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Tax Practitioner's Association, Thane

VAT On Builders / Developers – Recent Developments



- CA. Krunal J. Davda
B.Com., A.C.A

CHRONOLOGY OF EVENTS

- UPTO 19TH JUNE 2006:

No VAT levied on Builders/Developers & supported by DDQ in case of **M/s Rehab Housing Pvt Ltd.. & Larsen & Toubro Ltd.(JV) (WC-2003/DDQ-11/Adm-12/B-276 dtd 28.06.2004) :**

“The Commissioner of Sales Tax Maharashtra State has held that the transaction is composite one i.e. providing land with constructed tenements & hence it is not covered by Sales Tax Provision Including Works Contract Act.”

- 20TH JUNE 2006:

VAT was levied on Builders for the FIRST TIME as per :

K. Raheja’s Development corporation (141 STC 298) Supreme Court Judgment, on the facts of the case that there were two agreements with separate consideration viz. for sale of proportionate undivided share in the land & other for the cost of construction. & due to peculiar definition of “Works Contract” under Karnataka Sales Tax Act,

CHRONOLOGY OF EVENTS

- 1ST SEP 2006 & 7TH FEBRUARY 2007:

Cont....

Issue of Commissioner's Trade Circular no. 23T of 2006 & 12T of 2007 clarifying that S.C decision in K. Raheja now applicable to proceedings under MVAT Act & clarifying certain important aspects and Mah XXV of 2007 known as Maharashtra Tax Laws (Levy, Amendment and Validation) Act 2007 amended definition of works contract w.e.f. 20th June 2006 & was aligned with Karnataka Sales Tax Act definition of works contract.

- 7TH DECEMBER 2007:

Read with rectified order dated 8th February 2008 Bombay High Court granted interim relief to members of MCHI , subject to fulfillment of certain conditions..

CHRONOLOGY OF EVENTS

- ON 9TH JULY 2010:

Cont....

Notification of 1% composition scheme (for all agreements registered after 01.04.2010) (the new scheme of composition is not a new levy section but one more method of discharging tax liability by builders or developers)

- IN APRIL 2012:

Bombay High Courts decision in MCHI's case, decided against the Builders/ Developers.

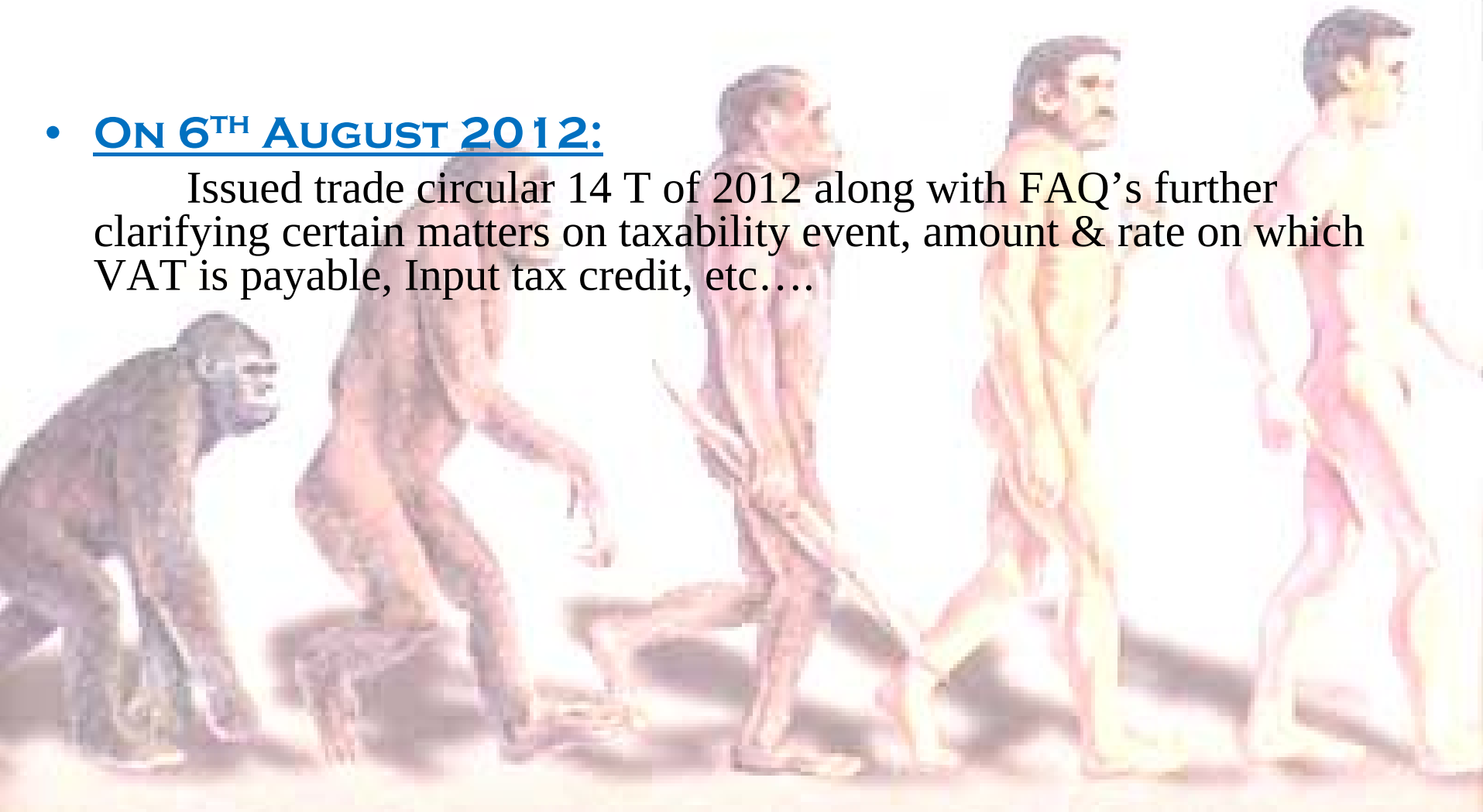
Brief summary - The Hon'ble High Court was mainly swayed by the rights obtained by the purchaser under Maharashtra Flat Ownership Act on the registration of the agreement . As per MOFA the purchaser gets certain rights like non change of plan with out consent of buyer etc.. Therefore the court considered that between the date of Agreement AND till the possession is given, certain rights accrue to the purchaser in respect of purchased property. Therefore there can be said to be transfer or property in goods between two dates & hence liable to works contract.

CHRONOLOGY OF EVENTS

Cont....

- **ON 6TH AUGUST 2012:**

Issued trade circular 14 T of 2012 along with FAQ's further clarifying certain matters on taxability event, amount & rate on which VAT is payable, Input tax credit, etc....



VAT ON BUILDERS/DEVELOPERS IN MAHARASHTRA

- At present , SC has admitted the appeal of the Builder's Association but till date there is no Stay Order on the same & hence on the basis of Bombay High Court Decision's in MCHI's case , VAT on Builders/Developers is enforceable in the State of Maharashtra.



COMPUTATION METHOD OF VAT LIABILITY ON BUILDERS

Read with Sec 2(24),2(25), 42(3), 42(3A),Rule 52,55,58, 58(1A) &
Trade Circular 14T of 2012

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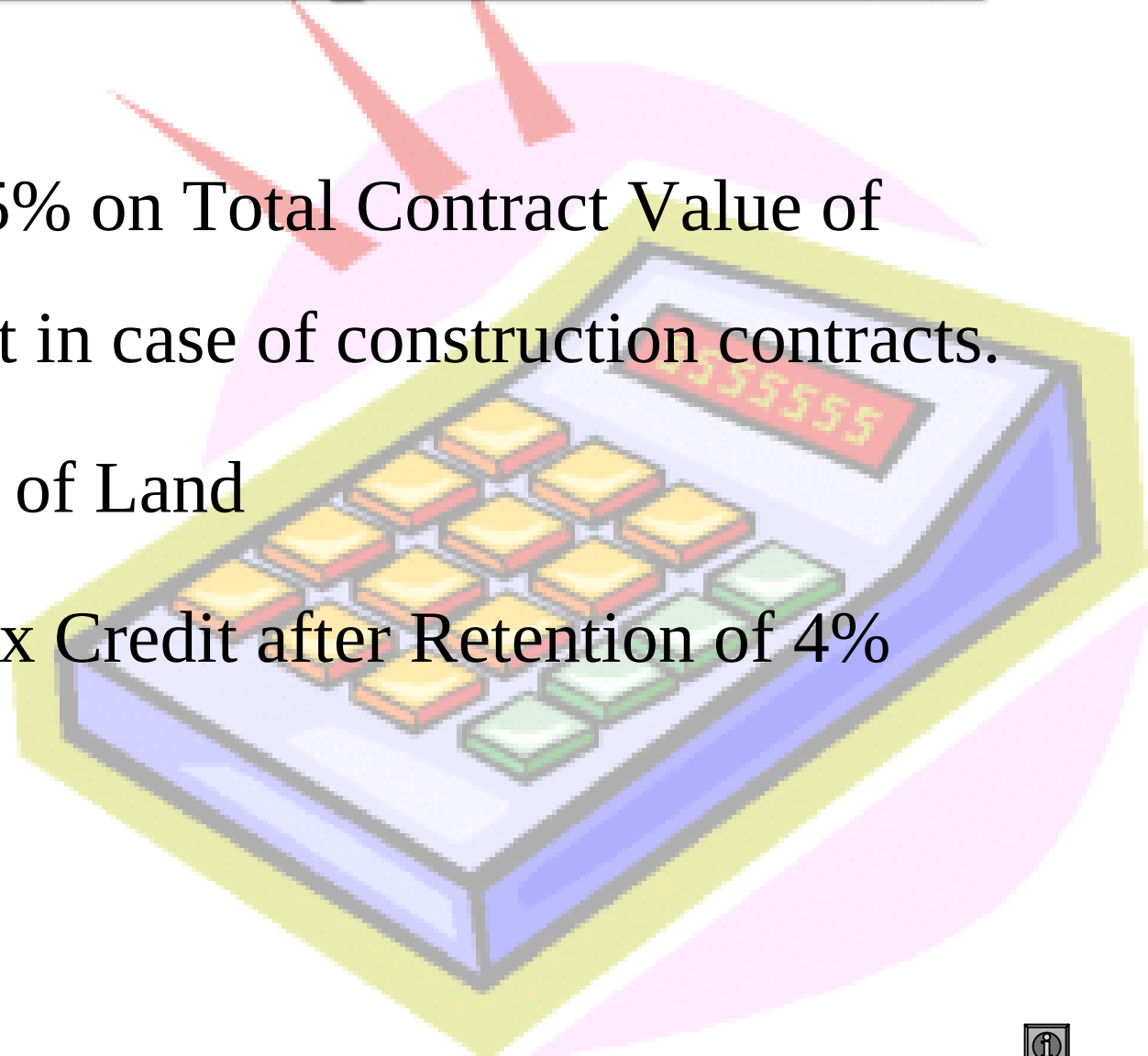
Sec 42(3)

Sec 42(3A) w.e.f 01/05/2010 via
notification dated 9th July 2010

Rule 58 & 58(1A)

Calculation as per Sec 42(3)

- Output VAT 5% on Total Contract Value of works contract in case of construction contracts.
- **No** Deduction of Land
- Take Input Tax Credit after Retention of 4%



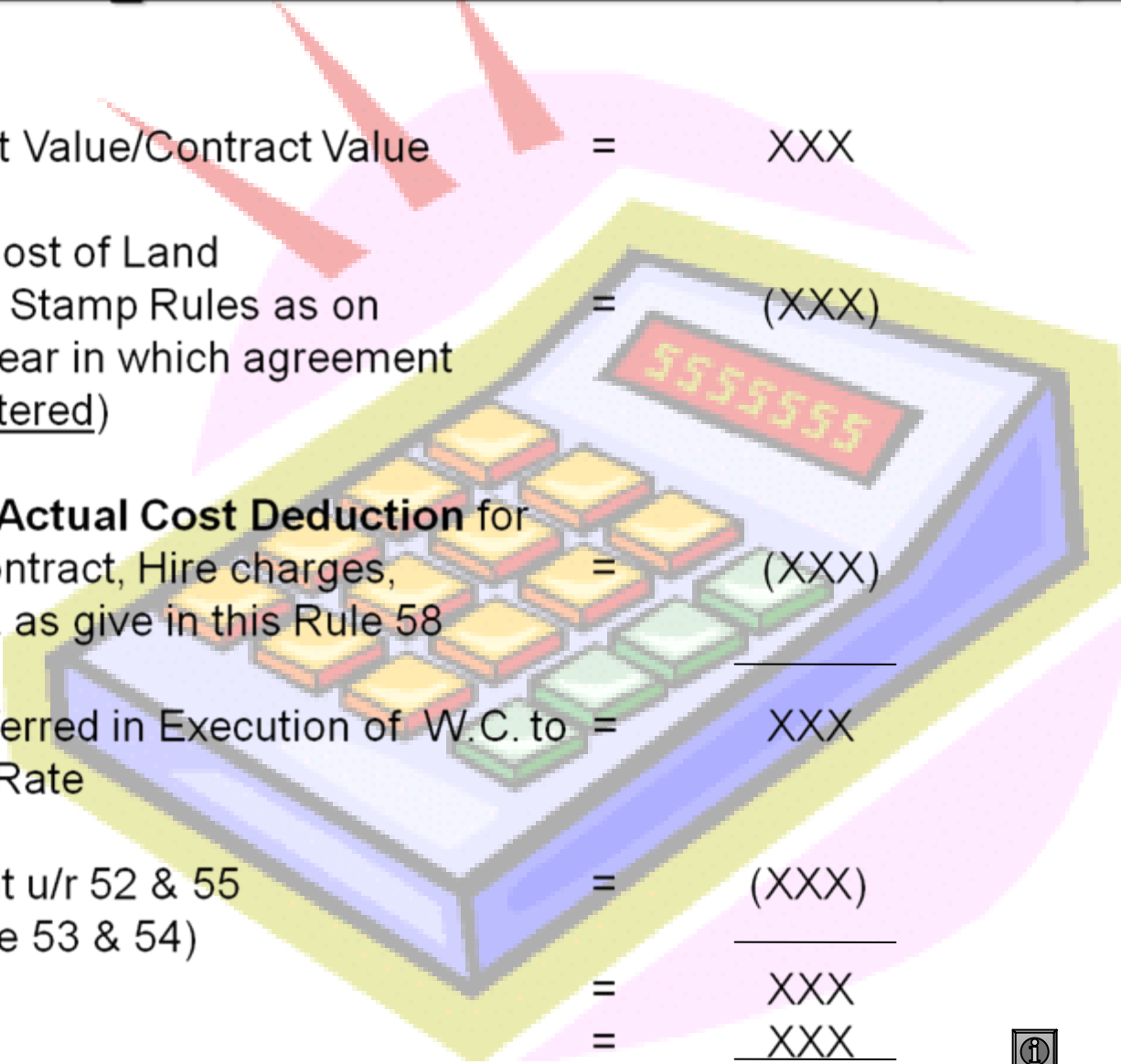
Calculation as per Sec 42(3A)

- VAT 1% on Agreement Value OR Stamp Duty Value (Whichever is Higher)
- **NO** Deduction of Land
- **NO** Input Tax Credit
- **NO** Purchase Against C Form
- Dealer cannot issue Form 409 to Sub-Contractor
- **This Section is w.e.f. 01/05/2010**



Calculation as per Rule 58 & 58(1A)

(1) Actual Deduction

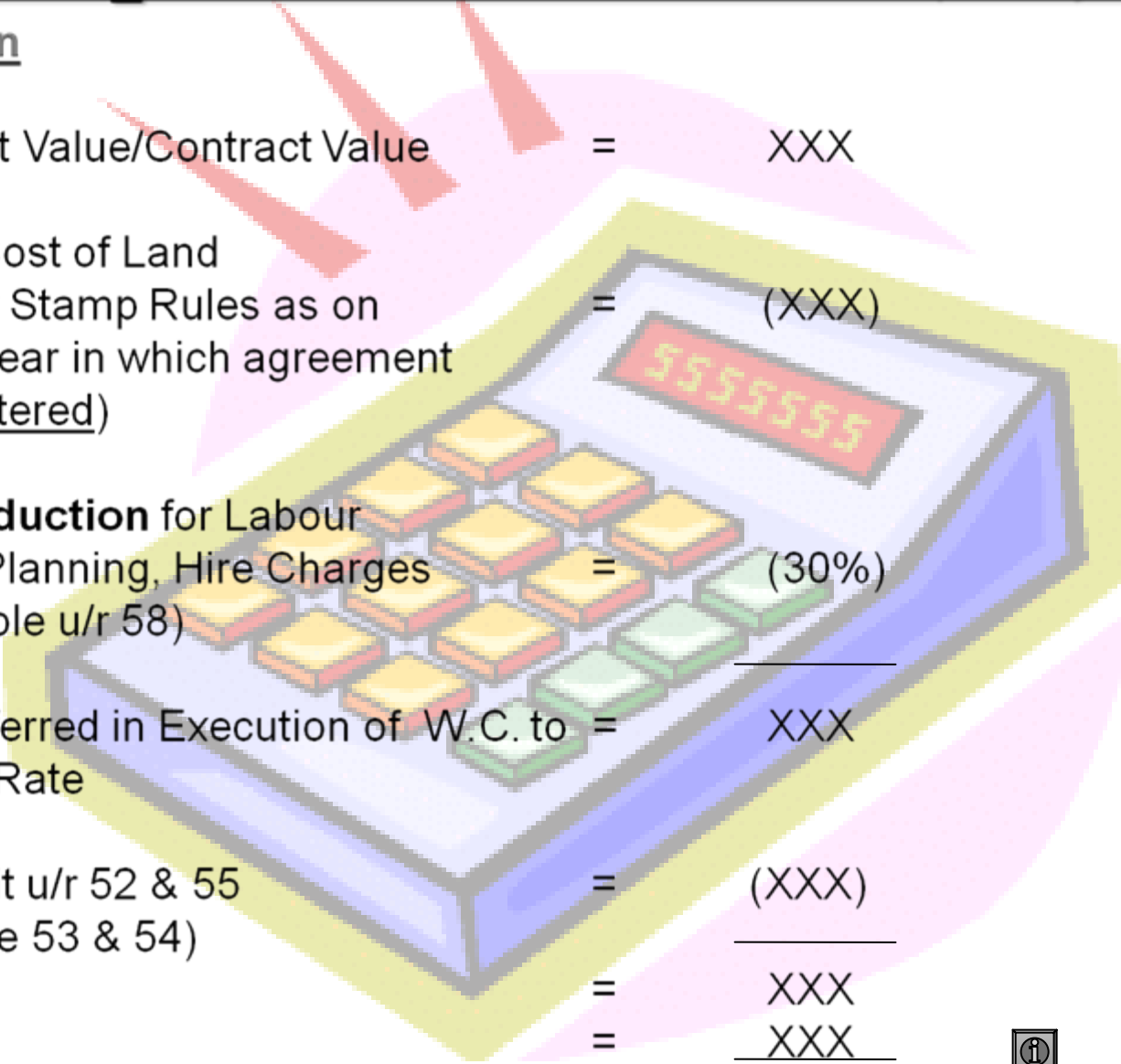


Sale/Agreement Value/Contract Value	=	XXX
(Less:) Proportionate Cost of Land (As per Bombay Stamp Rules as on 1 st Jan of the Year in which agreement to sell is <u>Registered</u>)	=	(XXX)
(Less:) Proportionate Actual Cost Deduction for Labour, Sub-Contract, Hire charges, Planning etc.. & as give in this Rule 58	=	(XXX)
Value of Material Transferred in Execution of W.C. to Be Taxed at Applicable Rate	=	XXX
(Less:) Input Tax Credit u/r 52 & 55 (Subject to Rule 53 & 54)	=	(XXX)
Vat Payable	=	XXX
Add: Interest u/s 30(2)	=	XXX
Total Payable	=	XXX



Calculation as per Rule 58 & 58(1A)

(2) Standard Deduction



Sale/Agreement Value/Contract Value	=	XXX
(Less:) Proportionate Cost of Land (As per Bombay Stamp Rules as on 1 st Jan of the Year in which agreement to sell is <u>Registered</u>)	=	(XXX)
(Less:) Lump Sum Deduction for Labour Sub-Contract, Planning, Hire Charges (Sr. No. 5 of Table u/r 58)	=	(30%)
Value of Material Transferred in Execution of W.C. to Be Taxed at Applicable Rate	=	XXX
(Less:) Input Tax Credit u/r 52 & 55 (Subject to Rule 53 & 54)	=	(XXX)
Vat Payable	=	XXX
Add: Interest u/s 30(2)	=	XXX
Total Payable	=	XXX



Examples of Above Mentioned Methods

<u>FACTS</u>		<u>AMT</u>	<u>Amt</u>
Agreement Value			1000
Proportionate Land Cost		500	
Labour Cost, designing, planning, hire charges, Profit related to supply of labour etc..		200	
<u>Net Value of Material on Sale's Side</u>			
<u>attributable to that agreement/contract</u>			
Net Amt . 4%		100	
Net Amt . 12.5%		100	900
Net Profit			100
<u>Value of Material on Purchase Side</u>			
<u>attributable to that agreement/contract</u>			
Net Amt . 4%		90	
Net Amt . 12.5%		90	

Computation as per 42(3)			Computation as per 42(3A)		
			<u>w.e.f 01/04/2010</u>		
Particulars		Amt	Particulars		Amt
	Vat 5% on Sale/Agreement Value/Contract Value	50		Vat 1% on Sale/Agreement Value/Contract Value	10
Less :	Land Cost	(Nil)	Less :	Land Cost	(Nil)
Less :	ITC		Less :	ITC	(Nil)
	Vat 4%	3.6		Payable	10
	Vat 12.5%	11.25	Add:	Int	XX
Less :	Retention 4% on 180	7.2	Add:	Late Fee	5000
	Payable	42.35			
Add:	Int	XX			
Add:	Late Fee	5000			

Computation as per Rule 58 & 58(1)

1. Actual Deduction

Particulars		Amt
	Sale/Agreement Value/Contract Value	1000
Less :	Proportionate Land Cost attributable to that contract	-500
Less :	Labour Cost, designing, planning, hire charges, Profit related to supply of labour etc.. Attributable to that contract	-200
	Value of Material Transferred in Execution of Works contract	300
	VAT Applicable on Above	24.75
Less:	ITC	14.85
	Payable	9.90
Add:	Int	XX
Add:	Late Fee	5000

Computation as per Rule 58 & 58(1)

2. Standard Deduction

<u>Our view</u>				<u>As per Trade Circular</u>		
<u>Particulars</u>		<u>Amt</u>		<u>Particulars</u>		<u>Amt</u>
	Sale/Agreement Value/Contract Value	1000			Sale/Agreement Value/Contract Value	1000
Less :	Labour Cost, designing, planning, hire charges, Profit related to supply of labour etc.. Attributable to that contract [1000 x 30%]	-300		Less :	Proportionate Land Cost attributable to that contract	-500
		700				500
Less :	Proportionate Land Cost attributable to that contract	-500		Less :	Lump sum Deduction Labour cost Etc [1000-500 x 30%]	-150
	Value of Material Transferred in Execution of Works contract	200			Value of Material Transferred in Execution of Works contract	350
	VAT Applicable on Above	16.5			VAT Applicable on Above	28.87
Less:	ITC	14.85		Less:	ITC	14.85
	Payable	1.65			Payable	14.03
Add:	Int	XX		Add:	Int	XX
Add:	Late Fee	5000		Add:	Late Fee	5000

IMPORTANT POINTS AS SPECIFIED IN **TRADE CIRCULAR 14T OF 2012**

- VAT Tax by Builders/Developers **payable w.e.f 20.06.2006**
- Registration to be done before 16/08/2012 & payment of Tax, Interest, Late Fee (Rs 1.2 Lacs for 6Years) & Compounding Fee of Rs 5000/- for **All Unregistered period** & application for ADM Relief to be done before **31/08/2012**
- Form 233 to be filled Quarterly
- Tax liability triggers on **Agreement date** though Advances are received earlier, Tax is to be levied from Agreement Date & **NOT** when agreement is registered.
- If not done before 31/08/2012, than as per Trade Circular Compounding fee would be desirably not less than **5000+0.5% of Gross Sales Tax Liability for each month of Delay**
- Vat Audit report for all pending years to be completed & filed before 30/11/2012 to avoid late filling penalty of VAT Audit Report

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- Purchases of Material like cement, iron & steel etc required to be used in the Construction Project will be eligible to Input Tax Credit
- Non-refundable deposits & other charges under the agreement such as electricity deposit , water charges, legal charges, development charges etc will be a deduction to the extent such amounts are actually paid to other authorities
- Vat Applicable on the agreements can be collected by raising a DEBIT NOTE
- It may be noted that in a case where a builder sells readymade flat i.e. after the flat is constructed, there is no controversy, it is considered as a sale of immovable property & there is no question of VAT Liability as works contract - as specified & supported by observation in *K. Raheja's Development corporation* by Supreme Court & by Trade Circular by 12T of 2007 .

VAT ISSUES ON DEVELOPMENT ON BARTER BASIS

- **Definition of Sale Sec 2(24) of MVAT Act, 2002**

“Sale” means a sale of goods made within the State for cash or deferred payment or other valuable consideration but does not include a mortgage, hypothecation, charge or pledge, & the words “sell”, “buy” & “purchase”, with all their grammatical variations & cognate expression, shall be construed accordingly”

Sec 2(24)(b)(ii)

“Works Contract” means the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract including , an agreement for carrying out for cash, deferred payment or other valuable consideration, the building, construction, manufactures, processing , fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property

- **Definition of Sale Price Sec 2(25) of MVAT Act, 2002**

“Sale Price” means the amount of valuable consideration paid or payable to a dealer for any sale made including any sum charged for anything done by the seller in respect of the goods at the time of or before delivery thereof, other than the cost of insurance for transit or of installation, when such cost is separately charged”

- **In M/s Gannon Dunkerley & Co. (9 STC 353) Supreme Court**

Supreme Court observed the ingredient of “Sale” as under on page 365 of 9 STC :

“Thus, according to the law both of England & of India , in order to constitute a sale it is necessary that there should be an agreement between the parties for the purpose of transferring title of goods , which of course presupposes capacity to contract , that it must be supported by money consideration, and that as result of the transaction property must actually pass in the goods.... So also if the consideration for the transfer was not money, but other valuable consideration, it may then be exchange or barter but not a sale. And if under the contract of sale, title to the goods has not passed, then there is an agreement to sell & not a completed sale.”

In C.I.T. v/s Motors & General Stores (P) Ltd. (66 ITR 692)

In this case Supreme Court has observed as under on page 695/696 of 66 ITR
“Section 54 of the Transfer of Property Act defines ‘sale’ as a transfer of ownership in exchange for a price paid or promised or part paid & part promised There is no definition of the words ‘price’ in this Act. But it is well settled that the word ‘price’ is used in the same sense in this section as in section 4 of the Sales of Goods Act, 1930 (Act III of 1930). Section 4 reads as follows:

1. A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part.....

Section 2 (10) of the Sale of Goods Act defines ‘Price: as meaning the **money consideration** for a sale of goods. The presence of money consideration is therefore an essential element in a transaction of sale .if the consideration is not money but some other valuable consideration it may be an exchange or barter but not sale”.

Thus from the above judgments it is clear that unless the transfer of property by the seller to buyer is against money consideration there cannot be ‘sale’ transaction for the purposes of sale tax laws.

POINTS TO PONDER

- Thus if we Exactly can't determine the value of Applicable VAT rate on Materials transferred in execution of Works Contract after deduction of Labour, Sub Contract, hire charges etc.. & deduction of Cost of Land from Agreement Value/Sale Value/contract then can we take on the basis of Proportion of Purchases of 4/5% & 12.5% to the Total Taxable Purchase & apply that proportion to the above ???

(See Trade Circular 53T of 2007 – Though issued for retailers & wholesalers)

- Whether Input Tax Credit for the whole year is to be first added up & then to be averaged out Quarterly or Should be taken in the Quarter of Purchases Bill Date ????
- Say in a Situation, if in 2007-08, if very few agreements are executed & major purchases are there in 07-08 & as per above calculation there is excess of VAT showing, Considering the Fact that in the year 2007-08, there was no provision to carry forward the Excess Vat Sett off ??? What to do ??? (Even the time limit to claim refund u/s 51 & to file Form 501 has also Expired)

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- The Trade Circular speaks that Method once Selected should be adopted Project wise, but as per Bombay HC , builders are now Contractors & therefore each agreement can be 1 Contract, therefore can the builder take different methods of Computation for each agreement to Compute VAT Liability
- The rule contemplates to determine the value of the land as per guidelines appended to the annual statement of the rates prepared under provision of Bombay Stamps Rules, 1995, as applicable on 1st January of the year, in which the agreement to sell the property is registered. This will also create difficulties. The agreement may be entered in one year but may be registered in subsequent year/years. The liability for works contract may arise on entering the agreement. **The question is how to decide the value of land cost in the year of agreement itself (though not registered in that year) ????**

Disclaimer

The views expressed in this presentation are the personal views of the presenter & the opinions expressed herein should not be construed as legal or expert advice.

THANK YOU

PRESENTER'S CONTACT DETAILS:

C.A. Krunal J. Davda

J R Davda & Associates

ADD: 101, 102 Thanawala Apt, Opp Vikam Book Depot, Jambli Naka,

Thane(W)-400601

Tel No : 022-25398169 / 9920375581

E-mail ID: krunal_davda@yahoo.co.in

krunal.davda@gmail.com