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INDIRECT TAX EXPRESS

FORTNIGHTLY e-NEWS LETTER FROM M/s D A V A & ASSOCIATES
Chartered Accountants

PART-A: FROM THE EDITOR

Applicability of Service Tax on Receipt of Constructed Area by the Landowner from the Builder/Developer in Lieu of Land under a Development Agreement

There are divergent views on the applicability of service tax on this aspect of the transaction. Some experts believe that development agreement is nothing but a sort of joint venture, and hence, parties are not rendering any service to each other, and service tax is not applicable on this arrangement. However, many others believe that generally the development agreement between the land lord and builder/developer is not in the nature of joint venture. To arrive at a reasonable and safer conclusion, we need to discuss the various issues involved in this sort of arrangement.

When the arrangement between developer and land owners can be called joint venture?

The Hon'ble Supreme Court of India in the case of **New Horizons [1995 SCC (1) 478; 1994 -TMI – 83686]** clarified that when two or more entities undertake a particular activity for mutual benefit, sharing risks and rewards, they are treated as joint venture. If the land owner and the developer are sharing the constructed area only in an agreed ratio and no risks and rewards are shared, they cannot be called as joint venture. Therefore, in view of the above, both developer and land owners should be treated as different persons and not as joint venture.

If there is no Joint Venture, Whether Builder/Developer is providing any Service to the Land owner?

Any activity for consideration is defined as 'Service' under the Finance Act, 1994. In the present case it can be said that the activity for consideration is 'construction' and developer is providing a service to the land owner by constructing flats and in return land lord is giving consideration for service in non-monetary form, i.e. a piece of land. There are two different persons and therefore the activity is carried out by one person for another person. Moreover, the view finds support from the case of **LCS City Makers Pvt Ltd vs CST, 2013 (030) STR 33(Tri-Mad)** wherein it was held that services by way of construction of residential complex to land owners who are transferring their rights in land and getting constructed flats are liable for service tax. Hence, service tax is applicable on this service.

If Taxable, What shall be the Value & Point of Taxation for the purpose of Service Tax?

In terms of section 67(1), consideration can be both monetary and non-monetary. The consideration for constructing flats for the landowner is not readily ascertainable and recourse has to be made to Rule 3 of the **Service Tax (Determination of Value) Rules, 2006** which

WHAT'S NEW

- CBEC vide **Circular No. 990/14/2014-CX-8** dated 19.11.2014, has clarified that the limitation of six months for availment of CENVAT credit would apply when the credit is taken for the first time on an eligible document and not on taking re-credit of amount reversed earlier.

- CBEC vide **Notification No. 32/2014–CE** dated 21.11.2014 exempts goods required for the Intensified Malaria Control Project (IMCP)-Phase II under the National Vector Borne Disease Control Programme from whole of customs duty & Additional duty.

- CBEC vide **Circular No. 12/2014 –Customs** dated 17.11.2014 clarified valuation/assessment practice to be adopted by custom houses in respect of export of Iron Ore.

- The Central Government, vide **File no. B1/6/2013-TRU** dated 25.11.2014, clarified that the SEZ units and developer may, if they so desire, route their application for issuance of authorization for exemption by the department through the specified officer of SEZ instead of submitting it directly to the department.

"We keep moving forward, opening new doors, and doing new things, because we're curious and curiosity keeps leading us down new paths."

- Walt Disney.

provides that the value of such taxable service shall be equivalent to the gross amount charged by the service provider to provide similar service to any other person in the ordinary course of trade and the gross amount charged is the sole consideration. In this respect, CBEC's circular **151/2/2012 Dt. 10.02.2012**, clarified that the value of the flats given to landowners would be equal to the value of similar flats charged by the builder/developer from the prospective buyers.

However, another interpretation is when the builder / developer is getting the right to develop and sell his share of UDS immediately on entering into the Joint Development agreement, the value of UDS portion of land pertaining to the builder/ developer's share of flats, on the date of Joint Development agreement should be considered as the value of services provided to the landowner. The **Para 6.2.1 of the Service Tax Education Guide** issued by the CBEC to guide the assessee in various service tax issues on introduction of negative list concept appears to have accepted this view.

In view of the Education Guide clarification, the value on which service tax is payable for the landowner share of construction would be the value of land transferred to the builder towards the builder / developer's share of the constructed area at the time of such transfer. This service should be considered as ‘original works’ under ‘works contract’ and in such a case, service tax will be payable on the total value minus the cost of materials used; and if the value of goods are not ascertainable from records or owing to any other reason, service tax will be payable on 40% of the taxable value. This seems to be the more logical interpretation. However, there is possibility of dispute with the department and decision has to be taken keeping in view the likely dispute.

The point of taxation has been a complex issue in this regard. Builders/developers are taking divergent views based on their risk appetite to decide at which point they prefer to pay service tax. In case of continuous supply of service, the point of taxation shall be determined as per Rule 3 of Point of taxation Rules, according to which the point of taxation shall be the date of issue of invoice for service provided; or, if invoice is not issued within 30 days of completion of provision of service, then it is the date of completion of provision of service; or, if payment is received before date of issue of invoice or completion of service, then it is the date of receipt of payment.

In case of Joint development agreements, the consideration received by developer is the date on which development rights are received by him. As soon as builder gets possession of land from land owner, it is ‘advance received’ and service tax will become payable on or before the due date next month/quarter. However, the CBEC vide its Circular no. 151/2/2012-ST dated 10.02.2012, has clarified that Service tax liability is to be paid by the builder/developer at the time when the possession or right in the property of the flats are transferred to the land owner. It is advisable for the builder either to pay service tax at the time of transfer of development rights or to pay service tax on the proportionate amounts on completion of each event when instalment becomes due as per the agreement with the prospective buyers. This will enable the landowner to avail and utilize Cenvat credit of the service tax against his output liability when he sells his share of flats. The aforesaid clarification by CBEC circular 151/2/2012-ST dated 10.02.2012 appears to be against the spirit of the provisions of the Point of Taxation Rules. Further, if the service tax will be paid by the builder/developer at the time of possession of flats to the land owner, the land owner will not be able to utilize the credit of the service tax against his output liability arising out of sale of his share of flats.

Thus, an aggressive view would be to pay on completion of the construction and on transfer of the possession of the flats and a safe view would be to pay at the time of transfer of developmental rights. However, another approach could be to pay service tax on the proportionate amounts on completion of each event when instalment becomes due as per the agreement with the prospective buyers. Due to complexity of the issue, whatever option is chosen, it cannot be conclusive.

PART-B: QUIZ TIME!!

1. From which date negative list tax regime has been made applicable under service tax?

2. Which is the only item not covered by the Self-Removal Procedure under Central Excise?

3. What is the rate of abatement in service tax applicable for services provided by an AC restaurant?

(Please mail your replies with your name, location and e-mail id to ***davaidtexpress@gmail.com)***

(The first 3 correct answers will be published in the next issue with name & mail id of the sender.)

ANSWER TO LAST FORTNIGHT’S QUIZ

Reply to Q1- **Rs. 20,000/-**

Reply to Q2– **Rs. 5 Lacs**

Reply to Q3– **90 days**

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SOME COMMON LEGAL MAXIMS AND THEIR USE

- ***Quantum meruit*** – as much as it deserves. E.g. The Court decided that A is entitled to some compensation based on *quantum meruit*.
- ***Per incuriam*** - by their neglect. E.g. the court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam.*

PART-C: CASE UPDATES

1. **Commissioner of Service Tax vs. Vijay Travels [2014(36) S.T.R. 513 (Guj.)]**

Issue: Can it be said that there is no renting out of cabs if the vehicles continue to be with the operator and payment is made per trip/ km and vehicles are given on hire basis?; i.e. renting of cab is distinct from hiring of vehicle in the entry "rent-a-cab" operator's services"?

Decision: The Hon'ble High Court observed that conceptually and essentially, if the nature of service provided is the same, natural corollary is that such service shall be taxed under the taxing statute. It nowhere culls out from the taxing statute that the same contemplated taxing those services where legal possession is handed over by the owner to the person renting the vehicle and where such *de jure* possession continues with the owner or person providing the service to the customer, such service is to be excluded. Further, the concept of providing transportation service where de jure control remains with the owner or company of the vehicle and the driver and yet, it functions in accordance with the wish and desire of the person hiring such vehicle is extremely popular in India unlike the concept of person renting the cab desiring to drive himself by having all liabilities on himself. In absence of any specific exclusion in the statute of such service from the taxing net, large portion of such services cannot be held to be non-inclusive by any artificial interpretation. The petitioner cannot escape tax liability on the ground that hiring is different from renting as the intention of the Government is to tax service provider of a service which involves both hiring and renting of a cab for a longer duration and distinction as sought to be carved out by the petitioner did not find favour with the court. Services provided by the respondent herein would get covered under rent-a-cab service and thereby, respondent is to be held liable the service tax thereon.

2. **Future Gaming Solutions India Pvt. Ltd. vs. Union of India [2014(36) S.T.R. 733 (Sikkim)]**

Issue: Whether or not the activity of the Petitioner of promoting, organizing or assisting in arranging the sale of lottery tickets of the Government of Sikkim is a taxable service falling within the purview of the Finance Act,1994, as amended by the Finance Act, 2012?

Decision: In the light of sub-section (1) to Section 65B read with sub-section (44) thereof, lottery is excluded from the definition of 'service' being 'actionable claim'. Even under sub-section (34) of Section 65B read with Sections 66B and 66D, lottery stands excluded from the purview of service tax under the Finance Act,2012 as being one in the 'negative list'. The activity of the Petitioner comprising of promotions, organizing, reselling or assisting in arranging of lottery tickets of the State Lotteries does not establish the relationship of a principal or an agent but rather that of a buyer and a seller, and thus are not liable to service tax under the provisions of the Finance Act, 1994, as amended by the Finance Act, 2012. Therefore, the action of the respondents to impose such tax on the Petitioner on the basis of Notification No. 36/2012- S.T., dated 20-6-2012 and the Service Tax Rules is *ultra vires* the very provisions of the Finance Act, being in excess of the powers vested therein.

The Finance Minister Shri Arun Jaitley has said that the GST bill will be tabled during this winter session of the Parliament itself. A panel set up by the state governments has proposed revenue-neutral rates (RNRs) for the central and state components of the proposed goods and services tax (GST) at 12.77% and 13.91% (totaling to a whopping 26.68%) respectively.

PART-D: FREQUENTLY ASKED QUESTIONS

Query 1: M/s. XYZ Ltd of Kolkata, a goods transport agency, is providing service to ABC Ltd of Bhutan for transportation of a consignment of goods from West Bengal to Bhutan and payment against services are received in Bhutan currency. In such case, what is the place of provision of service and who is liable to pay service tax?

Reply by E-News Letter Team: As per Rule 10 of Place of Provision of Service Rule, 2011, the place of provision of services of goods transportation agency shall be the location of the person liable to pay tax and sub-rule 2(1)(d) of the service tax rules, 1994 provides that person liable to pay tax is the person who is liable to pay freight (either himself or through his agent) for transportation of goods by road. If such person is located in non-taxable territory, then service provider is liable to pay tax. Therefore, M/s XYZ, being the service provider, is liable to pay service tax and his location is place of provision of service.

Query 2: M/s XYZ Foundation is a Section 25 company under Companies Act 1956, i.e. a non-profit organisation. It earns an income of Rs 15 lacs by rendering service in relation to skill development of homeless children. Being a non-profit organisation, is it liable to pay service tax for such activity?

Reply by E-News Letter Team: As per Mega Exemption notification 25/2012 - ST dated 20.06.2012, services by an entity registered under section 12AA of the Income tax Act, 1961 by way of charitable activities are exempt from service tax and the term charitable activities is defined in clause 2(k) of the said notification. Thus exemption will be available to M/s XYZ Foundation only if it is a registered entity under section 12AA of the Income tax Act, 1961 and its activities are covered under definition of 'charitable activities', irrespective of its status under Companies Act. 1956.

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