

HOME, SWEET HOME?

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Early 1971, the country was under the euphoria of an emphatic victory over Pakistan and the then Prime Minister of India, Smt. Indira Gandhi pulverized the nation with the slogan "Roti, Kapda aur Makan" and the rest is history. It is a dream of every average citizen of this country to have a house of his own.

With the advent of revolutionary banking policies and with the realization of all those who are in advancing loans that Housing Sector is the best sector for investments, there has been a flurry of activity in wooing the customers for Housing Loans. The boom in Housing sector reached its peak by early 2004 and there are around smiles. Umpteen number of builders, have literally grown out of air as if created by PC Sorkar and started offering houses/flats starting from Rs.1 lakh and then the sky is the limit for upper echelons. Even Governments started housing projects in addition to the Projects already started by various Housing Boards. Projects like WAMBE, Rajiv Awaas Yojana, Indira Awaas etc., with an intention to serve the economically weaker sections have been announced by the State Governments.

And then, Government of India struck and struck with such ferocity and it almost thrown the common man's dream of a house in to a dust bin. Construction of Complex Services brought under the Service Tax net with effect from 16.6.2005. The definition of construction of complex services has been given under clause (30a) of Section 65, which reads as under:

[(30a) "construction of complex" means —

- (a) construction of a new residential complex or a part thereof; or
- (b) completion and finishing services in relation to residential complex such as glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, wood and metal joinery and carpentry, fencing and railing, construction of swimming pools, acoustic applications or fittings and other similar services; or
- (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;]

The definition of residential complex as per clause (91a) of Section 65 reads as under:

[(91a) "residential complex" means any complex comprising of —

- (i) a building or buildings, having more than twelve residential units;
- (ii) a common area; and
- (iii) any one or more of facilities or services such as park, lift, parking space, community hall, common water supply or effluent treatment system,

Located within a premises and the layout of such premises is approved by an authority under any law for the time being in force, but does not include a complex which is constructed by a person directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by such person.

Explanation. — For the removal of doubts, it is hereby declared that for the purposes of this clause, —

(a) “personal use” includes permitting the complex for use as residence by another person on rent or without consideration;

(b) “residential unit” means a single house or a single apartment intended for use as a place of residence;]

With the advent of the above levy, now a person planning to buy an apartment has to shell down more money and in some cases, the unscrupulous builders even started making profit out of the tax, by collecting Service Tax on the full value and discharging the same by availing the abatement of 67%. The law does not differentiate between construction of houses within a limited budget and super luxury houses. For an officer implementing the law, there is no difference between a house constructed for weaker sections and high-end people. A Postman who dreamt of a house all through his life and when he finally within the reach of an apartment for a lakh of rupees, gets a rude jolt of Service Tax to the tune of around Rs.12,000/-

Apart from the above, there are two other burning issues in the Construction of Complex Services.

1. The normal practice in the infrastructure sector is that the Builder or Promoter in most of the cases will entrust the work of actual construction to sub contractor, who will do the actual construction. The other aspect is that the Builder or Promoter will have an agreement with the land owner for development of the land for which the land owner entitled for, say, 50% of the houses constructed.

It is again a normal practice that the Builder/Promoter will enter in to sale deed with the ultimate buyers both on his behalf and on behalf of the land owner and register semi-finished dwelling with appropriate share of land (to reduce the burden of ever growing stamp duty) and then enter into a separate contract for finishing the said dwelling.

Now, you have a service provider in two modes – one is the Builder/promoter and the other one is the sub contractor. The authorities insist that the sub contractor as well as the builder have to pay the Service Tax on the value of service provided. In other words, if an apartment is sold say for Rs.1 lakh and the sub-contractor is constructing the same for Rs.90,000/- both of them are required to pay Service Tax on the amounts mentioned above. With the advent of Notification No.1/2006-ST, dated 1.3.2006, the Builder/Promoter is no longer entitled to avail the credit of tax paid under the category of input service credit and due to obvious financial reasons he can neither pay Service Tax on 100% to avail such credit. This resulted in double jeopardy. A person can be taxed any number of times under any number of taxation laws, but, cannot be taxed twice under the same law. But, again, the department or

commonsense says there are two different entities, albeit providing the same service, hence, both have to pay.

A number representations, personal submissions to the authorities to allow credit of tax on input services appears to have not moved the mandarins of law making. Even today, the above position continues.

2. As per the statutory position, residential complex does not include a complex which is constructed by a **person** directly engaging any other person for designing or planning of the layout, and the construction of such complex is intended for personal use as residence by us such person. Personal use also includes permitting the complex for use as a residence by another person on rent or without consideration.

However, the Central Board of Excise and Customs has vide its Circular in F.No.B1/6/2005-TRU, dated 27.07.2005, clarified that residential complex constructed by an **individual**, intended for personal use as residence and constructed directly availing services of a construction service provider, is not liable to service tax. The above position was reiterated by Government vide F.No.332/35/2006-TRU, dated 1.8.2006.

If a Police Housing Corporation or MES or a University intends to constructed Quarters for its personnel and awards a contract to a Construction Company, will there be Service Tax on the gross value of the contract? The departmental answer is Yes. Since, the element of Commerce and Industry was not brought in to Construction of Complex Services, any construction of any complex of more than 12 units, irrespective of its utilization part falls within the purview of the tax net.

The law is different and the clarification of the Board is totally different. As per sub-clause (iii) of clause (91a) of Section 65, residential complex does not include a complex that is constructed by a person for his personal use and personal use includes letting it out either on rent or without consideration. The term "PERSON" is not defined under the provisions of Chapter V of the Finance Act, 1994, as amended and in terms of the clarification person means "an individual".

As per Section 2 of Income Tax Act 1961:

31)person includes

- (i) an individual⁴⁸,
- (ii) a Hindu undivided family⁴⁸,
- (iii) a company,
- (iv) a firm⁴⁹,
- (v) an association of persons⁴⁹ or a body of individuals⁴⁹, whether incorporated or not,
- (vi) a local authority, and
- (vii) every artificial juridical person, not falling within any of the preceding sub-clauses.

⁵⁰[*Explanation.* For the purposes of this clause, an association of persons or a body of individuals or a local authority or an artificial juridical person shall be deemed to be a person, whether or not such person or body or authority

or juridical person was formed or established or incorporated with the object of deriving income, profits or gains;]

From the above and in particularly with the explanation, it is clear that if a Company/University/Housing Board is constructing Staff Quarters for its staff then such an organization is deemed to be treated as a "Person" and exemption as envisaged in the law should be extended. The above position is fortified by clause (42) of Section 3 the General Clauses Act, 1897, as per clause (42) of Section 3 of General Clauses Act, 1897, which defined the term "Person" as " person shall include any company or association or body of individuals, whether incorporated or not". Therefore, even though, in general, person is understood as only natural person (i.e., human being) but in the context of Service tax, it includes natural, artificial and juristic person also. Thus, partnership firm, company, corporation, societies, government enterprises, Hindu Undivided family etc., will also fall under the definition of person.

From the above, it is clear that the term "Person" always includes a company, Corporation, factory, society so on and so forth. But, the Board felt otherwise and the field is already on the prowl to catch more Government departments for service tax evasion!