

SUBJECT 100

Sub:- VUDA - VISAKHAPATNAM - ACCOUNTS - Akkireddipalem
Housing Scheme - Re-imbusement of Service Tax to the
Contractor - Reg.

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AGENDA NOTE :

The VUDA has taken up a Mega Housing Project at Akkireddipalem. M/s Vision Ventures (P) Ltd., is the Contractor for the said Housing Project. Through L.S. Agreement No. 27/2004-2005/CE/VUDA a contract agreement was entered into with V.V.P.L with regard to Akkireddipalem Housing Scheme. The original Agreement value was Rs.21.45 crores and the revised agreement value is Rs. 30.56 Crores. It is submitted that as on the date of the contract all the existing contingencies and other cost factors were taken into consideration.

It is submitted that later by virtue of a Notification No. 15/2005 dt. 7.6.2005 the Government of India has brought in "Construction of Residential Complex Services" under the purview of Service Tax net with effect from 16.06.2005 @ 10.20%. However, 67% of the taxable service is exempted from Service Tax and only the remaining 33% of the value of the work Service Tax is levied. Initially there was a confusion as to who is liable to pay this service tax i.e. whether the employer (Principal) or the Contractor. However in any case it was felt that the payment of Service Tax is must and as such this component was also added to the house cost during cost fixation.

As the matter stood thus after thorough enquiries, it was revealed that it was the person providing construction of complex services to any other person shall be liable to pay the Service Tax, but not VUDA. But the Contractor is repeatedly requesting the VUDA to re-imburse the applicable

Service Tax as the same was not taken into consideration either at the time of tender or at the time of Agreement as the same is not in force by then. During, the deliberations the Contractor requested to consider the issue practically as they would be forced into huge losses with this unforeseen liability. The contractor was informed that a decision in this regard will be taken at a later stage.

V.V.P.L vide their letter No. VVPL/VUDA/285/2005 dt. 28.11.2005 once again requested for re-imburement of the Service Tax. As there was no clarity by then with regard to who is liable to pay the Service Tax, and presuming that VUDA has to pay the said Service Tax, this office vide letter 11.5.2005 has agreed to re-imburse the Service Tax. Now the contractor is insisting for a clarification in this regard and is also requesting for re-imburement of Service Tax.

Legally there is no obligation on VUDA to re-imburse the Service Tax to The Contractor. It is purely an administrative decision and taking the facts into consideration it is up to the Authority to take a decision whether to compensate (re-imburse) the contractor to the extent of the Service Tax levied as this is an unforeseen levy which was not in existence as on the date of agreement. As there was no clarity as to who is liable to pay the Service Tax as an abundant precaution, to save this office from any unforeseen financial loss due to this proposed Service Tax this component was also added to the house cost during cost fixation of Akkireddipalem Housing Scheme. If at this stage VUDA decides not to re-imburse the contractor, the allottees may claim for refund of the Service Tax component. Hence, the issue related to re-imburement of Service Tax to V.V.P.L as requested by them is placed before the Board for a decision on the subject.

The relevant Rules extract is enclosed.

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OPINION FOR VISHAKAPATNAM URBAN DEVELOPMENT AUTHORITY

The service of Construction of residential houses and apartments was brought within the service tax net with effect from June 16, 2005.

The definition of the service as per the service tax law is as follows:

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 carpentering, 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.

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 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 lay out, and the constructions of such complex is intended for personal use as residence by such person.

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



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- a) "personal use " includes permitting the complex for use as residence by another person on rent or without consideration;
- b) "residential units" means a single house or a single apartment intended for use as a place of residence.

The service will be taxable when the same is provided or to be provided to any person, by any other person, in relation to construction of complex.

Who is the person liable to pay service tax ?

Any person providing construction of complex services to any other person shall be liable to pay service tax and shall be treated as an assessee for service tax purposes.

VUDA is engaging the services of a builder to construct houses and apartments. It is the builder who has to register and pay service tax. The builder will charge VUDA for the services provided. The rate of tax is 10% and coupled with a education cess of 2% it is 10.2%. It is learnt that the builder also purchases the materials for construction and the value charged by the builder includes the materials cost also. In this situation the builder has to charge service tax only on 33% of the value of the bill raised by him, the balance is treated as abatement.

As already premised above construction services in relation to residential apartments and houses became taxable from June 16, 2005. It is possible that there are certain contracts entered by VUDA with the builder prior to this date. The question that arises is whether service tax will be applicable for these contracts also? For the construction that has been undertaken up to June 15, 2005 no service tax is leviable. For this purpose it is advised that the builder should take a valuation certificate from a Chartered Engineer for the value of work done up to June 15, 2005. The value as arrived by the Chartered Engineer will not be taxable. The construction activity undertaken by the builder on and after June 16, 2005 will be a taxable service. In case of VUDA for the on going projects it has to advice its contractor to take a certificate of valuation as discussed above. For that value VUDA shall not be liable to pay any service tax. For the balance portion of the construction activity from June 16, 2005 since contracts have already been entered prior to the date the construction activity became taxable the decision to reimburse the service tax will be a internal matter of VUDA and it is for the administration to take a decision whether to reimburse the said tax or not.



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 01/11/2005
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During the visit of the undersigned to Vishakhapatnam certain documents and records were perused. From the computations made it was found that minimum of Rs.2 lakhs and a maximum of up to Rs.40 lakhs will be the service tax saved by VUDA for the construction activity that is completed by the builder as on June 15, 2005. VUDA should insist the builder to take a certificate of value of construction completed as on June 15, 2005 so as to be eligible for the above saving. It is advised that the certificate may be taken from an independent and approved valuer/chartered engineer or an engineering firm.

DISCLAIMER

The opinion, given above, is based on facts as told to us. Neither the undersigned nor any of the Partners or Staff of M/s. Sanjiv Shah & Associates shall be held liable for any loss, monetary or otherwise, on any action taken by Messrs. VISHAKAPATNAM URBAN DEVELOPMENT AUTHORITY based on the above opinion.

PLACE: CHENNAI
 DATE : 26-11-2005

FOR SANJIV SHAH & ASSOCIATES
 CHARTERED ACCOUNTANTS



P.
 P. RAJENDRA KUMAR
 PARTNER.

✓ 19 Construction of Residential Complex Services

19.1 Provisions at a Glance

<i>Charge vide</i>	Notification 15/2005 dated 07.06.2005 w.e.f. 15.06.2005	
<i>Taxable Service defined u/s 65(105)(zzzh)</i>	Taxable Service means any service provided to any person, by any other person, in relation to construction of complex;	
<i>Service defined u/s 65(30a)</i>	<p>"construction of complex" means—</p> <p>(a) construction of a new residential complex or a part thereof; or</p> <p>(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</p> <p>(c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex;</p>	
<i>Altered Definitions</i>	<p>Section 65(91a) of the Finance Act, 1994</p> <p>"residential complex" means any complex comprising of—</p> <p>(i) a building or buildings, having more than twelve residential units;</p> <p>(ii) a common area; and</p> <p>(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.</p> <p>Explanation.—For the removal of doubts, it is hereby declared that for the purposes of this clause,—</p> <p>(a) "personal use" includes permitting the complex for use as residence by another person on rent or without consideration;</p> <p>(b) "residential unit" means a single house or a single apartment intended for use as a place of residence;</p>	
<i>Notifications</i>	Notification 18/2005-ST dated 07.06.2005 w.e.f. 16.06.2005	
<i>Circulars</i>		
<i>Accounting Codes</i>	Tax Collection	
	Interest & Penalties	
	Education Cess	00440297

Rate of Service Tax	Period	Tax Rate	Education Cess	Total
	16.06.2005 onwards	10%	2%	10.20%

See Also

Industrial Construction Services
Maintenance & Repairs Services
Erection, Commissioning & Installation Services

19.2 Analysis of the Definition

Section 65(10B) of the Finance Act, 1994 defines the term taxable service for construction of complex services as under:

Taxable Service means any service provided to any person, by any other person, in relation to construction of complex.

Thus, for any transaction to be liable for tax, it should be a taxable service as defined above. From the definition, the essential requirements for taxability can be understood as under:

1. The transaction should amount to a service
2. The service should be provided to any person
3. The service should be provided by any other person
4. The service should be in relation to construction of complex

19.2.1 THE TRANSACTION SHOULD AMOUNT TO A SERVICE

The foremost requirement for taxing a transaction for the purpose of levy of service tax is that the transaction should possess an essential character of "service". Unluckily, the term "service" is not defined either under the Service Tax Law or under any other law. In the absence of a specific definition and also in view of specific exemption provided by Notification 12/2003, one can conclude that any transaction that amounts to a sale of goods cannot be treated as a service liable for service tax.¹ Thus, if a builder purchases land, constructs the complex using his own work force and sells the built flats to the customers, there can be no liability towards service tax as the service of construction is provided by the builder to himself.

19.2.2 THE SERVICE SHOULD BE PROVIDED TO ANY PERSON

The scope of the service recipient is very wide. It is defined to mean "any person". The term "person" is defined under the General Clauses Act as under:

"Person shall include any company or association or body of individuals whether incorporated or not"

While the above definition is all encompassing, one should note that the essential character of taxability still continues to be service which implies duality of entities. Thus, if an entity renders service to itself (one branch providing service to another branch or department) there can be no incidence of service tax. Similarly, in situations where the mutuality principle can be squarely applicable, there can be no incidence of service tax.

19.2.3 THE SERVICE SHOULD BE PROVIDED BY ANY OTHER PERSON

The scope of the service provider is also equally wide as the term used is "any person". However, the presence of the word "other" clearly indicates that if an entity renders service to itself, there can be no incidence of service tax. Thus, if a builder purchases land, constructs the complex using his own work force

¹ For a detailed analysis of tax implications of works contracts, embedded contracts & composite contracts, please refer Chapter 13 of Part I of this Book.

and sells the built flats to the customers, there can be no liability towards service tax as the service of construction is provided by the builder to himself.

19.2.4 THE SERVICE SHOULD BE IN RELATION TO CONSTRUCTION OF COMPLEX

The term "construction of complex" has been defined under section 65(30a) of the Finance Act, 1994 as under:

"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 service in relation to residential construction can be viewed as a natural extension of the service in relation to the industrial construction which was made liable for service tax since 10.09.2004. The Finance Act, 2005 has therefore expanded the scope of taxability to cover construction services in relation to residential complexes w.e.f. <BD>

The term "residential complex" has been defined under section 65(91a) of the Finance Act, 1994 as under:

"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;

From the definition, one finds that for a particular property to be treated as a residential complex, it has to satisfy three basic conditions:

1. It should contain more than 12 residential units
2. It should have common area
3. It should have some common facilities

Since the phrase used is building or buildings, it is possible that a group of two buildings with 8 units each may constitute a common area if some common area and facilities are shared. Thus, the condition of 12 units applies not for each building but for the entire complex. The exact unit of measure for a particular complex would depend on the layout of the plans as approved by the relevant municipal authorities.

There is an exclusion of the complex which is intended for personal use as residence. However, the said exclusion is available only if the complex is constructed by a person directly engaging any other person for designing or planning of the layout. The said condition is not applicable to tax complexes which are constructed by contractors for builders/contractors. The intention seems to be to tax complexes which are intended for use by contractors/builders who who would then sell the same to the purchasers and hence there is an incidental nature. This intention is also reflected in the definition of the term "personal use" provided by Explanation (a) to the said definition. Accordingly, "personal use" includes permitting the complex for use as residential by another person on rent or without consideration.

Once the property is treated as a residential complex, the following services shall to such residential complex would get taxable:

- (a) construction of a new residential complex or a part thereof; or
- (b) completion and finishing services in relation to residential complex, including, but not limited to, work relating to glazing, plastering, painting, floor and wall tiling, wall covering and wall papering, metal joinery and carpentry, fence and railing, construction of swimming pools, scum tanks, escalators or fittings and other similar services; or
- (c) repair, alteration, renovation or restoration of, or similar services in relation to, residential complex.

It should be noted that clause (a) uses the term "residential complex or a part thereof" and (b) and (c) do not use the term "part thereof". Therefore, if there is a repair of a part of a residential unit, the same would not be liable for payment of service tax under clause (c).

19.3 Valuation of Taxable Service

The value of the taxable service shall be the gross amount charged to the client. The value of the taxable service incurred while providing the taxable service. As far as portion is available for various expenses incurred while providing the taxable service, reimbursement of expenses out of which the gross amount charged to the client is arrived at. In general, it has been clarified that reimbursement of expenses out of which the gross amount charged to the client is arrived at.

The gross value charged by the building contractors include the material cost, namely, the cost of steel, fittings and fixtures, pipes etc. Under the CENVAT Credit Rules, 2004, the service tax credit of excise duty paid on such inputs. Alternatively, a general exemption is available during the course of providing service but the exemption is subject to the condition of a documentary proof specially indicating the value of the goods sold. In case of a composite case of composite contracts where the gross amount charged includes the value of material would, however, be optional subject to the condition that no credit of input goods, capital goods or exemption towards cost of goods are availed.

Interestingly, the benefit of the presumptive abatement of 67% is not available in cases where the nature of the service referred to in clause (b) being the post completion and finishing services.

1. For a detailed analysis on this aspect, please refer Chapter 8 of Part I of this Book.
 2. Notification No. 12/2003-ST dated 26.06.2003.
 3. Notification No. 18/2003-ST dated 10.06.2003.

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19.4 Exemptions (At a Glance)

1. All taxable services provided by any person to the United Nations or an International Organisation are exempted from service tax.¹
2. Services provided to specific Diplomatic Missions is exempted.²
3. Services provided to units situated in special economic zones and to the developers of such special economic zones and consumed within such Special Economic Zones are exempted subject to the certain conditions.³
4. Services exported outside India are exempted.⁴

As per Export of Services Rules, 2005, in case of construction of complex services, the services shall be treated as exported if the immovable property in relation to which the service is provided is situated outside the country.

5. An exemption is provided for the value of goods and materials sold by the service provider to the recipient of service provided that there is documentary proof specifically indicating the value of the said goods and materials. The said statement is available subject to the condition of non-availability of CENVAT Credit on the inputs and capital goods.⁵
6. Services rendered free of cost do not attract service tax, as there are no rules for notional valuation of the service.⁶
7. Services rendered prior to the effective date do not attract service tax even if the payments are realized later as the charge of service tax is on rendering the services.⁷
8. Services provided within the State of Jammu & Kashmir are not liable for service tax.⁸
9. Small service providers have been granted an exemption⁹ for first aggregate realizations (across all service categories) of Rs. 4,00,000/- in a financial year provided the gross taxable services in the previous year were below Rs. 4,00,000/-.

19.5 Notifications

(1) 67% of the taxable service exempt from service tax

Notification No. 18/2003-ST [F. No. B18/2003-TRU], dated 7-6-2003

In exercise of the powers conferred by sub-section (1) of section 93 of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the Finance Act), the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby exempts the taxable service provided to any person by any other person, in relation to construction of complex, referred to in sub-clause (a) of clause (105) of section 65 of the Finance Act, from so much of the service tax leviable thereon under section 66 of the said Finance Act, as is in excess of the service tax calculated on a value which is equivalent to thirty-three per

1. Notification 16/2002-ST dated 02.08.2002
2. Notification 44/98-ST dated 22.01.1998 as amended by Notifications 47/98-ST dated 1.4.1998 and 6/2002-ST dated 08.05.2002
3. Notification 4/2004-ST dated 31.03.2004
4. Circular 56/2003-ST dated 25.04.2003 & Export of Services Rules, 2005 effective from 15.03.2005 (discussed in detail in Chapter 10 of Part I of this Book)
5. Notification 12/2003-ST dated 01.07.2003
6. Chandrasekhar Desai v Commissioner, 1998 (98) ELT 515 (Kolkata - CESTAT)
7. Section 64(1) of the Finance Act, 1994
8. Notification 6/2003-ST w.e.f. 01.04.2003 discussed in detail in Chapter 8 of Part I of this Book

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cent. of the gross amount charged from any person by such service provider for providing the said taxable service:

Provided that this exemption shall not apply in such cases where –

- (i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or
- (ii) the service provider has availed the benefit under the notification of the Government of India, in the Ministry of Finance, (Department of Revenue) No. 12/2003-Service Tax, dated the 20th June, 2003 [G.S.R. 503 (E), dated the 20th June, 2003]; or
- (iii) the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act.

Explanation.—For the purposes of this notification, the “gross amount charged” shall include the value of goods and materials supplied or provided or used for providing the said taxable service by the said service provider.

2. This notification shall come into force on the 16th day of June, 2005.

cent. of the gross amount charged from any person by such service provider for providing the said taxable service.

Provided that this exemption shall not apply in such cases where –

- (i) the credit of duty paid on inputs or capital goods used for providing such taxable service has been taken under the provisions of the CENVAT Credit Rules, 2004; or
- (ii) the service provider has availed the benefit under the notification of the Government of India, in the Ministry of Finance, (Department of Revenue) No. 12/2003-Service Tax, dated the 20th June, 2003 (C.S.R. 503 (E), dated the 20th June, 2003); or
- (iii) the taxable services provided are only completion and finishing services in relation to residential complex, referred to in sub-clause (b) of clause (30a) of section 65 of the Finance Act.

Explanation — For the purposes of this notification, the "gross amount charged" shall include the value of goods and materials supplied or provided or used for providing the said taxable service by the said service provider.

2. This notification shall come into force on the 16th day of June, 2005.

VUDA Resolution No.100, dated 31-05-2006

Resolved to reimburse the Service Tax to M/s Vision Ventures Pvt. Ltd., the contractor of Akkireddypalem Housing Scheme as proposed.


Chairman, VUDA