, the work done by the applicant at A-2/89, Safdarjung Enclave, New Delhi is in the nature of Work Contract. Held accordingly.

17. Further, after demolition, the dealer got the entire fixtures and fittings and other building material including iron and steel. The possibility of its resale in the market is also to be examined by the assessing authority with the help of books of account and other collateral evidences.

The purpose of this determination is just to clarify the issues raised by the applicant. Further, 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, in case, it finds any deviations during examination of books of accounts, the terms and conditions of the agreement, project wise/stage wise construction accounts, books of accounts, cash flow of funds etc.

(Prashant Goyal)
Commissioner, VAT

Copy for information and necessary action to:

1. Applicant
2. Addl. Commissioner (Law & Judicial)
3. Addl. Commissioner (System)
4. Joint Commissioner (Special Zone)
5. Value Added Tax Officer (Policy Branch)
6. System Analyst, for uploading this order on web.
7. President, Sales Tax Bar Association (Regd.)
8. Guard File

(Prashant Goyal)
Commissioner, VAT