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

No.355/CDVAT/2013/ 246 Dated: 20.02.2014

M/s. J.K. Goyal Estate Developers Pvt. Ltd.,
D-71, Ground Floor, 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 08/11/2013 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 R-164, Greater Kailash-I, New Delhi, is in the nature of Work Contract or not ?"

The question in detail is as below:

J.K. Goyal Estate Developers Pvt. (hereinafter called the "Company") entered into a Collaboration Agreement dated 27.11.2010 with Mr. Sudhansh Malhotra and Mr. Preety Bhandari the owner of property measuring 208 Sq. Yds. bearing No. R-164, situated at Greater Kailash-1, New Delhi-110048 on 27.11.2010 for the development construction of the aforesaid property comprising of part of Basement, Ground Floor, First Floor, Second Floor and Third Floor.

Mr. Sudhansh Malhotra and Mrs. Preety Bhandari, the owner of the aforesaid property executed a general power of attorney in favour of M/s. J.K. goyal Estate Developers Pvt. Ltd. acting through its director Mr. Joginder Kumar Goyal for the supervision manage, control, and construction of the aforesaid property after demolishing the old building. Mr. Sudhansh Malhotra and Mrs. Preety Bhandari handed over the physical possessionof the entire property to M/s. J.K. Goyal Estate Developers Pvt. Ltd. The old material, fittings and fixtures whatsoever was the property of M/s. J.K. Goyal Estate Developers Pvt. Ltd. The entire cost of construction for the entire building had to be borne by M/s. J.K. Goyal Estate Developers Pvt. Ltd.

The duty conveyance on the proportionate share of land and on the construction part was paid by the company on the General Power of Attorney executed by Mrs. Sudhansh Malhotra and Mrs. Preety Bhandari in favour of M/s. J.K. Goyal Estate Developers Pvt. Ltd. on 27.11.2010 to manage, control, construction and to sell the portions falling the share of the "company" to/in favour of any intended buyers.

The "Company " constructed the entire building comprising part of Basement, Ground Floor, First Floor, Second Floor & Third Floor out of it's own funds and resources including the borrowed money.

The entire Stamp Duty & Registration fee etc. was paid by the "Company" on the cost of land and also on the cost of construction as per the circle rates prescribed by the Delhi Government.

In the process the "Company" became the owner of Ground Floor.

After completion of the construction of entire building the "Company" sold the Ground Floor to Mr. Gaurav Arvind Karnik and Mrs. Rohini Rangachari Karnik vide sale deed dated 22.12.2011, duty of conveyance was paid by the purchaser on the proportionate cost of land and also as well as on the construction part.

As per legal opinion the transaction is transfer 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 on the proportionate cost of land share as well as on 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.078457 dated 07.11.2013 of Axis Bank Limited, Malviya Nagar, New Delhi.

3. M/s. J.K. Goyal Estate Developers Pvt. Ltd., is a Private Limited Company, duly incorporated under the Companies Act, 1956, having its Office at D-71, Ground Floor, Corner Side, Malviya Nagar, New Delhi-110017. Sh. Gaurav Goyal, Counsel of the Company appeared and reiterated the grounds of the determination application. In brief, his submissions are as under:-

Submissions dated 02.12.2013

(i) That J.K. Goyal Estate Developers Pvt. Ltd. (hereinafter referred to as the "Company") entered into a Collaboration Agreement with the owner of the Property bearing No. R-164, measuring 208 sq. yards at Greater Kailash-I, New Delhi-110048.

(ii) That stamp duty of conveyance under article 48(f) of Delhi Stamp Rules, 2007 in regard to Power of Attorney with consideration read with the section 2(21) of the Indian Stamp Act, 1899, wherein the term "power of attorney" has been defined, wherein the rate of duty is as per article 23 of the Delhi Stamp Rules, 2007 which states the duty for conveyance which has been defined under section 2(10) of Indian Stamp Act, 1899 which has been reduced from 8% to 3% by The Indian Stamp (Delhi Amendment) Act, 2007 along with other charges were paid by the company on the share of land i.e. 22.5% of land share and as well as on the construction part.

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

(iv) That the company did not at any point receive any consideration from the purchasers during the course of construction. After completion of entire construction the company sold/conveyed the Ground Floor to the ultimate purchasers by way of executing a sale deed, on which stamp duty had been paid under the relevant laws.

(v) That the cost of construction was complete in the books of account of the company before receiving any sale consideration from the purchasers of the Ground floor.

(vi) As a proof of completion of construction of the premises, submitted a copy of the certificate obtained by the company from the Civil and Structural Engineer.

(vii) That it is pertinent to note that proper duty of conveyance under Article 23 of Delhi Stamp Rules, 2007 read with Indian Stamp Act, 1899, along with other charges was paid by the ultimate purchasers of Ground Floor on the proportionate share of land as well as on the cost of construction.

(viii) That the construction 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 floor to

whom the same were sold subsequently and quoted the definition of works contract as per section 2(1)(zo) of the DVAT Act 2004.

(ix) That DVAT is an indirect tax, which is ultimately recoverable from the ultimate purchaser of goods. In the present case the purchaser has already 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.

(x) 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.

(xi) That Departmental Representative, in another case during hearing on 27.11.2013, relied on the rule 3 of the Notification No.F.3(16)(Fin.(rev-i)/2013-14/d & VI/785 dated 20.09.2013.

(xii) 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. This notification is full of explanations and under the garb of these explanations the department of Trade & Taxes is trying to implement DVAT retrospectively without taking into consideration of other circulars issued by the State Government particularly F.21/6(1)/Comp/Agx/cos/Hq/05-06/418-24 dated 05.05.2006.

(xiii) That the company was always of the view, based on the above circular that these type of transactions are governed by the Section 17(1)(b) of the Indian Registration Act 1908.

(xiv) Levy of DVAT on the same transaction/product/commodity would result in double taxation.

(xv) Distinguished his case from the case of L&T, 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.

(xvi) That the term 'competent authority' has not been defined under the DVAT Act, and it was never clarified earlier except the notification dated 20.09.2013, that before completion of construction the units sold to prospective buyer shall be subject to the DVAT.

(xvii) Distinguished his case from K. Raheja case as his case is different and K. Raheja case cannot be taken to be a precedent for all the cases.

(xviii) That with regard to the completion certificate, it is further submitted that the department should go as per the letter and spirit of the statute and also with the objects and intention sought to be achieved in the statute and not merely construe the term 'completion certificate' as per the plain words laid down in Delhi Building Bye laws.

4. The brief facts of the case are that the applicant M/s. The brief facts of the case are that the applicant M/s. J.K. Goyal Estate Developers Pvt. Ltd. acting through its Director, Mr. Joginder Kumar Goyal (hereinafter called the 'Company') entered into a collaboration agreement dated 27.11.2010 with Mr. Sudhansh Malhotra and Mr. Preety Bhandari the owner of property measuring 208 Sq. Yds. bearing No. R-164, situated at Greater Kailash-1, New Delhi-110048 on 27.11.2010 for the development construction of the aforesaid property comprising of part of Basement, Ground Floor, First Floor, Second Floor and Third Floor. The entire cost of construction for the entire building had to be borne by the Company. The owner authorized the Company to sell the portions falling in the share of the Company to/in favour of any intended buyers.

5. Scrutiny of the various clauses of the Collaboration Agreement 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 Company. Some of the relevant clauses of Collaboration Agreement have been reproduced to understand the intentions of the related parties.

In Collaboration Agreement

On Page 3

"AND WHEREAS the First party is desirous of reconstructing and developing the "said property" as per modern taste and architecture and has discussed with the Second party to enter into collaboration to construct, retain and transfer basis, under which the Second party is entitled to retain certain portion of the newly constructed building, in lieu of amount being paid herewith as cost of land and the cost construction to be incurred by him and services and expertise to be rendered by him, in reconstructing and developing the "said property.

The First Party is interested to retain Basement, App 600 Sq. Feet below the stilt area, stilt area (except two car parking, servant room with common toilet for all the owners/occupants of the building) First Floor, Second Floor and the Third Floor with Terrace Rights and will part with the Ground Floor and two place for parking car in the stilt area & one servant room (with common toilet in the stilt area) in the newly constructed building, they have agreed to transfer the ownership rights of the Second party's share in his favour or his nominees, assignees or intending buyers. Any tax liability for the sale of the Second party's Share as mentioned above shall be paid by the Second Party.."

On Page 4

"That after demolishing the existing building, the Second Party shall construct the building comprising of Ground Floor as per taste and requirements of the Second Party and the Basement App 600 Sq. Feet below the stilt area, First Floor, Second Floor & Third Floor with Terrace as per taste and requirements of the First Party as per Specifications attached with this Agreement. The cost of the o9ld material/malba and the demolition cost shall be on account of the First Party."

On Page 5 – Para C

"And it is agreed that in addition to the floor allocation and the construction to be carried out by the Second Party at its own cost and expense as specified above, the Second Party agrees to pay a sum of Rs.30,00,000/- (Rupees Thirty lac Only) as proportionate cost of land for his share to the First Party and also for equalizing his share in the allocation of the floor in the said property. The above said Entire amount of Rs.30,00,000/- (Rupees Thirty Lac Only), has been paid by the Second party to the First Party as full & Final settlement amount in following manner."

6. 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. In the process, the applicant has got rights for construction as consideration. 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 77.50% share of land on behalf of the land owner of such share of land and in turn has got share

in the property as consideration. 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:-

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

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.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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.

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 share in the property. The definition of 'works contract' under DVAT Act, 2004, includes 'other valuable considerations' which may be in any form including land portion.

12. The modus operandi of the applicant is also similar to the one as explained in the above example. Here also, on the instance of the owner who was desirous of reconstruction and development of his property as per modern taste and architecture (page 3 of collaboration agreement), the builder had constructed the property on the behalf of the owner. In lieu of the construction carried out, the builder has got the share in building i.e. one floor, car parking etc. along with undivided proportionate land. Since the market value of the one floor was higher than the construction cost incurred, the builder

has given to the owner the adjustment amount of Rs.30,00,000/-. This adjustment finds a mention in the collaboration agreement at page 5 para C.

13. 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 received valuable consideration in the form of share in the property. In this context, following paras of the collaboration agreement are important and clearly speak of this relationship between the builder and owner.

Para 7

> *"That the building project shall be completed and finished in every respect by Second Party and the First Party or his/their duly constituted/appointed Attorney or nominee shall be handed over his share as stated above in Para 6A within 12 (Twelve) months from the day of handing over the possession by the First Party to the Second party. In case of delay in completion of the project (construction) beyond 12 (Twelve Months), the Second party shall pay an amount of Rs.1,00,000/- (Rupees One Lac only) per month as compensation for the extended period.."*

Para 22

> *"That the First Party and Second Party have entered into this agreement 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 Second Party and Owner nor shall in any manner it constitutes an association of persons……."*

The power of attorney was executed in pursuance of the collaboration agreement wherein it was finalized between the two parties that in lieu of the construction to be carried out by the builder, one floor will be given to the builder. The power of attorney was granted to the builder only to supervise, manage, control and construct the said property and to sell the portions falling in the share of the builder. The selling clause in the power of attorney was to cover the valuable consideration for the construction executed by the builder on behalf of the land owner. Further, the power of attorney did not give any ownership right to the builder on the land. Hence, the general power of attorney executed prior to execution of works contract activities does not make a difference for the said construction to qualify as the works contract activity.

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.

14. In view of the foregoing, I am of the considered view that in the instant case, the applicant has carried out construction on land owner's share, and in lieu of the same has got share in the property as consideration. So, the work done by the applicant at R-164, Greater Kailash-I, New Delhi, is in the nature of Works Contract. Held accordingly.

15. 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, documents regarding completion of construction of the property, project wise/stage wise construction accounts, books of accounts, cash flow of funds etc.

(Prashant Goyal)
Commissioner, VAT

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