

AUTHORITY FOR ADVANCE RULINGS
(CENTRAL EXCISE, CUSTOMS & SERVICE TAX)
NEW DELHI

PRESENT

Hon'ble Mr. Justice P. V. Reddi (Chairman)
Mr. A Sinha **Mrs. Chitra Saha**
(Member) **(Member)**

Monday, the 7th day of April, 2008

Ruling No. AAR/04(ST)/2008
In
Application No.AAR/10(ST)/2007

Applicant	M/s Harekrishna Developers (through Jayantibhai Jermabhai Korat) A/1, Jay Apartment Thakkarbapa Nagar Road, Ahmedabad-382 350
Commissioner concerned	Commissioner of Service Tax Ahmedabad
Present for the Applicant	Mr. R.S. Sharma, Advocate Mr. Anil Brahmakshtriya, CA
Present for the Commissioner concerned	Mr. A.N. Sharma, Jt.CDR Mr. Deepak Garg, SDR Mr. Sumit Kumar, DR CESTAT, New Delhi

R U L I N G
(By Mrs.Chitra Saha)

The Applicant which is a partnership firm, wants to set up a joint venture with a non-resident named in the application, to develop a residential housing complex in Gujarat. The proposed activities nos. 3 & 4 involve sale of plots of land inside the complex belonging to the applicant,

to prospective buyers who will also enter into a works contract with the applicant for the construction of residential units. While in activity no.3 the applicant himself will execute the works contract and construct a residential house, in case of activity no.4, the applicant will further enter into a works contract with other contractors who will be constructing the residential houses. The applicant seeks advance ruling on the following questions of law under section 96-C of the Finance Act, 1994 :-

- “1. Whether the applicant is liable to service tax under section 65 (105) (zzzza) of the Finance Act, 1994 under the notified taxable service of execution of works contract in case of Proposed Activity No.3?

2. If the answer to Question No.1 is in affirmative, whether the applicant is entitled to deduct the value of transfer of property in goods involved in the execution of said works contract if the applicant opts for payment of service tax at the rate of 2 per cent under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 as notified vide notification no.32/2007-Service Tax dated 22.05.2007. (The next part of the question beginning with the phrase “in other words” is omitted as unnecessary).

3. Whether the applicant is liable to service tax under section 65 (105) (zzzza) of the Finance Act, 1994 under the notified taxable service of execution of works contract in case of Proposed Activity No.4?

4. Whether the applicant is liable to service tax under section 65 (105) (zzzza) of the Finance Act, 1994 under the notified taxable service of execution of works contract in case of Proposed Activity No.4, even when the petty contractors discharge service tax liability under the notified taxable service of execution of works contract?"

The details of the proposed activities have been submitted in Annexure A and Annexure I of the application. In addition, after the case was partly heard, the applicant filed written submissions and submitted a draft agreement for the construction of residential unit, to be entered into with the purchasers of plots. Further hearing was given to both sides. The applicant proposes to develop and build on its own plot of land, a residential housing complex having more than twelve residential units with a club house and other common facilities. In both activities 3 & 4, the applicant will first sell a plot of land inside the complex to the prospective buyer under a sale agreement, on payment by the buyer of the agreed amount. The buyer of the plot will further enter into a works contract with

the applicant for construction of a residential unit on the sub-plot purchased within the residential complex. The amount to be paid to the works contractor will include cost of construction, cost of material, labour and other incidental charges. The construction will be carried out as per the specifications, designs and detailed drawing prepared by the architect and approved by the buyer. The applicant states that the transfer of property in goods involved in the execution of such contracts would be leviable to tax as sale of goods. The payment for the works contract will be made by the buyer to the applicant in installments whose periodicity would be linked to the stage of completion of the works contract. The only difference between the activity nos. 3 & 4 is that, while in case of 3 the applicant will himself execute the works contract, in activity no. 4, the applicant will further enter into a works contract with another contractor who will be constructing the residential units on behalf of the applicant. Service provided to any person, by any other person in relation to the execution of works contract, excluding certain specified works contracts, attracts service tax under sub clause (zzzza) of clause (105) of section 65 of the Finance Act, 1994. The works contracts which attract service tax under this head are outlined in (a) to (e) of (ii) of the Explanation to (zzzza). The applicant contends that since the works contract in activities 3 & 4 involves construction of a new building, such an activity can only be covered under (ii) (b) in the above Explanation. The said classification i.e., (b) covers "construction of a new building or a civil structure or a part

thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry”. Since the new building proposed to be constructed in the course of the execution of the works contract is a residential one, and is not for the purpose of commerce or industry, such a works contract will not fall under (b) and therefore will not attract service tax. The applicant further states that a works contract for construction of a new building for residential purposes is also not covered under any of the remaining classifications in (ii) of the Explanation to (zzzza). The classification (c) which covers “construction of a new residential complex or a part thereof” is not applicable in applicant’s case as the works contract is for construction of an individual residential unit and not for construction of a residential complex. The applicant adds that construction of a new residential building, whether located inside the complex or outside should be treated equally for the purpose of levy of service tax. Since a works contract for construction of a new residential building outside the complex is not leviable to service tax, it would not be correct to impose such a levy simply because the residential unit is located within a complex. No service tax, according to the applicant, is therefore leviable in respect of the works contracts involved in activities 3 & 4.

2. The applicant further contends in question no.2 that in case it is ruled that service tax is leviable on the activities in 3, then the duty liability should be allowed to be discharged by simultaneously availing of the

benefit of deductions allowed from the gross value of taxable services under rule 2A of Service Tax (Determination of Value) Rules, 2006 and of the reduced rate of duty of two per cent under notification no. 32/2007 ST dated 22.5.07. Notification no.32/2007 does not prohibit simultaneous availment of the benefit under rule 2A. As required in notification 32/07, the applicant will not avail of CENVAT credit of duties paid on the inputs used for execution of the works contracts under the CENVAT Credit Rules 2004.

3. With regard to the activity no. 4, it is stated that when the contractor who executes the works contract on behalf of the applicant is paying service tax on the execution of the works contract, no liability to pay service tax can be fastened on the applicant as its activity does not come within the definition and scope of service tax under section 65 (105) (zzzza).

4. The Commissioner of Service Tax, Ahmedabad in his letter dated 6.7.2007 refutes all the claims of the applicant. He states that the works contract entered into by the applicant with the buyer of the plots in the activities 3 & 4, is squarely covered in the definition of works contract as defined in section 65 (105) (zzzza). The fact of a sub-contractor providing the construction services to the applicant in activity 4 does not alter this conclusion. Service tax is therefore liable to be paid by the applicant as

per the above section. With regard to the rate of the tax and the value of the taxable services, he states that the Finance Act provides for two modes of payments of taxes on services rendered by one person to another in the course of execution of a works contract : under section 66 of the Finance Act, 1994 read with notification no. 29/2007-ST dated 22/5/2007 or alternatively under sub rule (1) of rule 3 of the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007 notified vide notification no.32/2007 dt.22.5.2007. Where an assessee opts for composition under the latter method, there is no scope of simultaneously availing the benefit of Rule 2 A of Service Tax (Determination of value) Rules, 2006 notified vide notification no.29/2007 dt.22.5.2007.

5. Shri Deepak Garg, the Senior Departmental Representative has made exhaustive submissions supporting the view point of the Commissioner, Ahmedabad. He has compiled a brochure on all the law points involved and filed detailed comments on behalf of the Department.

6. The central issue for decision in the present application is whether the service provided in relation to execution of a works contract, by the applicant itself in activity 3 and through another contractor in activity 4, for construction of a residential unit, for the buyer of a plot of land in a housing project to be set up by the applicant on its own plot of land, is

leviable to service tax under section 65 (105) (zzzza) of the Finance Act, 1994. As per section 65 (105) (zzzza)

“taxable service” means any service provided or to be provided “to any person, by any other person in relation to the execution of a works contract, excluding works contract in respect of roads, airports, railways, transport terminals, bridges, tunnels and dams.

Explanation: For the purposes of this sub-clause, “works contract” means a contract wherein,-

- (i) transfer of property in goods involved in the execution of such contract is leviable to tax as sale of goods, and
- (ii) such contract is for the purposes of carrying out,-
 - (a) erection, commissioning or installation of plant, machinery, equipment or structures, whether pre-fabricated or otherwise, installation of electrical and electronic devices, plumbing, drain laying or other installations for transport of fluids, heating, ventilation or air-conditioning including related pipe work, duct work and sheet metal work, thermal insulation, sound

- insulation, fire proofing or water proofing, lift and escalator, fire escape staircases or elevators; or
- (b) construction of a new building or a civil structure or a part thereof, or of a pipeline or conduit, primarily for the purposes of commerce or industry; or
 - (c) construction of a new residential complex or a part thereof, or
 - (d) completion and finishing services, repair, alteration, renovation or restoration of, or similar services, in relation to (b) and (c); or
 - (e) turnkey projects including engineering, procurement and construction or commissioning (EPC) projects;”

The facts narrated in the application are as follows: that the applicant would develop a residential complex on its own plot of land in Gandhinagar; that such a complex would have 12 or more residential units with a club house and other common facilities; that sub-plots in the same complex would first be sold and the buyers thereof would then execute a works contract with the applicant for the construction of a residential house on the said sub plot. In activity 4, the applicant will enter into a works contract with a contractor who would undertake the actual construction. The applicant further states that in the course of the execution of the

works contract, property in the goods used in the construction would be transferred to the buyers and that such transfer of property in goods would be leviable to tax as sale of goods.

To attract service tax under (zzzza) of section 65 (105), a works contract has to meet the two conditions (i) & (ii) in the Explanation in (zzzza). The facts narrated above by the applicant indicate that condition (i) is met in the instant case as the transfer of property in goods involved in the execution of the works contract is leviable to tax as sale of goods under the local Sales Tax Act. To meet condition (ii), the activity involved in the works contract in 3 & 4 has to be covered by at least one of the classifications (a) to (e) in the Explanation in (zzzza). Proceeding serially, we find that building of a residential house on a sub-plot in a residential complex is clearly not covered in (a). As pointed out by the applicant itself, it is also not covered in (b) which covers construction of a new building intended primarily for commerce and industry and does not cover construction of a new building for residential purposes. (c) in (zzzza) covers “construction of a new residential complex or a part thereof”. A residential complex is defined in sub section (91a) of section 65 as follows :

“(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;”

7. As per the draft of the works contract submitted, it is clear that such contracts will be for construction of individual houses on sub-plots located within the plot owned by the applicant and on which the applicant

proposes to develop a residential housing project. As per the applicant's own narration, the residential project to be constructed on this plot would have at least 12 residential units, a club house and other common facilities and the lay out of the project would be got approved by the prescribed authority under the relevant law in force. Such a project constructed as per activities 3 & 4 squarely conforms to the definition of a "residential complex" given in clause (91a) of section 65, and the individual houses constructed get covered under the definition of a "residential unit" contained therein. Execution of the works contract thus involves construction of a part of a new "residential complex" and is covered by (c). One plea put forward by the applicant is that since the works contract with the buyers of the plots was for construction of individual houses and not for construction of a residential complex as such, the works contract cannot be classified under (c) of (ii) of Explanation in (zzzza). This plea cannot be accepted. A perusal of the draft of the works contract indicates that this contract is not for construction of a house on any plot of land but on a land which is located within the perimeters of the bigger plot located at Survey No.2/1, Moje Nana Chiloda, Gandhinagar. This plot is owned by the applicant and he proposes to build thereon a complete residential complex comprising of not merely individual residences but also a club and other common facilities which will be used by all the residents of the complex. When the buyer of the sub-plot enters into a works contract, such a contract is not for the construction of an isolated house, but for one

which will make available to the buyer, all the facilities such as a club house etc. provided for by the residential complex. Individual houses built through the works contract, therefore, have to be viewed as parts of a residential complex rather than as stand alone houses. Thus the expression “or a part thereof” occurring in clause (c) of (zzzza) of section 65 (105) squarely applies.

8. In the course of the hearing, the applicant has referred to the provisions of section 65A of the Finance Act to claim that classification of the works contract in activities 3 & 4 under classification (c) in (ii) of the Explanation in section 65 (105) (zzzza) has to be ruled out. They state that as per this section, if a taxable service is, prima facie, classifiable under two or more sub clauses of clause (105) of section 65, then the classification which occurs first amongst the sub clauses which equally merit consideration, is the appropriate classification for the taxable service. Since in the applicant’s case the works contract appears to be equally classifiable under (b) and (c) of (ii) of Explanation to sub clause (zzzza), the correct classification is (b) which occurs prior to (c) and therefore classification as a “new residential complex or a part thereof” referred to in (c) has to be ruled out. This argument of the applicant is not valid. Section 65A is applicable when a taxable service is prime facie classifiable under two or more sub clauses of clause (105) of section 65. This is not the situation in the instant case where the service provided in

relation to execution of a works contract is clearly classifiable in sub clause (zzzza) of clause (105) of section 65 and there is no other sub clause where this service could be classified. Section 65A cannot be pressed into service for determining the further categorization under the said sub clause (zzzza). The works contract of activities 3 & 4 are also not covered by (d) & (e) of (ii) of Explanation of (zzzza). The works contract of activities 3 & 4 are held to be covered under (c) of (ii) of (zzzza) in section 65 (105) and the questions posed at serial nos. 1 and 3 have to be answered in the affirmative.

9. Another question posed in the application is whether the applicant would be liable to pay service tax under (zzzza) in respect of activity 4 where the applicant does not construct a residential house as per the works contract entered into with the buyer of the plot and instead gets the residential house constructed through another contractor after entering into a works contract with him. The said sub contractor is stated to be discharging tax liability under (zzzza).

10. The above question also has to be answered in the affirmative. It is the applicant who has entered into a works contract for construction of a house with the buyer of the plot in the residential complex. The sub-contractor with whom the applicant further enters into a works contract and who actually constructs the house, works under the supervision and

as per the specifications of the applicant. In such a situation it is the applicant who is providing the service of construction of a residence in the residential complex in pursuance of the works contract entered into with the buyer of the plot. Merely for the reason that the sub-contractor becomes liable to pay service tax for the specific services performed by him in relation to the construction activity, the applicant/main service-provider cannot be absolved of the obligation to pay service tax. However, we are not called upon to express any view as to the quantum or modalities relating to the payment of tax. Thus the applicant is liable to pay service tax under (zzzza) of section 65 (105) even when the sub-contractor pays service tax for service rendered in the course of execution of the works contract.

11. In the second question of law put forward in the application, the issue raised relates to the rate of duty and the method of evaluating the value of the taxable service on which service tax is to be paid, in a situation where the service provided in case of activity 3 is held to be liable to tax. In chapter V of the Finance Act 1944, section 66 provides that service tax at the rate of twelve per cent will be charged on the value of the taxable services specified in this section. Service provided in relation to execution of a works contract referred to in sub clause (zzzza) of clause (105) of section 65 is one of the taxable services specified in section 66. We have held above that the service provided by the applicant in the

course of execution of the works contract referred to in activity 3 is liable to service tax under the above provision. The question that now arises is what would be the rate of duty and on what value is this tax to be paid.

12. Where service tax is chargeable on any service with reference to its value, then such value has to be determined in the manner set out in section 67. The basic rule under this section as stated in sub clause (i) of clause (1) is that service tax is to be levied on the “gross amount charged by the service provider”. Sub clause (iii) of the said clause adds that in case where the provision of service tax is for a consideration and the quantum of such consideration is not ascertainable, then the value on which the tax is to be paid would be determined in the manner prescribed. In a works contract which involves supply of both goods and services, it is often difficult to determine the value to be attached to the service component of the contract from the gross value, which covers value of both goods and services. Accordingly, the Central Govt., exercising the powers vested in it under section 94 (2) (aa), to determine the amount and value of a taxable service under section 67, has notified the Service Tax (Determination of Value) Rules, 2006 by Notification no.29/2007-ST dt.22.5.2007 prescribing, inter alia, the method of valuation of the service component of a works contract which is to be levied to tax as per sub clause (zzzza) of clause (105) of section 65. Rule 2A (1) (i) of these rules states that the value of the service component of a works contract which is

chargeable to tax would be equivalent to the gross amount charged for the works contract less the value of transfer of property in goods involved in the execution of the said works contract.

13. Section 93 of the Finance Act empowers the Central Govt. to exempt, in public interest, a taxable service from the whole or any part of the service tax leviable thereon. Under this section the Govt. has notified (Notification No.32/2007-ST dated 22.5.2007) a composition scheme for payment of tax on the service component of a works contract through the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007.

14. Instead of paying service at the twelve per cent rate specified in section 66, rule 3(1) of the above Composition rules gives the service provider an option to discharge his duty liability by paying four per cent of the gross amount charged for the works contract. (The rate of 2% applicable earlier has been raised to 4% with effect from 1.3.08 vide notification no.7/2008-ST dt. 1.3.08) For ready reference rule 3(1) is extracted below :

“3.(1) Notwithstanding anything contained in section 67 of the Act and rule 2A of the Service (Determination of Value) Rules, 2006, the person liable to pay service tax in relation to works contract service shall

have the option to discharge his service tax liability on the works contract service provided or to be provided, instead of paying service tax at the rate specified in section 66 of the Act, by paying an amount equivalent to four per cent of the gross amount charged for the works contract.”

(emphasis supplied)

15. In question 2 of the application it has been claimed that the applicant is entitled to deduct the value involved in transfer of property in goods in the course of execution of the works contract, from the gross value of the contract, in the manner provided in rule 2A of Service Tax (Determination of Value) Rules, 2006, even when the applicant opts for payment of service tax at the rate of four per cent under the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007. Such a claim is unacceptable. It is clear from a reading of the underlined provisions of rule 3(1) extracted above, that duty at the rate of four per cent mentioned therein, has to be paid on the gross amount charged for the works contract. Through the Works Contract (Composition Scheme for Payment of Service Tax) Rules, 2007, Govt. has provided an alternative method of payment of service tax which can be resorted to by an assessee, instead of paying tax at the rate of twelve per cent on the value determined as per rule 2A of the Service (Determination of Value) Rules, 2006 and these two routes for discharging duty liability are mutually

exclusive. Question no. 2 of the application, therefore, has to be answered in the negative.

16. In the background of the above discussions this Authority gives the following Rulings on the questions posed in the application and extracted in para 1 :

- (1) The applicant is liable to pay service tax under section 65 (105) (zzzza) of the Finance Act, 1994 on the services provided by them in the course of execution of the works contract referred to in activity no. 3.
- (2) While discharging duty liability on the service provided in the course of execution of works contract in activity no. 3, the applicant can choose either of the alternative methods of payment i.e. under the Service Tax (Determination of Value) Rules, 2006 as amended by Notification no.29/2007-ST dt.22.5.2007 or under the Works Contract (Composition Scheme for payment of Service Tax) Rules, 2007. The above two routes of payment are mutually exclusive.
- (3) The applicant is liable to pay service tax under section 65 (105) (zzzza) of the Finance Act, 1994 on the services

provided by them in the course of execution of the works contract referred to in activity no. 4.

- (4) The applicant would be liable to pay service tax under section 65 (105) (zzzza) of the Finance Act, 1994 on the services provided in the course of execution of works contract referred to in activity 4 even when the applicant sub contracts the construction work to another contractor who discharges his service tax liability. However, no views are expressed on the quantum of tax liability in such a situation.

Pronounced in the open Court of the Authority on this 7th day of April, 2008.

Sd/-

(A.Sinha)
Member

Sd/-

(P.V.Reddi)
Chairman

Sd/-

(Chitra Saha)
Member