

Negative Blues – II

Another unintended impact on construction sector

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As all of us know, broadly there are two models in vogue in construction sector, viz., (i) sale of Undivided Share of land (UDS) and entering into construction agreement between the builder and buyer; (ii) entering into an agreement to sell and receiving installment payments and ultimately registering the property for full value on payment of stamp duty. While the first mode is undoubtedly a service transaction, the second mode is a transaction of sale of immovable property. The first method attracted service tax from 10.09.2004 (commercial construction) / 16.06.2005 (residential construction). Being a transaction of sale of immovable property, the second mode was not liable to service tax, creating disparity between two models (also clarified so vide circular No. 108/2/2009 Dt. 29.01.2009). To overcome the disparity, an Explanation was added with effect from 01.07.2010 under the definition of both taxable services, whereby even in the second mode of transaction, a service was deemed, if any payment was received before issue of completion certificate. The validity of such Explanation was also upheld by the Hon'ble High Court of Mumbai in the case of Maharashtra Chamber of Housing Industry Vs UOI (2012-TIOL-78-HC-MUM-ST).

The second mode of transaction, which is admittedly a transaction of sale of immovable property after construction, does not involve any transfer of property in goods and hence the same cannot be considered as works contract. In other words, what is sold is not the any goods during the course of construction, but the constructed property is sold as such, under this model. Such transactions would fall under commercial or industrial construction service or construction of residential complex service, as the case may be. An abatement of 67 % from value or 75 % from value, if the gross amount also includes the value of land, can be claimed and service tax was payable on 33 % or 25 % of the gross amount, as the case may be, under notification 1/2006. This is history.

With the advent of negative list based service tax regime, the above said explanation finds a place the definition of declared services under Section 66 E of the Finance Act, 1994 as below:

The following shall constitute declared services, namely:--

(a)

(b) construction of a complex, building, civil structure or a part thereof, including a complex or building intended for sale to a buyer, wholly or partly, except where the entire consideration is received after issuance of completion-certificate by the competent authority.

So, the second mode of transaction dealt with above, would constitute a service, if any part of the consideration is received prior to issue of completion certificate. But, the said mode would not be a works contract, as no transfer of property in goods is involved in this mode,

as it is a transaction of sale of immovable property. Hence, the composition scheme of payment of service tax or the scheme under rule 2A of the Service Tax (Determination of Value) Rules, 2006 would not be applicable for this mode of transaction. In the absence of any abatement for such cases under notification 13/2012, service tax would be payable on the sale model transaction, on the entire value!

Certainly it would not have been the intention. It is hoped that the abatement of 67 % / 75 % would be restored for such cases.

Postscript. 75 % abatement has since been introduced vide Notification 26/2012 ST Dated 20.06.2012.