IMPLICATIONS OF HARYANA VAT ON JOINT DEVELOPMENT AGREEMENTS

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Abbreviations used: LO - Land Owner; BD - Builder/Developer; PB - Prospective Buyer; Haryana Value Added Tax Act, 2003 – HVAT Act

1. Introduction

In Haryana, we look around numerous building projects either under construction or upcoming, in the form of residential complexes and townships, commercial complexes, shopping malls, etc. With the issuance of couple of circulars in May'13 and June'13 by the Haryana VAT Department recently, clarifying certain aspects on VAT on builders' projects, this branch of indirect tax has been activated on these builders' projects. Haryana VAT on building contracts is an emerging challange; not only for the stake holders, which are, land owners, builders/ developers and the actual users, but also for the tax professionals. This article is an attempt to discuss various issues in this regard. **"Joint Development Agreements or the Builders Collaboration Contracts (referred as Builder Contracts)"** for the purpose of our present discussion means the contracts where LO offers his land to BD for construction of residential/commercial complex/units and the latter offers part of the constructed flats/units to LO; and remaining flats are sold by BD to the customers, either during construction or post construction as ready units. Size of complex, which may vary from 4 units or 400 units, will not have an effect on our discussion; nonetheless, in big complexes, number of LOs can certainly be more than one, and certain other issues would also crop up. Revenue sharing contracts between LO and BD have been excluded from our present discussion. **Thus, our present discussion is confined to implication of Haryana VAT on those contracts where, apart from material and services, value of land is also taking part of the bargain.**

2. Background

Before coming to the taxability part, it is necessary to look at the history of the same. In a case before *the Division Bench of the Supreme Court in K. Raheja Development Corporation vs. State of Karnataka (2005) 141 STC 298* ***(hereinafter referred as Raheja case)***, the owners of the land were also engaged in the business of constructing apartments/complexes, and for this purpose, they entered into agreements of sale with the intended purchasers. It was held by the Supreme Court that even an owner of the property might also be said to be carrying on a works contract if the builder enters into an agreement to construct with the intended purchasers. However, if the agreement is entered into after the unit is already constructed, then there would be no works contract. But so long as the agreement is entered into before the construction is complete, it would be a works contract.

However, the *Raheja case* has been referred to the larger bench in the case of *Larsen & Toubro Limited vs. State of Karnataka (2008) 17 VST 460 (SC)*; but, without grant of any stay by the Apex Court.

Relying upon the judgment in *Raheja case*, most of the State VAT Departments initiated imposition of VAT on the material involved in the transfer of residential and commercial complexes by considering the activity as works contract.

The Bombay High Court in the case of *Maharashtra Chamber of Housing Industry vs. State of Maharashtra (Writ Petition no. 2568 of 2007 dated 10.4.2012) (2012) 51 VST 1 (Bom)* also examined this issue. The Court observed that since works contracts have numerous variations, it was not possible to accept the contention of the appellant either as a matter of first principle or as a matter of interpretation that a contract for work in the course of which, title was transferred to the flat purchaser, would cease to be a works contract. The Court further made a note from the judgment by the Supreme Court in the case of *Builders' Association vs. U.O.I. (1989) 73 STC 370 (SC)*, that the doctrine of accretion is itself subject to a contract to the contrary. Analyzing various clauses of the agreement under the Maharashtra Ownership Flats Act, 1963 (MOFA), the High Court held that it was of the nature of works contract. The High Court also held that the explanation (b)(ii) to Section 2(24) of Maharashtra VAT Act, which reads, "'works contract' includes an agreement for carrying out for cash, deferred payment or other valuable consideration the building, construction, manufacture, processing, fabrication, erection, installation, fitting out, improvement, modification, repair or commissioning of any movable or immovable property", is constitutionally valid and within legislative competence of the State Legislature.

The High Court also approved the composition scheme under the Maharashtra VAT Act, which applies to the registered dealers who undertake construction of flats, dwellings, buildings or premises and transfer them in pursuance of an agreement along with land or interest underlying the land, at 1% of the agreement amount specified in the agreement or the value specified for the purpose of Stamp Duty under the Bombay Stamp Act, 1958 whichever is higher, subject to certain conditions.

3. Haryana VAT on Builders Contracts

3.1 Taxability / Incidence of tax

In accordance with *Raheja case*, builder contract, where agreement is executed with the intended buyers before completion of the building, falls within the definition of works contract. Under the HVAT Act, the term "works contract" has been defined under section 2(1)(zt) as, -

"(zt) **"works contract"** includes any agreement for carrying out for cash, deferred payment or other valuable consideration, the assembling, construction, building, altering, manufacturing, processing, fabrication, installation, fitting out, improvement, repair or commissioning of any moveable or immovable property."

The term "sale" has been defined in section 2(1)(ze) of the HVAT Act as, -

"(ze) "sale" means any transfer of property in goods for cash or deferred payment or other valuable consideration except a mortgage or hypothecation of or a charge or pledge on goods; and includes –

(ii) the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;"

A Memorandum (No. 152/ST-I; dated 07-05-2013) (hereinafter referred as "**Memo**") has been issued by the Excise & Taxation Commissioner, Haryana in relation to activities performed by the Builders; and Para No. 1.1 thereof reads as under, -

"1.1 ………. agreements or contracts entered into by the developers or others with prospective customers for sale of fully constructed apartments or flats or other buildings before the commencement of actual construction or before completion of construction, should be treated as agreements or contracts for execution of works contract of construction of building as held by the Hon'ble Supreme Court in the case of K. Raheja Development Corporation v/s State of Karnataka (reported in 141 STC at page 298). **It is still a good law and has not been reversed by the Hon'ble Supreme Court in any subsequent judgment. Claims to the contrary, if any, should be rejected.**"

In relation to builder contracts, Para nos. 2.1 to 2.3 of the said Memo state,-

"2.1 In the case of Joint Development Projects, where typically there is an agreement between the owner of a land and a developer to develop such land which involves construction of a building or buildings (residential or commercial) on such land, there is an understanding that an agreed portion of the constructed building would be transferred by the developer to the land owner. The developer would be given the right of selling or transferring the balance portion of the constructed building along with the undivided share in the land on which it is built. The developer would then enter into agreement for construction of flats or apartments or the other built up areas with customers or for sale of constructed flats or apartments or other built up areas. In many cases, the agreement by the developer for sale of constructed flats or apartments of other built up areas would be before their completion of construction. **As mentioned earlier, in respect of both the agreements for construction and agreements for sale of built up area that are entered before the completion of construction, the developer would be liable to tax** on the taxable turnover relating to transfer of property in goods involved in execution of such civil works contract of construction of buildings.

2.2 Further, generally a developer constructing a building in pursuant to a joint development agreement declares only part of the amounts received from his customers with whom he has entered into construction agreement as his turnover relating to the transfer of property in goods in the execution of such works contract. He would not declare the balance amounts received from the customers towards transfer of undivided share of land an which flat or other built up area is constructed and sold to them as part of his turnover. Similarly, he would not declare the value of goods transferred in the construction of the building relating to the share of the land owner as part of his turnover on the ground that no consideration is received from the land owner on such transaction.

2.3 **The claim that the developer executes works contract of construction of a portion of a building without any consideration is not factually and legally sustainable.** The correct view would be that the land owner has sold a portion of his land to the developer for a consideration and, in turn, the developer has agreed to construct a portion of the building for the land owner for an amount equal to that consideration."

Analyzing the activity in detail in view of *Raheja case* and the Memo issued by the HVAT Department, it can fairly be stated that BD executes works contract for two separate persons, that is, -

(A) Works Contract for the LO: where BD constructs the units for a consideration in the form of share in the land; and

(B) Works contract for PB, if BD receives payment (or enters into agreement of sale) from PB before completion of the construction.

So far as activity stated at (A), it is always a works contract activity (unless, it can be termed as barter transaction, discussed in next para); whereas activity referred to at (B) has become taxable with the decision in *Raheja case*. Supposing, the *Raheja case* is overruled by the larger bench, then no VAT will be payable *qua* this activity.

Valuable Consideration – Barter Transaction

As per the Courts, valuable consideration includes cash, money, cheques, bill of exchange, promissory notes, shares and like instruments. Whether exchange of goods (barter) constitutes a valid sale? It had been a matter of great controversy and the Courts had expressed different views in this regard. While discussing the basic elements of "sale", the Apex Court in the case of *Devi Dass Gopal Krishnan vs. State of Punjab (1967) 20 STC 430 (SC)* opined that cash or other valuable consideration is essential for completion of a sale. In the absence of cash or deferred payment, it is exchange of goods (barter), and not a sale.

In the case of *CST vs. Ram Kumar Agarwal (1967) 19 STC 400 (All)*, gold was paid as a price of jewellery. The jeweller purchased gold from the market, prepared ornaments, and transferred to the customer against the gold. It was held that exchange of goods was "barter" and not a "sale". It was also observed that it was immaterial whether gold was given before the preparation or at the time of transfer of jewellery. In another case, the dealer collected kansa, melted it and returned to the customer after deducting certain percentage in weight and collected labour charges extra: the Court held it as a barter transaction and not as sale. *[CST vs. Kansari Udyog (1979) 43 STC 176 (MP)].* **However**, contrary views were observed in the case of *VP Vadivel Achari vs. State of Madras (1969) 23 STC 273 (Mad)*, where gold was exchanged for new jewellery; it was held to be a "sale" since gold, handed over to assessee, could easily be converted into money.

Where goods are sold partly for goods and partly for money, it is a transaction of sale. *[Aldridge vs. John. (1887) 7 E & B 885; LJ QB 296; Sheldon vs. Cox (1824) 3 & C 420] Similarly,* in the case *CIT vs. M. & G. Stores AIR 1968 SC 200*, an old car was returned and difference was paid in cash: while explaining the word "price", the Supreme Court held that it was a transaction of sale. Likewise, where machinery was transferred against allotment of shares, it was considered as sale since transfer of shares was a mode of payment of price and discharge of liability. *[Premier Electro Mechanical Fabricator vs. State of T.N. (1984) 55 STC 371 (Mad) followed in State of T.N. vs. T.M.T. Drill (P) Ltd. (1991) 82 STC 59 (Mad); I.B.P. Co. Ltd. vs. Asstt. CCT (2000) 118 STC 33 (WBTT)]*

In another case, the Madras High Court held that even barter or exchange of goods might be considered as sale under the Act, provided there is transfer of property in the goods. *[Vishweshwasadars Gokuldas vs. Govt. of Madras (1962) 13 STC 113 (Mad)]*

In *Dhampur Sugar Mills Ltd. vs. CTT (2006) 147 STC 57 (SC)*, a company, which owned a sugar mill, executed a deed of licence in favour of the dealer; wherein the licence fee for the use of the entire sugar mill complex was to be paid in the shape of molasses. At the end of every licence year, the value of the molasses had to be ascertained on the basis of the rates notified by the Government and any excess or shortage towards the amount of licence fee was to be made good by either party. The Supreme Court observed that the such adjustment of price would come within the purview of the term "other valuable consideration" in as much as the dealer and the company were fully aware that they had to fulfill their respective terms and obligations, i.e., (i) payment of licence fee on monetary terms, and (ii) payment of price of molasses supplied by the appellant to the company which was again in monetary terms. Thus, it was held that the transaction could not be termed as "barter".

Therefore, looking at the afore-stated pronouncements, it would be difficult to plead before the courts with success that exchange of land with value of construction is merely a barter transaction.

3.2 Liability for registration

In view of our afore-discussion, since the builder is constructing the property for the land owner, and also booking flats for the intended buyers before completion of construction, he is liable for registration under section 11(2) of the HVAT Act. Primarily, the builder is not liable to obtain registration under the Central Sales Tax Act since the entire works contract in relation to particular project would be executed in the State of Haryana. However, if the builder wants to purchase goods from other States, he should obtain registration under the Central Sales Tax Act also, which would facilitate him to purchase goods at a concessional rate of tax of 2% against Forms C. However, the builder cannot purchase goods on the strength of Form C in relation to those flats, which are sold after completion of construction on which no VAT is payable.

3.3 Incidence of VAT

The builder shall be liable to pay HVAT as works contract in respect of those flats which are constructed for the land owner. In addition, he shall also be liable to pay tax in relation to those flats which are sold to the intended buyers before completion of construction. In other words, in the second case, he is not liable for HVAT in relation to those flats which are sold after completion of construction as ready units.

3.4 Measure of tax

Determination of VAT in case of works contract depends upon the provisions under the State VAT Act. Three Schemes have been laid for computation of HVAT:

(1) Regular Scheme (1) – Total consideration receivable from the land-owner (in the form of land) and the intended buyer (–) Value of Land (–) Value of actual labour & services as stated in Rule 25(2)(a) of Haryana VAT Rules;

(2) Regular Scheme (2) – Total consideration receivable from the land-owner (in the form of land) and the intended buyer (–) Value of Land (–) Value of labour & services calculated as per percentage specified in Rule 25(2)(b) of Haryana VAT Rules;

(3) Composition Scheme – Under this Scheme, deduction for labour and services shall not be allowed. Rate of VAT would be 4%.

Under the Regular Scheme, determination of turnover and output VAT of works contract transaction is as under: -

i	Gross Turnover – Work executed during the tax period		…………
ii	Less : Cost of land		
iii	Less : Value of labour & services		…………
	[Either on actual basis or at percentage basis]		
iv	Taxable value of material (Taxable Turnover)		…………
v	Computation of Output Tax on (iii)		
	Declared goods (mainly iron & Steel)	@ 5% ……. Tax ……	
	Other goods	@12.5%...... Tax ……	…………

As per explanation 1 to section 2(1)(zg), "In relation to the transfer of property in goods (whether as goods or in some other forms) involved in execution of a works contract, "sale price" shall mean such amount as is arrived at by deducting **from the amount of valuable consideration paid or payable to a person for the execution of such works contract,** the amount representing labour and other service charges incurred for such execution, and where such labour and other service charges are not quantifiable, the amount of such charges shall be calculated at such percentage as may be prescribed."

3.4.1 Determination of value of land in the builder contracts:

No provisions have been laid for determination of value of land either under the HVAT Act or Rules made thereunder. **Here, the value of land would be determined for two purposes, namely:** (i) Determination of value of works contract for the land-owner where consideration has been received in the form of land; and (ii) Determination of taxable turnover in the case of sale to prospective buyer where consideration includes value of land.

It can also be argued that unless the Rules are framed for valuation of the land, Haryana VAT is not payable at all on builders' activities *qua* intended buyers. Reliance can be placed upon the judgment by the Supreme Court in the case of *K. Damodaraswamy Naidy vs. State of Tamil Nadu (2000) 117 STC 001 (SC)*, where five judges bench of the Apex Court, in relation to the taxability of composite charges received by the hotels, opined that the composite charge that the hotel owner levied for lodging and boarding had to be split up and only the element thereof that related to the supply of meals could be subjected to the sales tax. The Court held that sales tax could not be levied on the composite charge for boarding and lodging unless the State made Rules which set down formulae for determining the supply component on the composite charge. It was further held that it was not for the assessing authority to split up the composite price into two and make the one part taxable; that is, only the State could promulgate rules to indicate how to treat the composite charges for lodging and boarding and set out formulae for splitting of the two. The said judgment squarely applies to our case since no rules have been framed for valuation of land for the purpose of determination of taxable turnover in builders' case.

However, VAT is an indirect tax and if it is not collected from the customers at the time of execution of contract, it might become a cost to the builder at a later stage; and thus, *taking a conservative view*, we suggest that value of land may be computed on some fair and reasonable method; which might be at cost or at the circle rate of the land, discussed hereinafter.

(A) Transaction between the builder and land-owner

In relation to determination of value of works contract for the land-owner where consideration has been received in the form of land, Para no. 2.4 of the Memo dated 7.5.2013 issued by the Department states that the amount payable by the land owner towards construction of his share of the building shall be calculated on the basis of:

(i) the aggregate of amounts received from his customers by the developer with whom he has entered into construction agreements or entered into agreements for sale of constructed building before completion of such building, towards transfer of undivided share of land to them; *(that is, on the basis of amount received from prospective buyers towards land)*; or

(ii) the aggregate of amounts declared by the developer to be the value of undivided share of land transferred to the customers with whom he has entered into construction agreements or agreements for sale of constructed building but before

completion of such building *(in short, on the basis of amount declared by the developer to the prospective buyers towards land)*; or

(iii) aggregate of amounts fixed under the relevant law as the value of undivided share of land transferred to the customers with whom he has entered into construction agreements or agreements for sale of constructed building but before completion of such building *(that is, on the basis of municipal circle rate of land).*

(B) Transaction between the builder and the prospective buyer

In relation to determination of land for the purpose of computation of value of works contract in the case of sale to prospective buyers, Para no. 2.3 of the said Memo states,-

(i) The developer in most of the cases collects amounts separately from his customers towards the transfer of undivided share of land on which their earmarked flat or other built up area is constructed. The aggregate of all such amounts would be the consideration that is to be taken as payable by the land owner towards construction of his share in the project *(that is, amount received from prospective customers towards land separately)*.

(ii) In cases, where such amounts are not collected separately, the aggregate of amounts declared by the developer to be the value of undivided share of land transferred to the customers while registering with relevant authorities transfer of such land along with the customer's portion of the building constructed on it, would be the consideration that is to be taken as payable by the land owner towards construction of his share in the project. *(In short is, amount declared by the builder at the time of registry)*

(iii) in case where the value of the undivided share of land transferred is not declared separately at the time of registration, the aggregate of the amounts fixed under the relevant law (circle rate) for the purpose of payment of fee or consideration that is to be taken as payable by the land owner towards construction of his share in the project. *(that is, on the basis of municipal circle rate of land)*

3.4.2 Deduction towards labour and services:

In accordance with Rule 25(2) of the Haryana VAT Rules, -

"(a) In case of turnover arising from the execution of the works contract or job-work, the amount representing the taxable turnover shall exclude the charges towards labour, services and other like charges subject to the dealer's maintaining proper records such as invoice, voucher, challan or any other document evidencing payment of charges to the satisfaction of the Taxing Authority.

(b) For the purpose of clause (a) of sub-rule (2), the charges towards labour services and other like charges shall include, —

(i) labour charges for execution of works ;

(ii) charges for planning and architect's fees ;

(iii) cost of consumables such as water, electricity, fuel, etc., used in the execution of the works contract the property in which is not transferred in the course of execution of a works contract ;

(iv) cost of establishment of the contractor to the extent it is relatable to supply of labour and services ;

(v) other similar expenses relatable to supply of labour services ;

(vi) profit earned by the contractor to the extent it is relatable to supply of labour and services subject to furnishing of a profit and loss account of the works sites:"

Thus, two methods for determination of labour, services and other charges have been specified under the HVAT Rules, as under:

(A) Actual Basis; and (B) Percentage Basis

(A) Actual Basis

If labour and services are determined on actual basis, the contractor shall maintain the records in a manner so as to easily quantify the value of material, amount of direct labour and services and proportionate amount of indirect labour and services. Scope of "labour and services" is not confined to wages and salaries; but it extends to the other charges of the nature of expenses stated in seven clauses of Rule 25(2) discussed above.

(B) Percentage Basis

Where amount of charges towards labour, services and other like charges are not ascertainable from the books of accounts of the dealer or where the dealer fails to produce documentary evidence in support of such charges, the amount of such charges shall be calculated on the basis of percentages specified in the table given in proviso to rule 25(2)(b) of HVAT rules. Civil works contracts fall within the following clause: -

Sl. No.	Type of contract	Labour, service and other like charges as percentage of total value of the contract
6	Civil works like construction of buildings, bridges, roads, dams, barrages, canals and diversions.	25%

3.5 Composition Scheme notified under section 9 of the HVAT Act

Under the HVAT Act, in relation to works contracts, the applicable rate of tax is 4% of total valuable consideration received or receivable for execution of the contract.

In relation to deduction for the value of land, Para No. 3.1 of Memo dated 7.5.2013 states, "Where a builder or developer has opted for payment of tax on his turnover relating to transfer of property in goods involved in execution of works contract under the composition scheme as provided under Section 9 of the HVAT Act, the total consideration on which such dealer is liable to tax would not include the amount received from the customers towards their undivided share in land. However, as explained earlier, in the case of joint development projects this exclusion would not be applicable."

As per the said Para, deduction of land is available under this scheme if it is separately charged, and not otherwise. However, the author is of the view that the intention of legislature cannot be to compute tax @4%, whether or not the value of land is included. Moreover, VAT cannot be levied on the value of land. Therefore, value of land should be deducted in this Scheme also.

Under this Scheme, deduction for labour and services shall not be allowed. Benefit of input tax credit is also not available. The builder can purchase goods within the State at lower rate of tax u/s 7(2) of the Act on the strength of Form VAT-D1 [4% or such lower rate applicable on sale of such goods]. He can also purchase goods against Form C from other States at a concessional rate of tax of 2%.

3.6 Booking/Sale of flat during construction

In a builder agreement, builder's share in the property could be sold prior to completion, but at various stages of construction, to the prospective buyers. Sometimes, the builder sells the flat when the project has just started, and sometimes when the flat is almost complete. The question generally arises as to at which value of construction, VAT shall be paid; that is, on the total value of flat or on the value received after the date of booking? Memo issued by the HVAT Department is silent in this regard. However, in the opinion of the author, where the builder constructs part of the flat for himself due to non-booking or otherwise, he should be liable to pay tax only in relation to that portion of works contract which is executed after the date of booking since before that date he was not a deemed contractor of prospective buyer. Simultaneously, it may also be noted that if that is so, the builder shall be eligible for deduction towards labour and services and benefit of input tax credit only in respect of works contract executed post-booking.

3.7 Time of turnover / Point of taxation

In the case of works contracts, unless otherwise contrary in the contract, goods are deemed to be sold at the time of incorporation of goods in the works contract. The term "gross turnover" has been defined in section 2(1)(u) of the HVAT Act as, -

> *"(u) "gross turnover" when used in relation to any dealer means the aggregate of the **sale prices received or receivable** in respect of any goods sold, whether as principal, agent or in any other capacity, by such dealer and includes the value of goods exported out of State or disposed of otherwise than by sale;"*

3.7.1 Works contract executed by builder for land owner

Here, the entire land is received by the builder in advance, before commencement of construction. Therefore, it might be said that time of turnover would be the execution of agreement between land owner and builder, and tax would be payable at that time itself on total construction value. However, the author is of the opinion that since on the date of agreement, no material is transferred by the builder; therefore, time of turnover would be the time when goods are incorporated in the works contract.

3.7.2 Works contract executed by builder for prospective buyer (PB)

In this case, goods are deemed to be sold at the time of incorporation of goods in the works contract, and not when installment is received. However, it would be practically difficult to arrive at the taxable turnover at that time. Therefore, to maintain uniformity in collection of tax from the PB and payment of VAT, it is advised that HVAT may be paid by the builder at the time of raising of bills on the PB or at the time of receipt of consideration.

It may further be noted that every installment would consist payment towards land, material and services. Therefore, the author is of the view that amount of output VAT may be calculated, in advance, as a percentage of per square foot rate; and tax be computed accordingly on the basis of per square foot billing on every installment. At the time of completion of the project, actual liability of HVAT shall be ascertained and shortfall, if any, be paid.

3.8 Where a part of the area is booked for the prospective buyers

Where only a part of total constructed area is being transferred, the deduction towards labour, services and other like charges mentioned in rule 25(2) shall be calculated on a pro-rata basis. Further, the input tax credit shall be available proportionately in respect of that property which is subjected to the output tax.

3.9 Cancellation of booking by the prospective buyer

If booking of the flat is cancelled during the construction thereof, and subsequently the construction is carried by the builder for himself, the sale shall be treated cancelled, and the builder would be entitled to adjust/refund the tax already paid. However, if the same flat is again sold to another PB during construction, then it would be taxable under the HVAT, as discussed earlier.

3.10 Preferential Location Charges (PLC)

When charged separately, these receipts shall not form part of sale price of the builder because these are relatable to the value of land and not the cost of construction.

3.11 Sale of units by the land owner during construction

As per Para No. 2.5 of the Memo dated 7.5.2013, "It may be noted that in some cases even the land owner also may have entered into agreements with prospective buyers in respect of his portion of building being constructed by the developer or builder. In such cases, even the land owner would be liable to tax on the taxable turnover relating to transfer of property in goods involved in the execution of works contract of such building (though actually carried out through the developer or builder). However, it shall be ensured that both the land owner and the developer or builder is not assessed to tax on the same transaction."

3.12 Rates of Output VAT

Under the Regular Scheme, rate of output tax would be the commodity-wise rate as specified in Section 7 of the Haryana VAT Act.

Goods specified in Schedule A of the Act are taxable at the rate specified against these goods. It includes bullion, jewellery, certain petroleum products, diesel, tobacco, ply-board, etc.

Schedule B contains exempted goods. Schedule C contains goods taxable @ 5%, including iron & Steel, Aluminum, etc.

Rate of tax on goods not specified in any of the Schedule is 12.5%.

In addition, 5% surcharge shall be levied on the rates specified in section 7.

3.13 Liability of builder – Computation of HVAT – An Illustration

Let us adapt our discussion in the form of an illustration:
LO enters into a collaboration agreement with BD, wherein -

(Rs. In lacs)

- BD constructs 4 flats/units;
- Out of which, BD gives 2 flats to LO towards consideration of land;
- Remaining 2 flats are kept by BD for further sale in market;
- BD sells 2 flat to PBs during construction for Rs.1200 (600 per flat); sale deed also executed for Rs.1200;
- Value of land is Rs.2000 and value of construction is Rs.400 (Rs.100 per floor);
- Since BD receives land worth Rs.1000 (2000*2/4) and gives Rs.200 as value of construction for 2 floors (100 per floor); it is further agreed that BD will give Rs.800 to LO towards land or as value for transfer of construction rights;
- Circle rate per flat, of land : Rs.400; and for construction : Rs.100;

- Agreements to sell between BD and PBs specify that value of land is Rs.500 and value of construction is Rs.100.
- Break-up of value of construction of Rs.400 is:-
  - Material with proportionate overheads & profit - Rs. 240
  - Labour & Services with proportionate overheads &profit - Rs. 120
  - Permissions and sanctions (treated as services) - Rs. 40
  - Total Expenses - Rs. 400
  - Proportion of expenses towards LO and BD portion (for sale to PB) - 50 : 50
- It is assumed that total material consists of 1/3 iron & steel taxable @5%; and 2/3 other materials taxable @12.5%: thus average VAT rate comes to 10% (impact of surcharge ignored for the purpose of this illustration);
- VAT input tax credit is assumed at Rs.16 (10% of 66% of 240);
- Total Investment of BD comes to : Rs.800 paid to LO (+) Construction value of all four flats being Rs.400 (=) Rs.1200.

Met-hod	Description	Output VAT-LO	Output VAT-PB	Input Tax	Net Liabi-lity	Liability (% of Inv-estment)
(1)	(2)	(3)	(4)	(5)	(6)	(7)
I	**Regular Scheme (1) (Services-Actual; Land - Actual)** • LO-10% of (240)/2 [50% material pertains to LO] • PB -10% of [(1200-1000) – (160)/2]	12	12	16	8	0.07
II	**Regular Scheme (2) (Services-%; Land-Actual)** • LO-10% of 75% of 200 • PB -10% of 75% of (1200-1000)	15	15	16	14	1.17
III	**Composition Scheme** • LO-4% of 200 • PB -4% of (1200-1000)*(Refer Para 3.5)*	8	8	0	16	1.33

4. Conclusion

Even after having a lengthy discussion on the subject, it is difficult to conclude the topic with certainty and authority. We have taken a fairly simpler illustration, wherein various complex situations have not been considered. The measure of tax would further be complex if the discussion on the amount of conveyance/sale deed, which varies from customer to customer even in the same building and at the same time, is also initiated. Further, the exact taxation would depend upon the terms of the builder agreement between the parties, which might vary from case to case.

Moreover, looking at the impact of service tax and VAT simultaneously, double taxation certainly tortures the stake holders. The VAT Department should realize that it can tax material portion only; whereas, the value of land, particularly in the metro cities, has the maximum involvement in this activity. The variance in the total price of a flat/unit is mainly due to land rates. For example, a house of 500 sq. yards with same amenities would price for Rs.10 crores in Gurgaon and Rs.5 Crores in Manesar. The land rate may also vary within the same colony, depending upon its location. Value of material and services would, by and large, remain the same everywhere. The HVAT Act allows deduction towards value of land based upon circle rate (which is uniform in the entire colony), irrespective of its location. It is certainly an attempt to levy HVAT on the value of land, which is out of its scope.

This activity is also facing different treatment under different statutes, even by the same Government. Both, VAT and the stamp duty, are collected by the State Government; and for the purpose of collection thereof, it has got different charging provisions: that is, for the purpose of levy of VAT, land is deemed to be sold during the construction itself; and for the purpose levy of stamp duty, land is treated to be sold along with construction, as a ready unit.

Since the levy is somewhat new, and in the absence of appropriate assistance in the form of clarifications by the Authorities or the judicial pronouncements, the builders are always in the sate of confusion while discharging their obligations and making compliances. Being an indirect tax, if VAT is not recovered from the customers in time at the time of making execution of contract, it becomes the cost of the dealer; and if any additional demand is raised after few years along with interest and penalty, many of the builders would have no option but to shut down their businesses; which would not be the intention of the Revenue. Taxation on this infrastructural activity certainly needs early attention of the Government and Revenue Authorities for the systematic growth of this sector; and thus, our economy.

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