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By Adv. Pawan Arora

(Partner at Athena Law Associates)



9+ Hours in 8 Sessions | Starting from 13th Feb 2021 - 5 PM (every saturday)





SESSION - 1

CONSTITUTIONAL ASPECTS AND LEGAL HISTORY

*By: Adv. (CA) Pawan Arora
Partner, Athena Law Associates*





Sale of Flat/ Unit

Service

Material

Land

Constitution of India - Prior to Constitution (101st) Amendment Act , 2016

- Article 246 – Parliament has power to make laws for matters enumerated in List I
 - Entry 92C of List – I - “*Taxes on services*”
 - 2005 – Construction of Residential/ Commercial Complex Service
 - 2007 – Works Contract Service
 - 2009 – CBEC Circular – Construction of Flat by Developer for Buyer, Not leviable to Service Tax
 - 2010 – Explanation inserted [Construction of Complex Service] – Where part of Consideration received prior to issuance of CC – leviable to Service Tax
 - 2012 – Declared Service

Constitution of India - Prior to Constitution (101st) Amendment Act , 2016

- Article 246 – States are empowered to make laws for matters enumerated in List II
 - Entry 54 of List – II - *“Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.”*
 - Entry 49 of List – II - *“Taxes on lands and buildings”*
 - Entry 63 of List-II - *“Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.”*
 - Entry 91 of List-I - *“Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.”*

Legal History

- Ganon Durnkerley (1), *1959 SCR 379 (Supreme Court)*
- 51st Report the Law Commission
- The Constitution (46th) Amendment Act
- Inserted Article 366 (29A) - “tax on the sale or purchase of goods” includes
 - (b) a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
- Builders Association, *[1989]2SCR320* – Amendment was challenged – held validity of the 46th Constitutional Amendment
- Ganon Durnkerley (2), *[1993] 88 STC 204 (SC)*

K Raheja Development Corporation
5 SCC 162 (2005)

Issue : Whether construction of Units / Flats by Developer is a works contract and leviable to VAT under Karnataka VAT Act?

Para 20

1. Construction by Developer for Flat Buyers is a Works Contract under Karnataka VAT Act
2. If after termination of contract, Unit is not resold by the Developer, there would be no works contract to that extent. [No Works Contract if Flat is cancelled and not resold].
3. If agreement is entered after the Unit or Flat already constructed, then there would be no works contract.
4. So long as the agreement is entered into before the construction is completed it would be works contract.

Larsen and Toubro Limited

17 SCC 199 (2008)

Issue: Whether construction of Units / Flats by Developer is a works contract and leviable to VAT under Karnataka VAT Act?

1. Disagree with Judgement of K Raheja and referred the matter to Hon'ble Chief Justice for reconsideration by Larger Bench.
2. Court is of the view that if ratio of K Raheja is to be accepted then there would be no difference between works contract and contract for sale of Chattel as a Chattel.

Larsen and Toubro Limited 1 SCC 708 (2014)

Issue: Does the two Judges Bench in K Raheja Development lay down the Correct Position? (J. Lodha)

1. Meaning of Work, Works and Works Contract (Para 68 to 72)
2. Difference between Contract for Work (Service) and Contract for Sale (goods) - Depend on Substance and intent of the transaction - various judgments cited [Para 73 to 87]
3. After insertion of Article 366(29A) in 46th Amendment of Constitution of India, the traditional judgments which hold that substance of the contract must be seen has lost their significance (para 87, 97.6)
4. The ultimate transaction between the parties may be sale of flat, but it cannot be said that Characteristics of the Works Contract are not involved in that transaction (para 88).
5. Ordinarily, in case of works contract goods passes by way of accretion or exertion i.e., when goods and material is incorporated in the Building. But there may be contract to contrary or Statute may provide otherwise (para 90) 5. Where a Contract comprises of both works contract and transfer of immovable property, such contract does not denude it of its character as Works Contract. (para 92 & 97.3)
6. Building Contracts are species of Works Contract (97.4)
7. Contract for Sale of Flat is works contract and transfer of property in goods under such contract is leviable to VAT being deemed sale as defined under Article 366(29A) of COI (para 97)
8. Facts of K Raheja Case (para 99) and Summary of K Raheja Judgement (para 102)
9. Their argument that flat is sold as flat and not as aggregate of its components is already negated by the Constitution Bench in the Case of Builders Association (1989) 2 SCC 645 (para 107)
10. Goods incorporated after the date of agreement would only be taxed by the State Government (para 110, 112)
11. Taxing the sale of goods element in a works contract is permissible even after incorporation of goods (para 118)

Suresh Kumar Bansal

2016 SCC online Del 3657

Issue: Levy of Service Tax on sale of Flat in absence of machinery provisions to exclude Value of Land

1. Argument to levy tax only after the date of Agreement. (para 10)
2. CBEC Circular: Construction till date of Execution of Agreement is "Self Service". Prior to amendment in FA Act 2010. (para 17)
3. Deeming Fiction can be created in the Statute which does not exist in real. (para 29)
4. Service Tax Levy on transaction between Developer of a complex and a prospective buyer does not impinge the legislative field for the States under Entry 49 of List -II (para 34)
5. Levying a tax on the constituent Goods and Land would clearly intrude into the legislative field reserved for the State under List-II (para 38)
6. Discussion on Meaning of expression "Prescribed" (para 42)
7. Machinery for computation of tax must be provided in the Statute or the Rules. (para 53)
8. Neither Act nor Rule framed therein Provide for a machinery provision for excluding all components.... Notification or Circular cannot substitute the lack of Statutory Machinery. (para 54).
9. Set aside the explanation inserted vide amendment in FA 2010 to levy service tax on sale of Flat where part of the consideration received prior to CC (para 56)

Larsen and Toubro Limited

(2016) 1 SCC 170

Issue : Whether Service Tax can be levied on indivisible works contract prior to the introduction on 01.06.2007 of FA 2007, which expressly makes works contract liable to service tax?

1. Discussion on Amendment in FA 2010 - insertion of Works Contract Service (para 10), insertion of Valuation Rule 2A (para 12)
2. Para 49 of Ganon Dunkerley (2) - Deemed deduction can be provided where Books of accounts are not properly maintained. It must, however, be ensured that the amount deductible under the formula that is prescribed for deduction towards charge for labour and services that would be incurred in normal circumstances in respect of that particular type of works contract. (para 13)
3. Valuation of service to be done as per eight heads provided in Ganon Dunkerley (2) by the Constitutional Bench. However, if books of accounts are not of worth Credence, it is open to the legislature to provide fixed percentage That is not having been done by FA for services specified under FA 1994 and it would only of service contracts simpliciter and not composite indivisible works contract (para 14)
4. Mathuram Agrawal (SC) - The intention of the legislature in a taxation Statue is to be gathered from the language of the provisions particularly where the language is plain and unambiguous. Three elements namely (i) subject of the tax, (ii) person who is liable to pay tax (iii) rate at which tax is to be paid. If there is any ambiguity regarding any of these ingredients in a taxation statute, then there is no tax in law. (para 20)
5. Govind Saran Ganga Saran (SC) - Four Elements required without any ambiguity in a taxing Statute - Taxable Event/ Transaction, (ii) Person who is obliged to pay tax, (iii) Rate at which tax is to be paid (iv) Measure or Value to which the rate will be applied. (para 21)
6. BC Srinivasa Setty (SC) para 10 - No method to compute cost of Goodwill. Not subjected to tax.
7. Valuation Rule 2A provides the manner of Computation for Works Contract and this Scheme alone which complies with Constitutional requirements (para 25)
8. L&T vs. State of Bihar (Patna HC) - Para 22: When the law provides that Something is to be prescribed in Rules then that thing must be prescribed in Rules to make the provision workable and Constitutionally Valid. (para 35)
9. Orissa HC in L & T: Machinery Provisions cannot be provided by Circulars (para 37)
10. SC is of the view that FA lays down no charge or machinery to levy and assess service tax on indivisible Composite Works Contracts. (para 42)

Constitution of India – Power to Levy Stamp Duty

- Article 246 – States are empowered to make laws for matters enumerated in List II
 - Entry 49 of List – II - “*Taxes on lands and buildings*”
 - Entry 63 of List-II - “*Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.*”
 - Entry 91 of List-I - “*Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.*”

Constitution of India – Power to Levy GST

- Article 246A levies GST on Supply of Goods and Services – Starts with *“Notwithstanding anything contained in Article 246...”*
 - Article 366(12) “goods” includes all materials, commodities, and articles.
 - Article 366 (26A) “Services” means anything other than goods
- Wide definition of services & include transactions in immovable property
- Thus, both GST & Stamp Duty as on date.

WRIT PETITIONS ON DEEMED LAND VALUE

Writ Petitions Challenging
deeming fiction in regard
to value of Land

Sanjeev Sharma
[Delhi HC against AAR Ruling]

Abhinav Mittal
[P&H HC]

THANK YOU

Adv. (CA) Pawan Arora
Partner

Athena Law Associates

pawan@athenawassociates.com

+91-88000-91636

