

# Constructions Contracts – Practical Issues Multiplicity of Taxes

Year 2009

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# Construction Services – full of doubts

- Whether levy prior to 1.06.2007 was constitutionally valid?
- Whether service tax is applicable on supply of Ready Mix Concrete (RMC)?
- Whether Service Tax is applicable on so called “Free Supply” of materials?
- Whether service tax can be levied on the entire value of contract including the material involved in the execution of such construction contract?
- Whether Service Tax is leviable on sale of flats to prospective buyers?

## **Construction Services – Whether levy prior to 1.06.2007 was constitutionally valid?**

**❖Circular No. 98/1/2008-ST, dated 04.01.2008 - The Government clarified that the service providers who have paid service tax prior to 01.06.2007 under commercial construction or residential complex service is not entitled to pay the tax under the composition scheme under Works Contract services for the contract entered into prior to 01.06.2007.**

***SC case in Kerala State Electricity Board v CCE, 2007-TIOL-226-SC-ST : 2008 (9) STR 3***

**in para 27 held as under :**

***"27. There is a distinction between the object of tax, the incidence of tax and the machinery for the collection of the tax. The distinction is important but is apt to be confused. Legislative competence is to be determined with reference to the object of the levy and not with reference to its incidence or machinery"***

## Whether service tax is applicable on supply of Ready Mix Concrete (RMC)?

❖ The production of RMC is an activity amounting to “manufacture” within the meaning of section 2(f) of the Central Excise Act, 1944 and an item covered under Tariff item No. 3824 50 10 by specifying Nil rate of duty of excise under the Central Excise Tariff Act, 1985, which is also specifically clarified by the Board through various circulars. As per Central Board of Excise & Customs, New Delhi (CBEC) Circular No. 368/1/98-CX, dated 6-1-1998 : “Ready Mix Concrete is thus an excisable product which has a separate tariff entry under sub-heading 3824.20 of the Central Excise Tariff Act, 1985”.

## **Construction Services- Whether Service Tax is applicable on so called "Free Supply" of materials?**

The Delhi High Court in Writ Petition No. 3048/2008 by Order dated 22.05.2008 held that "we are of the opinion that while the adjudication proceedings may go on and be concluded by the Respondents, they will not include for the purposes of determining the taxable service the supply of free material to the Petitioner and to this extent the Explanation appearing against Serial No.7 in the table given in the Notification dated 1st March, 2006 will not be applied to the detriment of the Petitioner"

**Whether service tax can be levied on the entire value of contract including the material involved in the execution of construction contract?**

***MOF Instructions F. No. 233/2/2003-CX.4, dated 3-3-2006:***

"3. The matter has been examined by the Board. The intention of the Notification No. 12/2003-ST, dated 20-6-2003 is to provide exemption only to the value of goods and material sold subject to documentary evidence of such sale being available. Therefore, in case, the goods are consumed during the provision of service and are not available for sale, the provision of the said notification would not be applicable. Therefore, in supersession of clarification to contrary, it is clarified that goods consumed during the provision of service, that are not available for sale, by the service provider would not be entitled to benefit under Notification No. 12/2003-ST, dated 20-6-2003."

**Whether Service Tax is leviable on sale of flats to prospective buyers?**

**Harekrishna Developers 2008-TIOL-03-ARA-ST (Ruling No. AAR/03(ST)/2008), the Advance Ruling Authority held that the sale of house is taxable service under construction of complex service.**

**Whether Service Tax is leviable on sale of flats to prospective buyers?**

**Magus Construction Pvt Ltd v UOI reported in 2008-TIOL-321-HC-GUW-ST, the High Court held the sale of flat/ house to the prospective buyer is not a service at all, hence not taxable.**

## Whether Service Tax is leviable on sale of flats to prospective buyers?

The Supreme Court in the case of **Larsen & Toubro Ltd v State of Karnataka** reported in **2008 (12) STR 257 (SC)** has disagreed the decision in the *K. Raheja Development Corporation v State of Karnataka* **2005-TIOL-77-SC-CT : 2006 (3) STR 337 (SC) : AIR 2005 SC 2350 : (2005) 5 SCC 162** case and has referred the matter to the Larger Bench of the Supreme Court.

## Whether Service Tax is leviable on sale of flats to prospective buyers?

**Circular No. 108/02/2009 – ST** , dated 29th January 2009

any service provided by such seller in connection with the construction of residential complex till the execution of such sale deed would be in the nature of 'self-service' and consequently would not attract service tax

# Construction Services- Collaboration Agreement

**Faqir Chand Gulati v Uppal Agencies Pvt. Ltd. and Anr. in Civil Appeal No. 3302 of 2005**, agreements are popularly known as joint venture agreements or development agreements or collaboration agreements are treated as provision of service to the owner of land unless there is real joint venture that is community of interest or common/joint control in the management, nor sharing of profits and losses

## ***Complexity – Levy of Excise Duty and Service Tax both on same transactions***

The CBEC, **Government of India Ministry of Finance**, in its Instruction Dy. No. 167/11/08-CX.4, dated 05.03.2008 has indicated that they are examining the issues: **Quote**

**“1) Whether both the Service Tax and Excise duty are payable; on same activity or not?**

**2) Whether for both taxes, the same value is considered or different value is considered. ”**

***Whether same transactions/activities can be subjected to excise duty as well as service tax?***

No. As per Entry 84 of the Union List of Schedule VII of the Constitution of India, duty of excise can levied on "goods" manufactured or produced in India, whereas as per Entry 92C of the Union List of Schedule VII of the Constitution of India, Union of India is competent to levy "Taxes on Services".

**Reference:** The Supreme Court in the case of **Calcutta Gas Co. v State of West Bengal 1962 Supp (3) SCR 1 : AIR 1962 SC 1044** had occasion to deal with the conflict between two Entries and held that if the industry in Entry 24 is interpreted to include gas and gas work, Entry 25 may become redundant.

***Complexity*** - multiplicity of taxes  
treating same transactions as  
"goods" and "services"

***Levy of Service  
Tax and VAT both  
on same  
transactions –  
How far valid?***

## Whether same transactions/activities can be subjected to service tax as well as state vat/sales tax?

***Entry 54 of the State List in the Seventh Schedule of Constitution read as – ‘Taxes on the sale or purchase of goods other than newspapers’.*** In the year 1982, inserted a new Clause (29A) to the Article 366 of the Constitution and thereby enlarged the scope of tax on sale or purchase of goods.

Entry 92C of the Union List of Schedule VII of the Constitution of India, Union of India is competent to levy “Taxes on Services”.

## Whether same transactions/activities can be subjected to service tax as well as state vat/sales tax?

No.

*At the same time, a transaction cannot be treated both as "goods" and "service". Hence both service tax and VAT cannot be levied simultaneously.*

***Reference :Imagic Creative Pvt. Ltd. v CCT 2008-TIOL-04-SC-VAT : 2008 (9) STR 337 (SC) held as under:*** "28. Payments of service tax as also the VAT are mutually exclusive. Therefore, they should be held to be applicable having regard to the respective parameters of service tax and the sales tax...."

# Good and services

□ A transaction cannot be both for goods and services. The Government through the **Master Circular No. 96/7/2007-ST, dated 23.08.2007** in reference code No. 036.03/23.08.2008, clarified that service tax is not leviable on a transaction treated as sale of goods and subjected to levy of sales tax / VAT. It was further clarified that payment of sales tax/ VAT on a transaction indicates that the said transaction is treated as sale of goods.

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# Good and services

□The Supreme Court in the case of **All India Federation of Tax Practitioners v UOI (2007) 7 SCC 527** has also observed that “the words ‘goods’ has to be understood in contra-distinction to the word ‘services’ “. Further, the **Finance Minister in his reply to the debate on the Finance Bill 2007-08 in the Lok Sabha on 03.05.2007** has also stated that “the word ‘service’ has to be understood in this context. It is used in contra-distinction to ‘goods’”.

## *In the words of Mahatma Gandhi*

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*“You must not worry whether the desired result follows from your action or not, so long as your motive is pure, your means correct”*

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*.....Thank you.....*